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The Inflation Reduction Act as an Element of Shaping the US Grand Strategy and the UN Strategy of Global Goals

Abstract: The purpose of this article is to present the US Inflation Reduction Act (IRA), signed by the US president on 16 August 2022, which provides the legal basis for the largest nationwide public investment in the economic, social and environmental spheres since the 1930s. The Act is an offshoot of the 2020–2021 legislative effort known as the Build Back Better Plan, which aims to create synergies between the US Grand Strategy to maintain the 'exorbitant privilege' of being the economic hegemon (resulting from the balance of power in the global economy and international politics, the status of the US dollar as an international currency and the oversight of the global reserve currency that has protected US sovereignty, security and prosperity to date) and the Agenda 2030 for Sustainable Development, adopted in 2015 by 193 UN Member States. The assessment of the US IRA is relevant not only because of the attempt made to holistically assess US strategic policy goals, including in the area of sustainable finance, but also to isolate global development trends in economic, social and environmental areas.
Keywords: Environmental Social Governance (ESG), national security law, renewable energy, strategic management, sustainable finance

Introduction

On 16 August 2022, the US president signed the Inflation Reduction Act (Inflation Reduction Act of 2022, IRA) into law, a goal which aims to enable the American political vision to achieve global leadership in confronting the existential threat of

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the climate crisis, thus making the United States a global leader in clean energy technology, production and innovation and to drive the US and global economy with it (The White House, 2023). A review of the IRA regulations shows that it includes a number of ambitious national-level strategic goals in economic, social and environmental areas. For example, in the economic area, these goals include reducing inflation through a budget deficit reduction that is unprecedented in the history of the United States, investments in clean energy, and tax reform. In the social area, the strategic objectives focus especially on lowering the cost of health insurance by reducing the price of prescription drugs, introducing a mechanism to negotiate prices with drug manufacturers, and extending the temporary extension of health insurance subsidies for an additional two years under the provisions of the Affordable Care Act (Patient Protection and Affordable Care Act 2010). The final strategic goals also included environmental protection, such as reducing US carbon emissions by 40% by 2030, introducing a system of tax credits and subsidies for technology, production, investment and innovation in clean energy, and conservation of natural resources. We suggest that, the IRA also fulfils the obligations of Agenda 2030, adopted on 25 September 2015 by all 193 UN Member States (United Nations, 2015a). The Agenda sets out 17 Sustainable Development Goals (SDGs) to be achieved by Member States by 2030, also referred to as Global Goals, and the status of their achievement is monitored by relevant indicators (United Nations, 2015a), the shaping of which the United States has played a key role in (Pipa et al., 2022).

We also view the IRA as part of the foundation of the so-called US Grand Strategy. While there are many definitions of the US Grand Strategy in the literature (Art, 1991, p. 7; Layne, 1998, p. 8; Luttwak, 1987, p. 179), our attention was drawn to a study by R. D. Hooker Jr, according to which it is a strategy that exists above and beyond strategies aimed at securing specific objectives, such as the National Security Strategy (The White House, 2022), and beyond the use of military force to achieve political objectives (Hooker, 2014, p. 1). Is the author Hooker noted that one way to understand the Grand Strategy is to look for the long-term actions of the state defined by enduring core security interests and how the state secures and develops them over time. Hooker view, it is relevant and more meaningful to indicate which specific initiatives the state has taken, rather than what it has pledged to take. Finally, Hooker came to the conundrum that the US Grand Strategy is a strategy that shows great persistence over time, focusing on the things considered most important, that is, the 'interests in the protection' of which any administration is likely to be willing to expend public resources, establish legal norms, apply sanctions and even take military action (Hooker, 2014, p. 1).

With the above in mind, we decided to review the IRA and its legal environment. We then extracted the strategic objectives from it that, in our view, allow the United States not only to meet the SDGs of Agenda 2030 and the US Grand Strategy but also to address several domestic issues, such as maintaining stable public finances after

the COVID-19 pandemic, protecting the US economy from the spectre of recession, reducing inflation and energy prices, and, finally, transitioning to a low-carbon economy. We believe that the IRA is an important element of the US legal system, enabling synergies between strategic initiatives which are ultimately designed to enable the United States to maintain the 'exorbitant privilege' of being the economic hegemon, which results from the balance of power in the world economy and international politics, the status of the US dollar as an international currency and the oversight of the global reserve currency that has protected US sovereignty, security and prosperity to date (Eichengreen, 2011).

In order to validate such a hypothesis, we conducted a holistic review of the US legal norms that make up the Build Back Better Plan initiative, then outlined the essence of the IRA, extracted and evaluated the strategic objectives in it, and finally compared these objectives with the 17 goals and 169 targets set out in the Agenda 2030 for Sustainable Development. Furthermore, we examined several strategic documents of the federal government and other official documents and scientific studies produced by or for representatives of the federal administration. The above, we argue, is intended to make it possible not only to assess IRA on their own but to identify global trends that can serve as a basis for models or possible implementation in national law or as a contribution to an appropriate response at the national level in political, legal and management terms.

1. Political and legal conditions for the enactment of the Inflation Reduction Act

The inauguration day for new presidents of the United States falls on the 20 January.[1] This day also marks the 2021 inauguration of Joe Biden, who took office during the trade war with China (Fajgelbaum & Khandelwal, 2021) and the energy war with Russia (Morningstar & Webster, 2022), during the ongoing COVID-19 pandemic and at the beginning of an upward trend in inflation, which a year and a half later reached the highest level in the United States in 40 years. This was also the year before Russia's aggression against Ukraine. The US administration also faced a number of problems and challenges in domestic policy, which included high unemployment rates, rising prices for energy, food and building materials, a growing budget deficit and realistic forecasts of the onset of a recession (Doherty et al., 2021). It is also impossible to ignore the fact that on 25 September 2018, during the 73rd session of the UN General Assembly, President Donald Trump denounced Agenda 2030, which virtually determined that US energy policy would still be based on fossil fuels, especially shale gas,

1 Congress had originally established 4 March as Inauguration Day. The date was moved to 20 January with the passage of the Twentieth Amendment in 1933.

rather than the clean energy promoted in Agenda 2030 which is supposed to reduce greenhouse gas emissions and overcome the long-term threat of the climate crisis (Department of Defense, 2021; The White House, 2021a; The White House, 2021b).[2]

We believe that the US economy at the end of the COVID-19 pandemic faced the spectre of weakening in the long term and, consequently, the risk of not retaining the 'exorbitant privilege' of being the economic hegemon resulting from the balance of power in the world economy and international politics. Accordingly, the US administration has taken a number of legislative measures to prevent the identified problems, risks and challenges from materialising in the short and long term.

On his very first day in office, President Joe Biden signed the United States up to once again become a party to Agenda 2030 (Blinken, 2021), which means that the country is still obliged to meet the 17 SDGs by 2030, despite a gap of almost two and a half years in their progress towards that obligation. It cannot be ruled out that this action was one of the reasons for the development of the IRA. Since the adoption of Agenda 2030 in the United States, it has not been possible to identify any legislative initiative that fulfils the SDGs on a national level. A review of US legislation shows that such a legislative initiative was launched in 2020 by the political base of the then presidential candidate Joe Biden. The initiative was referred to as the Build Back Better Plan and was the most ambitious nationwide public investment in social, infrastructure and environmental programmes since the Great Depression of the 1930s (The White House, 2023a).

The Build Back Better Plan initiative consisted of three parts: the American Rescue Plan, enabling the mitigation of the COVID-19 pandemic crisis (American Rescue Plan Act of 2021), the American Jobs Plan, leading to a range of infrastructure investments and reducing the US contribution to climate destruction (American Jobs Plan 2021) and the American Families Plan, providing funding for various social policy initiatives (The White House, 2021c). The first part was adopted in the American Rescue Plan Act of 2021, and the solutions from the next two were ultimately regulated in the Infrastructure Investment and Jobs Act of 2021 (The White House, 2021c) and the IRA of 2022,[3] which President Joe Biden signed on 16 August 2022. Significantly, a few days before signing the IRA, on 9 August 2022, the president also signed into law the CHIPS and Science Act of 2022, which seeks to provide incentives for the construction, upgrade or expansion of semiconductor manufacturing facilities and equipment, to implement a programme of high-tech semiconductor research and development and semiconductor-related human resource development in the United States, and to undertake several initiatives to protect US supply chains, national security and international cooperation. This fact is important insofar as the above acts

2 The Department of Defense treats climate change as a national security priority.

3 The Inflation Reduction Act was adopted under the lawmaking procedure known as reconciliation. See 2 US Code § 641 – Reconciliation.

have partially overlapping priorities; citing them is necessary to clarify the essence of the United States' strategic objectives and will help us to come to a conclusion.

2. Strategic objectives of the IRA and comparison with the SDGs

Based on the review of the IRA above, we identified eight strategic objectives and assigned them to one of three areas, i.e. economic, social and environmental. The three strategic objectives identified in the economic area are reform of the tax system, investments in clean energy and reduction of inflation by reducing the budget deficit. The tax system reform consists of introducing a selective minimum corporate tax rate of 15% for corporations with annual revenues above USD 1 billion, with an estimated revenue of USD 222 billion from this tax within ten years of the law coming into force.[4] In addition, a 1% excise tax on share buybacks has been introduced, with revenue expected to reach USD 74 billion. Another solution that makes up the tax reform is the extension of the provision of Section 461(l) of the Internal Revenue Code for two years, according to which a taxpayer who is not a corporation may benefit from a tax credit or deduction that reduces their tax liability for the current and future tax years if an excess business loss arises.[5] We argue that the most significant element of tax reform in the United States is the allocation of USD 79.6 billion to the agencies that operate the tax system to modernise and increase the efficiency of the Internal Revenue Service (IRS) tax enforcement system (Department of Treasury, 2022),[6] including reducing opportunities for tax optimisation, particularly in corporate income tax. These funds are to be spent by the end of the fiscal year 2031 on 1) IRS enforcement (USD 45.6 billion), including USD 153 million for the Tax Court; 2) operational support (USD 25.3 billion); 3) taxpayer services (USD 3.2 billion); and 4) business systems upgrades (USD 4.7 billion) (McDermott, 2022).

The first of the two strategic objectives identified in the social area is the generation of savings in the health system totalling USD 281 billion. These savings are to be generated through the repeal of the drug rebate rules introduced under President Donald Trump (USD 122 billion), the introduction of a mechanism for negotiating certain drug prices with their manufacturers (USD 96 billion) and the establishment of a price cap on certain drugs (USD 63 billion). The second strategic objective is to reduce citizens' costs in healthcare to the tune of USD 108 billion. In this case, the

4 According to the Joint Committee on Taxation, a minimum corporate income tax would affect around 150 US corporations (Congressional Research Service, 2022).

5 26 US Code § 461 – General rule for taxable year of deduction.

6 According to the IRS 2021 Data Book, the IRS had 78,661 full-time employees in the fiscal year 2021, of whom 44.6% had tax law enforcement as part of their responsibilities. The IRS budget for the 2021 fiscal year was approximately USD 13.7 billion, of which approximately USD 5 billion was allocated to tax law enforcement.

target is to be achieved by prolonging the temporary extension of health insurance subsidies, which were established under the Affordable Care Act, for an additional two years (USD 64 billion). Another example of reducing patients' healthcare costs is the establishment of a maximum limit on the cost of medicines to USD 2,000 per year per person who benefits from Medicare, as well as providing subsidies to people on low incomes, covering the cost of certain vaccinations and the partial cost of insulin (USD 44 billion), including limiting the cost of insulin to USD 35 per month per patient.

Finally, the three strategic objectives identified in the environmental area include reducing US carbon emissions by 40% by 2030, introducing a system of tax credits and subsidies to facilitate the energy transition to clean energy, and conserving natural resources. These goals are to be achieved through the implementation of eight tasks at a total cost of USD 391 billion (Wall Street Journal, 2023). In this case, a task systematisation developed by the Congressional Budget Office was used, according to which these strategic goals will achieve: 1) tax credits for clean electricity (USD 161 billion); 2) funding to reduce carbon emissions generated by air pollution from hazardous materials, transportation and infrastructure (USD 40 billion); 3) clean energy financial incentives for individuals (USD 37 billion); 4) clean energy production tax credits (USD 37 billion); 5) tax credits for clean fuel and electric vehicles (USD 36 billion); 6) funding for rural and forest conservation and development (USD 35 billion); 7) funding for building efficiency, electrification, the energy transmission and distribution grid, industry, and grants and loans from the US Department of Energy (USD 27 billion); and 8) other energy and climate spending (USD 18 billion).

While in some UN Member States the principle of sustainable development is a fundamental principle of law, as exemplified by Poland and the regulation of this principle in Article 5 of its Constitution, an initiative was taken at the UN to develop a universal template for sustainable development. This template was adopted in the UN General Assembly Resolution known as Agenda 2030. Although Agenda 2030 is not legally binding and therefore only contains general recommendations for specific actions, it can be recycled in virtually any way at the national level. For example, in Poland, Agenda 2030 was recycled in the Resolution of the Council of Ministers on the Adoption of the Strategy for Responsible Development until 2020 (with an Outlook until 2030) (Council of Ministers, 2017, item 260); in the United States, the IRA has been passed into law.

The strategic goals of Agenda 2030 make it possible to solve problems and overcome challenges, particularly in the economic, social and environmental areas, that cannot be solved by a single individual, organisation or country. Based on its Article 21, UN Member States are responsible for its implementation at national, regional and international levels, taking into account their realities, opportunities and degrees of development, based on respect for national development policies and priorities. In addition, UN Member States are required to set SDG-compatible targets at the na-

tional level, to monitor the progress of their implementation, including the selection of indicators and reporting, and finally to strengthen the partnership of the public and private sectors. Agenda 2030 thus represents a global sustainable development strategy.

Agenda 2030 distinguishes between the following SDGs: 1) eradicating poverty; 2) eradicating hunger, achieving food security and promoting sustainable agriculture; 3) ensuring healthy lives and promoting prosperity; 4) ensuring access to education; 5) achieving gender equality; 6) ensuring access to water and sanitation; 7) ensuring access to affordable energy; 8) promoting economic growth and access to decent work; 9) building stable infrastructure and sustainable industries and fostering innovation; 10) reducing inequality; 11) making cities safe and inclusive; 12) ensuring a pattern of sustainable consumption and production; 13) addressing climate change and its impacts; 14) protecting oceans, seas and marine resources; 15) protecting terrestrial ecosystems and forests, combating desertification and halting land degradation and biodiversity loss; 16) promoting peace, ensuring access to justice and building effective and accountable institutions; 17) strengthening the Global Partnership for Sustainable Development.

A comparative analysis of the IRA and Agenda 2030 shows that while the temporal scope of Agenda 2030 is precisely defined from many perspectives, in contrast to the IRA, the IRA is presented in ten-year terms. For example, the time frame of the US Congressional Research Service report on the impact of the IRA on climate change (Congressional Research Service, 2021) and the time frame of the Congressional Budget Office report on the estimated impact of the IRA on public finances (Congressional Budget Office, 2022) are both 2022–2031. In addition, the realisation of one of the key targets to be achieved under the IRA, to aim to reduce US greenhouse gas emissions to 50–52% below 2005 levels, was set for 2030 (The White House, 2023.

What is undisputed is the geographical scope of Agenda 2030, which is global in nature, with 193 UN Member States being party to it. In the case of the IRA, the situation is not so clear-cut. Although the IRA is a law adopted by the US Congress and its geographical scope is not in dispute, as it covers the territory of the United States, one cannot fail to interpret that its range of influence is much broader than the external borders of a state. This is not only due to the political manifesto of the US administration, according to which the United States seeks to achieve international leadership in climate protection and clean energy, but also to the ability of the US economy to influence and be influenced by the global economy. For example, virtually as soon as the IRA was enacted, accusations were made against it in terms of its protectionist nature, and after a few months of it being in force, initial symptoms of its impact on the economy of the European Union were seen (European Parliament, 2022; European Commission, 2023).

The Regulatory Impact Assessment of the IRA shows that the legislation provides the basis for new spending and tax relief to the tune of USD 499 billion, which is expected to reduce the budget deficit by USD 238 billion over a decade, including more than USD 61 billion, before interest, in 2031. This means that the total costs, revenues and savings settled in the IRA come to USD 738 billion (Committee for a Responsible Federal Budget, 2022). The issue of how to finance the implementation of Agenda 2030 goals was admittedly not as detailed as in the IRA, but it was nevertheless not omitted. On 13–16 July 2015, the Third International Conference on Financing for Development adopted the so-called Addis Ababa Action Agenda, a financing framework for Agenda 2030 that was enacted two months later, which identified possible sources of funding, including domestic resources, private sources of funding and official development assistance (United Nations, 2015b). It is evident from both UN agendas that the primary source of funding for Agenda 2030 is an integrated national financing framework, particularly from improvements in national taxation and other revenue collection capacity.

A comparison of the IRA and Agenda 2030 also shows that the strategic objectives of both cover three areas, i.e. economic, social and environmental. In turn, a comparison of the eight strategic goals of the IRA with the 17 goals of the SDGs leads to the conclusion that, for the most part, they coincide with each other and are aligned with the realities, problems and challenges existing in US domestic and foreign policy. We suggest that the IRA pays the least attention to the SDGs about ensuring access to education (Goal 4) and achieving gender equality (Goal 5). On the other hand, the strategic goals identified in the IRA that most fully implement the strategic goals of the SDGs include ensuring access to affordable energy (Goal 7), building stable infrastructure, creating sustainable industry and fostering innovation, (Goal 9) and addressing climate change and its impacts (Goal 13).

3. Opportunities of and threats to the implementation of the IRA

While in the United States the enactment of laws does not generally deviate from the standard established in democratic countries, a characteristic feature of the process has become the conferring of 'catchy' titles to laws. Based on statements by Owen and Ritchie, it is possible to conclude that in the enactment of certain laws in the United States and their subsequent application, it is desirable to generate interest among the media and the public in order to gain public support and, consequently, to lead the public to believe that a particular law is a means of satisfying their needs or solving their problems (cited in Long, 2005). Arguably, this type of social engineering is precisely what we are dealing with in the case of the IRA, as it was based on changes in the economy and subsequent changes in the mood of the US public.

A review of data from the Organisation for Economic Co-operation and Development (OECD) shows that the change in the annual inflation rate in the United States between the third quarter of 2019 and the third quarter of 2021 was almost 3.6 percentage points, which determined that the annual inflation rate, as measured by the Consumer Price Index, reached 6.2% in October 2021, the highest in more than three decades. It consequently represented the third highest inflation rate in the study group, behind Brazil and Turkey (OECD, 2019–2021). Gallup's Economic Confidence Index, on the other hand, stood at – 45 points in May 2022, up from -39 points in March and before, marking the lowest score since the COVID-19 pandemic began and possibly the lowest level of confidence since the end of the Great Recession in early 2009 (Gallup, 2022; Jones, 2022).[7]

Finally, a Pew Research Center survey conducted in May 2022 found that 70% of the American public considered inflation to be the biggest problem facing the United States; the next biggest, recognised by 55% of the public, was access to healthcare. As can be seen, the title of the IRA is therefore unlikely to be coincidental, as it seeks to alleviate public concerns about rising inflation levels and the increasing cost of living for American families. However, this begs the question of whether this bill can reduce inflation and what other problems it can solve.

A study by the Penn Wharton Budget Model (PWBM) of the IRA's estimated budgetary and macroeconomic effects suggests that it will reduce the annual rate of inflation by about 0.1 percentage points within about five years of its implementation, but will have no measurable impact on inflation beyond 2028 (Arnon & Smetters, 2022). According to PWBM estimates, the planned additional tax revenues will be higher relative to expenditure, leading to a reduction in public debt of 4.1% in 2040 and 8% in 2050, with a consequent positive impact on economic growth. In addition, the increase in business taxes will reduce the after-tax return on investment, which will offset the positive effects on investment resulting from the lower level of public debt. After accounting for these two effects, private-sector output will fall by 0.2% in 2031, remain unchanged in 2040 and increase by 0.3% in 2050. The PWBM also assumes that productivity gains from climate and energy effects are expected in 2050, which will be reflected in wage growth of 0.1% and GDP growth of 0.1%. Finally, in the PWBM's assessment, 75% of the corporate tax burden will be borne by capital owners and the remainder by employees, while in the case of the share buyback tax, the tax burden will be borne exclusively by shareholders. A distributional analysis of

7 Gallup's Economic Confidence Index is a summary measure of Americans' perceptions of the current economic situation and their outlook for the economy. The index has a range from +100 (if all respondents say the economy is excellent or good and getting better) to –100 (if all say it is weak and getting worse). The results are based on a Gallup poll from 2–22 May 2022, conducted at a time of record high gas prices, elevated inflation, government reports of declining economic growth in the first quarter and stock market crashes.

the newly introduced taxes shows that the majority of the burden will affect households with higher incomes (Arnon & Smetters, 2022).

On the basis of the PWBM's assessment, it can be concluded that, in the short term, the IRA will not lower inflation, but neither will it cause it to rise further. In our opinion, in the long term, the Act offers the potential to fulfil the expectations placed in it, although this depends on the appropriate management of the risks and opportunities that are directly or indirectly associated with it. Firstly, on the one hand, the purpose of the IRA is to bring about a reduction in healthcare-related costs for individuals (Cubanski et al., 2023; Larsen et al., 2022)[8] and, on the other, to encourage them, as it were, through a system of subsidies, to spend the money they have saved on the energy transition, with the ultimate aim of lowering energy prices and increasing the availability of energy, with a consequent increase in the liquidity of supply. The key question here is whether and to what extent it will be possible to influence consumer decisions and redirect the flow of funds saved and 'freed' from subsidies to the energy transition.

Secondly, one could say that the purpose of the IRA is to reduce the budget deficit, which only affects the reduction of inflation. Deficit reduction can be achieved by reducing expenditure or increasing revenue. The IRA can increase budget revenues if tax revenues are increased, which will reduce demand in the economy, reducing the direct pressure on excessively high prices. Reducing the budget deficit has a positive impact on the dynamics of investment growth and net exports, enabling the stimulation of economic growth in the short and long term and consequently achieving stability for the American economy (Stiglitz et al., 2022).

Thirdly, deficit reduction through increased tax revenues is possible, as the IRA introduced two new taxes: a minimum corporate income tax of 15% and a share buyback tax of 1%. The implementation of the corporate income tax, including tackling complex holding structures, which often use aggressive tax optimisation, will not be a simple matter. Even if there are legal instruments in US tax law to counteract aggressive optimisation, the adequate preparation of IRS revenue officers and the availability of tax data and IT tools is under question. It cannot be ruled out that technology based on artificial intelligence, which is already being used in the United States to audit public finances, will be used to achieve this strategic objective (Lizak & Skuza, 2023).

We should also mention two ways of lowering inflation which can complement the provisions of the IRA and the measures taken on its basis, although they

8 The Rhodium Group estimates that by 2030, the provisions of the IRA will save households up to USD 112 per year on average, as a result of falling gas and electricity prices. In contrast, a Kaiser Family Foundation study shows that in 2019, 1.2 million Medicare payers spent an average of USD 3,216 on prescription drugs, with payers taking the most expensive drugs spending an average of USD 10,000 to 15,000 per year.

do not derive from them. The first is to raise effective federal funds rate (EFFR) by an appropriate amount when inflation rises (Board of Governors, 2022). In January 2022, there was a change to the Fed's previous 'loose' monetary policy by the funds rate being raised to 4.38%; it had been unchanged from 0.12% since the start of the COVID-19 pandemic in March 2020. The current March 2023 rate of 4.9% was last seen in October 2007 (Federal Open Market Committee, 2023). The Fed's monetary tightening policy has yielded positive results, as the inflation rate stood at 5.4% in January 2021, reached 9.06% in June 2022 and fell to 6% in February 2023 (statista.com, 2023).

The second way is to avoid the risk of rising inflation by ensuring the stability of global supply chains, whose disruption during the COVID-19 pandemic caused shortages of certain components, especially semiconductors, resulting in price increases for some commodities, intermediates and materials. The IRA, correlating with the CHIPS and Science Act of 2022, is intended to minimise the risk of disruption to global supply chains and, in the long term, to not only ensure price stability but even exert downward pressure on prices, especially in the areas of electric cars and rare-earth elements (Ferreira & Critelli, 2022; Kennedy, 2022).[9]

Conclusions

Firstly, it should be noted that the US economy entered the third decade of the 21st century in what has been referred to as a 'polycrisis' (Tooze, 2022). This is because the return to the economic reality before the COVID-19 pandemic was complicated by Russia's aggression against Ukraine, which set off a series of overlapping national, regional and international crises in the economic, environmental, geopolitical, social and technological areas (World Economic Forum, 2023). In order to protect its own economy, the United States has adopted the extremely ambitious and bold IRA, which, in our view, provides the basis for the federal government to use the greatest amount of leverage over the domestic economy since the Great Depression of the 1930s. A review of the provisions of the IRA leads to a number of multidimensional and interdisciplinary conclusions.

Firstly, the IRA is a good example of solving current problems and crises, but also minimising risks in the long term. The impact assessment leaves no doubt that the Act provides a basis for aggressive and non-fragmentary interference in the US economy in order to minimise known risks, such as inflation, rising living costs, so-

9 As M.R. Kennedy (2022) aptly points out, the IRA provides funding and extends authority under the Defense Production Act of 1950 (Public Law 81–774, 81st Congress, 8 September 1950, [p. 798]) to conduct research into the exploration of sources of critical raw materials, including rare-earth elements necessary for renewable energy production such as solar panels and wind turbines, which are now largely controlled by China.

cial unrest, geopolitical confrontation and global strategic rivalry, but also new risks, which may include disruption of global supply chains, failure to mitigate and adapt to climate change, or global competition for the rare-earth elements market. As can be seen, virtually all of these risks could be acute in the long term. This is all the more important because in an era of polycrisis, a 'firefighting' approach to solving a problem may prevail, which is short-sighted and often perpetuates a vicious circle. In our view, the IRA creates a readiness to respond to long-term risks across multiple domains, which can help policymakers make decisions that enable them to minimise risks, not only domestically and in global strategic competition but also in the short- and long-term.

Secondly, the IRA can have a positive impact on reducing inflation by decreasing the budget deficit, lowering energy prices and increasing energy availability (making it more difficult to disrupt domestic and global supply chains), and changing the Fed's monetary policy in terms of adjusting the level of the Fed funds rate on an ongoing basis (The White House, 2023b).

However, the attainment of this objective depends at least on the following factors: 1) reform of the corporate tax enforcement system; 2) the absence of circumstances that would make it impossible to use the proceeds of new taxes, i.e. the corporate tax and the tax on share buybacks, for deficit reduction; 3) the influence on consumer decisions regarding the redirection of money saved from reduced costs of healthcare and money 'freed' from subsidies for the energy transition; 4) a lack of circumstances that would make it impossible to adjust the Fed's monetary policy to current needs; and 5) the implementation of the provisions of the CHIPS and Science Act of 2022, in particular regarding the construction of self-sufficient production of semiconductors and ensuring the protection of US supply chains. While the above projection of lower inflation in the United States is reasonably consistent with the current projection of lower inflation worldwide, according to which inflation will decline as demand dynamics in the global economy slow down, global trade imbalances subside and energy prices fall, the lack of the above factors could result in the continuation of stubborn inflationary pressures, in individual economies and worldwide, economic slowdowns and excessive debt problems. Based on this, we conclude that the IRA is a kind of anti-inflation shield that seeks to provide security and stability for the US economy for at least the next decade.

Thirdly, the IRA is the most significant piece of US federal climate-protection legislation. It lays the foundation for the US energy transition from its previous fossil fuel-based energy policy to clean energy. This is supported by the fact that it is difficult to name any element of the US energy infrastructure system or renewable and non-renewable energy sources that would not be covered by the IRA. Another important issue is that of the so-called Internet of Energy (Rifkin, 2015). Although the wording of the IRA does not explicitly address this issue, we believe that the Act lays the foundations for the construction of the world's first smart-state energy system, i.e.

the Internet of Energy, which would be managed using quantum computers and artificial intelligence (Schmidt et al., 2021, pp. 253–269). Thus, the actions to be taken under the Act and the extent to which they are funded are likely to lead to: 1) a 5.2–6.7% reduction in retail energy costs over a ten-year period, which would result in savings of USD 170–220 per year for the average US household (Roy et al., 2022); 2) ensured energy price stability; 3) a reduction in US carbon emissions by 50–52% by 2030. Moreover, a comparison of the IRA and Agenda 2030 shows that synergies can be achieved between the strategic goals extracted from both pieces of legislation. It is also reasonable to believe that, despite the two-and-a-half-year gap in the United States' failure to meet the SDGs, the scope and momentum of action taken under the IRA could soon lead the country to a position of global leadership in achieving them.

Fourthly and finally, the IRA enables the US economy to prepare for any potential new problems, crises and risks that may arise and makes it easier to steer the economy in an era of existing polycrisis by providing it with qualities such as stability, resilience, predict ability and self-sustainability. In addition, the IRA enables the United States to become a world leader in clean energy technology, production and innovation, with its supply, availability and flows, employing a dominant share of its own workforce; consequently, the United States will drive its own economy, and the global economy with it. We argue that the goal of the US Grand Strategy which emerges from a review of the strategic objectives extracted from the legislation that makes up the Build Back Better Plan, particularly the IRA, is to achieve US global leadership in the areas of the economy, energy and the climate, which ultimately will enable the maintenance of the 'exorbitant privilege' of being the economic hegemon that results from the balance of power in the world economy and international politics, the status of the US dollar as an international currency and oversight of the global reserve currency that has protected US sovereignty, security and prosperity to date.

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EU Regulation of the Crypto-Assets Market[1]

Abstract: The present paper discusses the issue of regulation of the crypto-assets market. This area is still struggling with a lack of legislation, and there are only some initiatives to regulate the market. The aim of the article is to analyse the state of legal regulation of the crypto-assets market while simultaneously pointing out problematic issues with *de lege ferenda* proposals. For this purpose, we established two hypotheses: the crypto-assets market needs to be regulated by legal acts of a European nature (H1), and the adopted EU legal acts regulating the crypto-assets market are adequate and sufficient (H2). Several types of scholarly papers, such as analysis, synthesis, and the historical method, were used in the preparation of this paper.

Keywords: digital revolution, crypto-assets, crypto-assets market, financial law, financial-market law

> *Digital finance is an increasingly important part of Europe's economic environment. It is crucial to create a stimulating environment for innovative businesses while mitigating risks for investors and consumers.*
>
> Andrej Šircelj, Minister of Finance of Slovenia (Council of the EU, 2021)

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Introduction

Almost everyone has come across the concept of crypto-assets, or other synonyms for this phenomenon.[2] It can be said that they have already become an integral part of everyday life in an era that is often referred to as the industrial (digital) revolution 4.0. A relatively long period has passed since the first crypto-assets were issued,[3] and they are increasingly becoming more accessible to the general public, who do not even need to have investment experience to buy or sell them. This is also due to many other technological innovations,[4] which are used in the competitive struggle for clients and which make it possible to buy crypto-assets practically anywhere.[5]

This is also why the quote with which we deliberately started this article is becoming more relevant. What is the state of the current financial-legal legislation of crypto-assets? The answer to this question is definitely not positive, because national parliaments in most cases have not yet reflected that the area is characterized by insufficient, or in many cases, absent legal regulation. At first, the attention of legislative bodies was focused primarily on the issue of taxation of income flowing from crypto-assets and related criminal-legal aspects, while financial-legal regulation continued to live a life of its own. The availability of crypto-assets, high volatility and the associated risk for individuals are facts that lead us to fully identify with at least the second part of a statement by the president of the European Central Bank, Christine Lagarde, according to whom '[c]rypto is "worth nothing" and should be regulated' (Koc, 2022).

However, the current situation is not completely black and white, and legislative initiatives at the level of the European Union indicate that there is an effort to adopt a certain basic regulatory framework that would regulate some financial-legal issues related to crypto-assets; we can perhaps add in the same breath that progress in this area is not only quantitative but certainly also qualitative. States prefer a joint and coordinated approach to the various unilateral efforts to deal with this issue. The aim of this article is to analyse the state of legal regulation of the crypto-assets market while simultaneously pointing out problematic issues with *de lege ferenda* proposals. As part of the research activity, we verified two hypotheses: hypothesis H1, that the crypto-assets market needs to be regulated by legal acts of a European nature; and

2 The essence of bitcoin and other crypto-assets, as well as their conceptual definition, have been addressed by several authors (Kubát, 2015; Richter et al., 2015; Tumpel & Kofler 2019).

3 In 2008, the most famous crypto-asset, bitcoin, was introduced. The identity of the architect of this digital asset is still unknown, because he appears under the pseudonym Satoshi Nakamoto (Nakamoto, 2018).

4 Technological innovations are already applied in all spheres of human life. The area of public finance control is no exception (Zalcewicz, 2023).

5 The COVID-19 pandemic was also a driving factor for technological progress. Coffie et al. (2022) have addressed the impact of this disease (among other things) on the transformation of mobile payment services.

hypothesis H2, that the adopted EU legal acts regulating the crypto-assets market are adequate and sufficient.

The state of the background literature is at a very solid level if we talk about the issue of financial-market law in general (see Babčák et al., 2017; Čunderlík, 2017; Jurkowska-Zeidler, 2016; Karfíková et al., 2017; Šimonová, 2012). It is also possible to observe a growing number of scholarly and professional papers on the topic of the nature of crypto-assets (Čunderlík et al., 2018, pp. 19–37) or the taxation of income arising from the handling of crypto-assets (Hrabčák et al., 2021, p. 116; Štrkolec, 2022). Given that investments in crypto-assets and related issues are still in their infancy, there is a certain corresponding vacuum in the publication sphere, which is also related to the long-term absence of appropriate financial-legal regulation of crypto-assets.

Several methods of writing scientific papers, such as analysis, synthesis and the historical method, have been used in the preparation of this study. The starting method was analysis, which we used to examine adopted and proposed EU legal acts directly or indirectly related to crypto-assets, with special emphasis on Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on Markets in Crypto-Assets, and Amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. Through synthesis, we arrived at a formulation of proposals at the level of *de lege ferenda* and conclusions in relation to the raised hypotheses. The historical method showed the historical context of ongoing legislative initiatives in the research area. The methods were equally applied in processing the outlined issue.

1. Legal regulation of crypto-asset markets in Europe over time

The field of crypto-assets is characterized by the long-standing absence of relevant and adequate legal regulation. We noticed the first regulatory initiatives mainly after 2018, when bitcoin and other crypto-assets reached their historical highs, which in investment terminology are also denoted by the abbreviation ATH (from the English All Time High). The bull run was replaced by a bear market, and it was not until 2021 that the value of crypto-assets began to grow again significantly.[6] However, the attention of legislatures was mainly focused on the area of taxation of potential income connected with crypto-assets or the anti-money laundering (AML) sphere. Other issues, such as the legal nature of crypto-assets, their classification, the supervision of activities in the area and others, became relevant a little later.

6 Bitcoin, undoubtedly the most famous crypto-asset, reached its ATH on 10.11.2021, reaching the amount of almost USD 70,000 (the exact amount was USD 69,045). At the time of writing (23 June 2023), the value of bitcoin is at the level of approximately USD 30,000, which represents a drop of more than 50% compared to its peak value.

Despite the high volatility and other negative characteristics of crypto-assets, it is a very popular phenomenon among some investors, which is confirmed by the enormous increase in the number of crypto-assets and the market capitalization, at a level exceeding EUR 1 trillion (CoinMarketCap, n.d.).[7] Initially, it was possible to observe a certain correlation between stock markets and the crypto-assets market, but in March and April 2023, an interesting situation occurred, when it was possible to identify a slight increase in the value of crypto-assets during a period of declining stock markets. However, this is rather an exceptional phenomenon, and we are of the opinion that it will continue to be possible to observe a certain connection between the crypto market and stock markets.

Approaches to solving the issue differ depending on the nature of what is regulated. In the field of taxation, it is possible to identify what are completely natural, unilateral solutions by individual states. This approach is related to the tax sovereignty of states, which states do not want to give up completely in favour of international integration groupings such as the EU. It also has a historical context, and it cannot be expected that there will be any changes within this approach. The situation is different in the financial-legal area. The vast majority of EU Member States have not resorted to adopting their own financial-legal regulation, which is due to the complexity of the issue and a preference for adopting a common and coordinated solution. These digital assets are tradable globally. So can unilateral solutions have the desired effect?

Since their inception, crypto-assets have always been associated with money laundering and terrorist financing (Daudrikh, 2022; Haffke et al., 2020). It is therefore not surprising that it was concerns about criminal activity linked to crypto-assets that led the representatives of individual EU Member States to an accelerated reaction, which resulted in reaching a consensus in the adoption of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU (the AML Directive), which also affects the crypto sphere. Obligations arising from individual Member States have been incorporated into national legislation in various forms.[8]

7 Investors and crypto fans have previously classified crypto-assets into two groups, namely bitcoin and the so-called altcoins, i.e. alternative coins in relation to bitcoin. Currently, however, it is possible to identify another group (subset) of crypto-assets among altcoins – the so-called shitcoins (crypto-assets without real use in practice or intrinsic value).

8 The obligations that flowed to the Slovak Republic from the AML Directive were fulfilled by the adoption of the amendment to Act No. 297/2008 Coll., on Protection against the Legalization of Income from Criminal Activity and on Protection against the Financing of Terrorism and on the Amendment of Certain Laws, as amended.

In relation to crypto-asset service providers, the AML Directive brought several changes.[9] During the transposition period, Member States were forced to expand the range of obligations on entities in their national legislation to include crypto-asset service providers. On a practical level, this meant that, from the moment the changes in the national legal systems came into effect, crypto-asset service providers became entities subject to several obligations, such as a registration obligation, the identification of clients and end-users of benefits, an obligation to find out information about the purpose and nature of the planned transactions, the performance of client checks, reporting unusual transactions and so on.

The adoption of the AML Directive was undoubtedly necessary; however, not only professionals, but also the wider public were aware that the adoption of this legal act does not solve all the problems related to crypto-assets. This is confirmed by the Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on the FinTech Action Plan: For a More Competitive and Innovative European Financial Sector (the Action Plan). This document embodied the Commission's efforts to explore the opportunities and challenges associated with crypto-assets. In the Action Plan, the Commission mandated the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) to assess the applicability and appropriateness of the existing regulatory framework in the area of financial services in relation to crypto-assets.

The initial results of the assessment activity were already available in 2019 and determined the direction of further activities of the EU institutions. ESMA issued advice entitled 'Initial coin offerings and crypto-assets' on 9 January 2019 (ESMA, 2019), and the EBA issued a 'Report with advice for the European Commission on crypto-assets' on the same day (EBA, 2019). The mandated institutions concluded that although some crypto-assets may fall within the scope of EU legal acts, the effective application of these acts to such assets is not always easy.[10] ESMA and the EBA stated that the existing legal regulation may create obstacles for the application of distributed ledger technology (DLT) and at the same time emphasized that most crypto-assets do not fall within the scope of EU legislation in the field of financial services (with the exception of the AML sphere), and therefore are not covered by, among other things, provisions on consumer and investor protection and market integrity, despite the high risk of these 'assets'.

9 The legal act in question did not use the term 'crypto-asset', but 'virtual currency'. In order to maintain uniformity of terminology, we primarily use the term 'crypto-asset' in this article.

10 The European Economic and Social Committee also commented on this issue in its opinion entitled 'Crypto-assets: Challenges and opportunities' (2022). Within it, the committee stated that some crypto-assets can be classified as financial instruments within the scope of the Markets in Financial Instruments Directive II (MiFID II), as electronic money under the Electronic Money Directive or as funds under the Payment Services Directive 2.

The so-called Digital Finance Package presented by the Commission on 24 November 2020 can be considered a milestone in the development of legal regulation of the crypto-assets market.[11] The package contained several documents, namely a strategy in the field of digital finance, a proposal on crypto-asset markets, a proposal on digital operational resilience and a proposal on distributed transaction database technology. As the Commission further states, the aim of the package of these measures is 'to support innovation and the uptake of new financial technologies while providing for an appropriate level of consumer and investor protection' (Council of the EU, 2021). Even this nobly formulated goal did not lead Member States to an early consensus regarding the final form of the basic financial-legal framework for crypto-assets, although this was probably due to the search for solutions to problems related to the COVID-19 pandemic, and subsequently the war in Ukraine and attempts to solve the high rate of inflation and related price increases.

In the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU (Digital Finance Strategy), the EU defined the active use of digital finance for the benefit of consumers and businesses as a strategic goal. It is also clear from the document that the EU was aware that in order to come closer to fulfilling this goal, adaptation of the EU regulatory framework would be necessary. This also applies (among other things) to the functioning of markets within the EU with crypto-assets and tokenized financial instruments.

According to the Digital Finance Strategy, the EU should introduce a comprehensive framework by 2024 that will enable the use of DLT and crypto-assets in the financial sector. At the same time, it should address the risks related to these technologies. The Commission, as the proponent of these measures, is fully aware that crypto-assets and related blockchains can bring significant opportunities for the financial industry, such as potentially cheap and fast payments, especially in cross-border and international transactions, new financing options for small and medium-sized enterprises and more efficient capital markets (European Commission, 2020).

The legal acts contained in the Digital Finance Package presented by the Commission were gradually adopted after long discussions (the last legislative process was completed on 20 April 2023), and the current framework of the Union (international) legal regulation of crypto-asset markets is formed (apart from the above-mentioned AML Directive) by the following legal regulations:

11 This step was preceded by the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Shaping Europe's Digital Future, which the Commission followed up on and presented in the Digital Finance Package in September of the same year. Thus, in a relatively short period of time after the announcement, the Commission also presented to the public specific measures that it is interested in taking in the area.

Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on Markets in Crypto-Assets, and Amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (the MiCA Regulation),

Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on Digital Operational Resilience for the Financial Sector and Amending Regulations (EC) No. 1060/2009, (EU) No. 648/2012, (EU) No. 600/2014, (EU) No. 909/2014 and (EU) 2016/1011 (the DORA Regulation),

Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a Pilot Regime for Market Infrastructures Based on Distributed Ledger Technology, and Amending Regulations (EU) No. 600/2014 and (EU) No. 909/2014 and Directive 2014/65/EU (the DLT Regulation), and

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU (the MiFID II Directive).

We consider the MiCA Regulation to be a fundamental pillar of the regulation of crypto-asset markets, which follows from the very name of the legal act in question. However, this issue must be seen within the complex of the other legal acts mentioned above, even if they only deal with certain partial issues related to crypto-assets, which, however, cannot be perceived negatively. The DORA regulation was also part of the Digital Finance Package. This creates uniform requirements for the security of networks and information systems of companies and organizations operating in the financial sector, as well as important third parties that provide them with services related to information and communication technologies, such as cloud platforms or data analysis services. The DLT regulation, in turn, introduces a pilot regime for market infrastructures based on DLT, the aim of which is to test the trading and settlement of transactions with crypto-assets that qualify as financial instruments (so-called tokenized financial instruments). Although the MiFID II Directive was adopted before the aforementioned initiatives, it certainly has its place in the financial-legal framework of crypto-asset markets, and some crypto-assets that meet the characteristics of a financial instrument will be subject to its regime.

Based on the above, we conclude that hypothesis H1 – the crypto-assets market needs to be regulated by legal acts of a European nature – has been confirmed. More than 25,000 different types of crypto-assets have already been issued. The issuers of these assets are located in the territories of different countries (even outside the EU), and individuals buy them worldwide. In the digital space and the world of digital finance, borders are no barrier. The various unilateral approaches of the EU Member States did not achieve the effect they intended, and, as the Commission stated in several documents, they only led to market fragmentation. Another group of Member States, on the other hand, was restrained and in the field of crypto-asset markets proceeded to regulate only certain issues in the interest of fulfilling the Union's obli-

gations, which flowed, for example, from the AML Directive. The adopted legislative acts will certainly be an impetus for the adoption of further legislation at the national level in the field of crypto-asset markets, despite the fact that the regulations are directly applicable and enforceable in all Member States. Only further application in practice will show whether this problem does not go beyond the EU framework and whether the European consensus will be sufficient.

2. The MiCA Regulation: The right step towards the regulation of crypto-asset markets?

The MiCA regulation can be described without any exaggeration as a basic pillar of the regulation of crypto-asset markets and is the result of long discussions that ended on 20 April 2023, although the draft of this act was already presented to the public in 2020 as part of the Digital Finance Package (also see Bočánek, 2021; Srokosz, 2021). Is this the right step towards the regulation of crypto-asset markets? We will try to answer this question in the context of the most key measures introduced by the MiCA regulation in order to eliminate risks and protect consumers. The Commission, as the proposer of this legal act, formulated four goals to be achieved with the MiCA regulation, namely achieving legal certainty, promoting innovation, adequate protection of consumers, investors and market integrity and, finally, financial stability.

Prior to the adoption of the MiCA regulation, there were several legal-regulatory issues related to crypto-asset markets that we could identify. Specifically, these were about the problem of defining crypto-assets and individual subcategories of crypto-assets; uniform conditions for the provision of crypto-asset services within the EU; and supervision of and control over the activities of crypto-asset service providers and issuers. The adoption of the MiCA regulation brought with it several changes, also in relation to these problematic areas. But are such changes sufficient and have the problems really been eliminated? Due to restricted space, we limit ourselves in the following text to answering the questions we have outlined, even though there are other problems associated with crypto-assets.

A crypto-asset, within the meaning of Art. 3 Paragraph 1 Point 2 of the MiCA regulation, is 'a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology' (MiCA 2023). The regulation further specifies the definitions of individual subcategories of crypto-assets, namely asset-referenced tokens, electronic money tokens and utility tokens. The definition of crypto-assets seems to us to be legally vague and ambiguous. It follows from the definition that crypto-assets in the sense of MiCA will be based on DLT, or similar technology. Union legislators should have been more precise in this respect and should have specified other similar technologies (in addi-

tion to DLT). Furthermore, the current definition of subcategories of crypto-assets under the MiCA regulation does not cover all current crypto-assets, especially those that are not pegged to the value of another currency (typically bitcoin). Even after the adoption of the MiCA regulation, these crypto-assets have so far only remained in the limited regime of legal regulation (Štrkolec, 2022, p. 113). The variety of terminology used within the Union legal acts can also be evaluated negatively; it is possible to point to the AML directive, which does not use the term 'crypto-asset' but 'virtual currency'. It would be appropriate to unify the terminology used.[12]

Since the MiCA regulation regulates markets with crypto-assets, the question of whether crypto-assets can be classified as financial-market instruments with this new legal regulation is logically raised here.[13] Some crypto-assets were considered financial instruments in the context of the MiFID II directive and were subject to the regime of that legal act. This can also be deduced from Art. 2 Paragraph 2 of the MiCA regulation, which stipulates that crypto-assets considered financial instruments under the MiFID II regime will not be governed by the MiCA regulation. Here we also encounter the problem of non-harmonized legislation on securities within EU Member States. One and the same crypto-asset may be assessed or qualified differently in different states, which may raise the question of whether a given crypto-asset is governed by MiFID II or the MiCA regulation. This can also lead to different interpretations and speculative actions on the part of the addressees of legal norms in an effort to choose the most benevolent regulation in a specific situation.

Another problem that we defined above is the creation of uniform conditions for the provision of crypto-asset services. In this area, two groups of EU Member States can be observed. The first is a group of states that have adopted rules for the provision of crypto-asset services (e.g. the Slovak Republic) regulating partial issues, and the second is states that have adopted relatively complex legislation for crypto-asset service providers (e.g. Malta).[14] These facts have raised concerns in the eyes of the EU institutions regarding the fragmentation of rules within the single internal market.[15]

12 Currently, we have noticed a shift in that the Commission already adheres to the terminology introduced by the MiCA regulation in its proposal for the DAC 8 directive, which we evaluate very positively.

13 Using the example of the Slovak Republic, it can again be pointed out that the current version of Act No. 566/2001 Coll., on Securities and Investment Services does not consider crypto-assets as financial instruments (Paragraph 5 Section 1).

14 Malta has taken a very progressive approach to crypto-assets, positioning itself as a global leader in crypto regulation (Comply Advantage, 2023).

15 The Slovak Republic also belongs to the category of states that have not adopted their own regulation applicable to crypto-asset service providers, except for that which was necessary for the fulfilment of Union obligations (for example, within the framework of Act No. 455/1991 Coll., on Trade Business (Trade Act) as amended in later regulations). However, the stipulated conditions were insufficient and too benevolent. The legislation did not take into account all aspects of the regulated issue, which is why it appears to us to be not very effective.

These concerns are justified, but we consider the global nature of crypto-assets to be a more important reason for joint and coordinated action in this area.

A crypto-asset service provider (CASP) is 'any person whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis' (MiCA 2023). The number of CASPs has grown in direct proportion to the increase in market capitalization crypto-assets, because a number of subjects have seen the potential in the area for the realization of their business intentions. Crypto-asset services are the services and activities calculated in Art. 3 Paragraph 1 Point 9 of the MiCA regulation, which are related to crypto-assets (e.g. custody and administration of crypto-assets on behalf of third parties, operation of a trading platform for crypto-assets, exchange of crypto-assets for fiat currency that is legal tender, and others). After entry of provisions of MiCA into force, crypto-asset services will only be able to be provided on the basis of a permit issued by the competent authorities of the EU Member States after meeting the established prerequisites, while CASPs will be registered in the central register maintained by ESMA. This step is very positive, but in order to evaluate the mentioned question (status of CASP), it is necessary to take a closer look at the established conditions.

At first glance, the established conditions are very strict, and as soon as the MiCA regulation begins to apply (after 18 months from the entry into force, i.e. from 29 June 2023), a number of entities that have provided crypto-asset services up to now will have problems fulfilling them.[16] The applicant for a permit for the provision of crypto-asset services will have to prove in the application the fulfilment of the conditions established in Art. 54 Paragraph 2 of the MiCA regulation. For our purposes, we have divided the individual assumptions into three groups, namely:

Material requirements: the existence of material requirements was very desirable. For legal entities that provide crypto-asset services, there have been mainly legal conditions regarding the amount of capital depending on the specific form of the business.[17] In many cases, however, it can be an 'empty entity', i.e. subjects without a real material background. We therefore rate the condition according to Art. 54 Paragraph 2 in conjunction with Art. 60 of the MiCA regulation very positively, which stipulates that CASPs must always have prudent security guarantees in the amount of capital requirements mentioned in Annex IV or amounting to a quarter of the previous year's fixed costs, which are reviewed annually. Capital requirements are tiered depending on the CASP and depend on the other crypto-asset services it provides.[18]

16 The adoption of the AML Directive already meant increased administrative requirements for such entities, but it is questionable how many CASPs fulfilled the letter of the relevant AML regulations.

17 Here, too, differences between the commercial legal regulations of individual EU Member States can be observed due to the fact that these issues are left under the responsibility of states.

18 They are graduated to the amounts of EUR 50,000, EUR 125,000 and EUR 150,000.

Prudential security guarantees must either take the form of their own funds or an insurance policy covering the EU territory where they actively provide crypto-asset services, or a comparable guarantee.

Personnel requirements: the formulated personnel requirements appear to us as another positive step. We can see here the effort of the rule makers to emphasize both the integrity of the entities owning the CASP[19] and the expertise of the persons in its governing bodies or the persons who provide advice related to crypto-assets.[20]

Administrative requirements: this category of the fulfilment of several requirements (e.g. an activity plan, a description of the management system, a description of the internal control mechanism, descriptions of information systems and security mechanisms, etc.) can cause problems for many entities. The development of the necessary documentation will cause the applicants higher costs (for legal, accounting or other related consulting services), which will certainly create another filter that will 'cleanse' the market of some risky entities.

Despite the evident shift in the legal-regulatory level, we have certain reservations in relation to the formulated criteria and requirements. Our first reservation refers to prudential security guarantees. In the event that these requirements are fulfilled in the form of the CASP's own resources, their established minimum amount cannot be ignored (see above). If we look at the volume of capital traded within crypto-asset markets and the risk arising from them (due to high volatility), the capital requirements are rather symbolic in nature. This is all the more true because this assumption can also be fulfilled by an insurance contract or other similar guarantee. Riskiness in the area of crypto-asset markets not only results from volatility, but also from the fact that many entities provide services, but not on a professional basis due to the absence of professional requirements of the personnel basis. Although professional requirements are introduced with the MiCA regulation, we are concerned that the wording used is not satisfactory due to its generality.[21] Only application in practice will show whether these concerns will take on real shape and whether they will lead the Union's lawmakers to reevaluate the accepted requirements for CASPs.

Permits issued by the competent authority of an EU Member State will be of great importance from several points of view. On the one hand, conditions across

19 This applies only to owners who directly or indirectly own 20% or more of the capital or voting rights.

20 When consulting about crypto-assets, a real problem can arise in practice, since the MiCA regulation aims at personalized services and consulting. It is quite likely that such entities will try to avoid CASP obligations under the guise of providing generic, non-personalized services.

21 It is possible to point to the wording of one of the professional requirements in Art. 54 Paragraph 2 Letter g of the MiCA regulation, according to which 'the natural persons involved in the management body of the applicant crypto-asset service provider collectively possess sufficient knowledge, skills and experience to manage that provider and […] those natural persons are required to commit sufficient time to the performance of their duties'.

EU Member States are unified, as already mentioned. States that already have their own unilateral solutions for the regulation of crypto-asset markets will have to align their legislation with European legislation, while in the case of setting stricter criteria, we may run into limits set by EU primary law which could potentially lead to the initiation of proceedings at the EU Court of Justice. Despite the increased requirements for entities, uniform rules regarding the provision of crypto-asset services will benefit CASPs in the sense that they will be able to provide services on the basis of a single licence in the territory of EU Member States, without the need for an in-depth analysis of local legislation before starting their business activities.

CASPs will have to fulfil several obligations that already flow from the aforementioned AML sphere (Haffke et al., 2020) or from GDPR (Iaia, 2021), but they will also have to deal with new obligations in accordance with the MiCA regulation. This is a whole catalogue of obligations, which the EU legislator divides (also systematically) into two groups, namely general obligations (applicable to all CASPs) and special obligations (applicable to CASPs depending on the type of crypto-asset services provided[22]). The general duties of CASPs include, for example, the obligation to act honestly, fairly and professionally in the best interests of clients and to provide information for clients, the obligation to comply with prudential requirements (see above), the obligation to comply with organizational requirements, and others. Therefore, we consider the 18-month deadline for the MiCA regulation to become applicable as also extremely important for CASPs, who will have to adapt to the new conditions when it comes to the provision of crypto-asset services.

The fundamental issue introduced by the MiCA regulation is supervision in the field of crypto-assets, which has been completely absent until now. It follows from this legal act that EU Member States have the obligation to designate a responsible authority for the performance of functions and duties in accordance with the MiCA regulation, and they must inform ESMA and the EBA about this fact. It is not excluded that the functions and obligations arising from the MiCA regulation will be fulfilled by several authorities, but in such a case, one of them will have to be designated as a single point of contact, which is important from the point of view of cross-border cooperation. The list of competent authorities of the EU Member States will be published on the ESMA website; these authorities will also be equipped with several powers, which derive primarily from Titles II, III, IV and V of the MiCA regulation (e.g. the right to request information and documents from entities, the right to suspend the provision of services, the right to publish essential information, and

22 One can point to the example of CASPs' custody and management of crypto-assets on behalf of third parties. These subjects are (among other things) obliged, pursuant to Art. 67 Paragraph 1 of the MiCA regulation, to enter into an agreement with their clients, in which their obligations and tasks are determined in detail, while it must contain at least the elements required by the regulation.

others). Powers can be exercised by the competent authorities of the Member States either directly, in cooperation with other authorities, by delegation or by submitting a proposal to the competent judicial authority. In addition, the competent authorities have several information obligations towards the Commission, the EBA and ESMA. We consider cooperation with the authorities of third countries to be more than just problematic, as the MiCA regulation does not have any legal effect on those countries, and it is only up to them how they stand in relation to potential cooperation.

The MiCA regulation also introduces other measures regarding crypto-assets, such as providing information on environmental and climate footprints, introducing a public register of non-compliant CASPs, determining the liquidity reserve of stablecoin issuers,[23] limiting the development of asset-referenced tokens based on non-European currencies, and other measures, but due to limited space we will not go into them here.

Hypothesis H2 – that adopted EU legal acts regulating the crypto-assets market are adequate and sufficient – has not been confirmed. In the area of regulation of crypto-asset markets, we have seen increasing legislation in recent years (mainly at the Union level), but the regulation of the crypto-assets market did not undergo a major change until 20 April 2023, with the adoption of the MiCA regulation. This regulation (in the context of other legal acts such as the DORA regulation, the DLT regulation and others) can be evaluated as a positive step towards establishing at least a minimum level of protection for individuals. In the areas we address (definition of crypto-assets, CASPs and supervision), we have identified several shortcomings that in practice may disrupt the effective application of the adopted legal act and the real enforceability of the introduced measures.

3. Further development trends of the financial-legal regulation of crypto-asset markets

Crypto-assets, and business in the field of crypto-assets, are an interdisciplinary issue, not only in the sense that they are the object of research from several scholarly disciplines, but because they must also be seen in the context that this is an issue that is (or should be) regulated by several legal branches, not only in the area of private law, but also of public law, which also follows from the previous parts of this article. It is therefore necessary to examine the outlined questions comprehensively, not selectively.

23 A stablecoin is a type of crypto-asset, where its digital value is linked to a reference asset, which is usually a fiat currency (EUR, USD, etc.) but can also be commodities traded on the stock exchange (e.g. gold) or another crypto-asset.

Despite the fact that today we already know the final form of the MiCA regulation, it can be stated that the financial-legal regulation of crypto-assets is not fully completed. On the contrary, we can expect a further increase in legal acts (national or European) that will address this issue, or amendments to the MiCA regulation will be adopted. In some countries, there have even been voices saying that the use of crypto-assets should be banned (e.g. China has banned its citizens from mining or owning crypto-assets) (Openiazoch, 2022), which would automatically mean the impossibility of providing services (doing business) in the given area.

We are not supporters of the idea that crypto-assets should be completely banned. Rather, we lean towards the opinion of the vice-governor of the Czech National Bank, who has repeatedly presented his position on crypto-assets – not to help, not to protect, not to harm and not to lead by the hand (Wolf, 2017). Such an attitude is, in our opinion, legitimate and justified. In our opinion, restrictive measures regarding the crypto-assets market would not be appropriate, and if any of the EU Member States resorted to such a step, it would be possible to consider them in conflict with primary EU law (see below).

Not helping crypto-assets can be interpreted in the sense that, taking into account the multiple risks associated with crypto-assets, it is not necessary or even desirable to accept an adjustment that could be characterized as favourable (one that would, for example, allow easier access to crypto-assets or simplify the conditions for doing business in a given area). In comparison to other investment instruments, crypto-assets do not have deposit protection mechanisms, which is natural due to their decentralized nature and the absence of supervision by any institution (usually a central bank).[24] On the other hand, this regulation should not be harmful and should not create obstacles for individuals if they decide to buy or dispose of crypto-assets. Ultimately, it is their money, and they have to bear the associated risk of losing it.

The prohibitions regarding crypto-assets could cause alternative (speculative) ways of buying crypto-assets to be sought, but this does not solve the problem at all. As we have already stated earlier, such actions by an EU Member State could disrupt the realization of freedoms in the EU's single internal market and would thus be a clear contradiction of primary EU law. This would be due to the fact that a consensus regarding the prohibition of crypto-assets will most likely not be reached across the Member States, and therefore there would be a certain disadvantage for entities within the state that has enacted such a prohibition in its national legislation. Therefore, we do not see further trends in the development of the financial-legal regulation of crypto-assets (within the EU states) towards the adoption of prohibitive measures. For this reason, the EU tries rather to present an alternative to crypto-assets

24 With the arrival of the MiCA regulation, there will be changes in this area, as follows from the previous sections of this article.

to the public in the form of the digital euro. Central digital currencies were already mentioned in a general way in several explanatory reports to legal acts, thus creating space on the part of the EU institutions for the introduction of the digital euro. The digital euro is currently under investigation, which was supposed to last until 2023. It is highly unlikely that the earlier deadlines will be met. After this 'preparatory' phase, the digital euro should be introduced in real life. It was originally estimated that this step should occur in 2025, according to the European Central Bank, but given the current progress of preparatory and research work, we are very sceptical and rather assume that this moment will occur much later.

It is true that the digital euro is associated with a number of technological and also legal issues, which European institutions must deal with before the first digital euro is issued. One issue is the fundamental basis on which the digital euro is supposed to function (blockchain is also being considered), and there are also fundamental questions of a legal nature which come into consideration, such as the legal basis for the issuance of the digital euro (it will be different depending on its purpose, whether legal tender, a monetary policy instrument, an instrument made available to private entities as well as a settlement unit), a specific regulation within the framework of secondary legal acts, and others.

EU primary law and related legal acts create a sufficient legal basis and mandate for the Union's legislators to introduce the digital euro, except for certain reservations (see Hrabčák, 2021). Taking into account that this is a very dynamically developing area, it will be necessary to monitor how the legal-regulatory framework will develop, which will already specifically regulate the status and nature of the digital euro. But at the same time, we are also of the opinion that the digital euro (also taking into account its declared properties) will never be a sufficient alternative in relation to crypto-assets, and it is very naïve to think that the demand for crypto-assets from the public will decrease.

Conclusion

The law will never be able to foresee all situations, and there will always be certain facts to which it will have to react in time. It was no different even with the arrival of phenomena that define the industrial (digital) revolution 4.0, such as crypto-assets, digital services or the shared economy. Crypto-assets have an interdisciplinary nature, and at the legal level, questions arise here in the fields of tax law, financial law, civil law or other legal branches.

Within the framework of this article, the aim of which was to analyse the state of legal regulation of the crypto-assets market while pointing out problematic issues with *de lege ferenda* proposals, we focused primarily on the financial-legal aspects of crypto-assets or crypto-asset markets. Due to the breadth of the issue, we focused

primarily on the development of the regulation of crypto-asset markets, with a special emphasis on the MiCA regulation, and we also pointed out possible further directions of the legislation in this research area.

We have come to several conclusions, which we have formulated in relation to the raised hypotheses: firstly, the crypto-assets market needs to be regulated by legal acts of a European nature. A relatively long period has already passed since the moment when the first crypto-assets were introduced into real life. At the beginning, almost no attention was paid to this issue from the point of view of states and or of international institutions (especially in the EU). It was not until 2018 that the first legislative activities (with certain exceptions) that dealt with this problem were brought together, which was caused by the increase in capital invested in crypto-assets. These activities were primarily of a tax nature (in view of potential tax revenues for state budgets). Due to the fact that crypto-assets (and their use) have practically no geographical boundaries, we are of the opinion that more complex financial-legal regulation is necessary, and it is desirable to find a consensus at least at the European level, even if national regulation also has an invaluable place (conditions for the performance of business activities by commercial law regulations). We can therefore conclude that hypothesis H1 has been confirmed.

Secondly, the hypothesis that the adopted EU legal acts regulating the crypto-assets market are adequate and sufficient: as part of this paper, we examined the current financial-legal framework of the crypto-assets market formed by legal acts adopted at the European level. The recently adopted MiCA regulation , which is supposed to be the basic pillar of the financial-legal regulation of crypto-asset markets within the EU Member States, demanded attention. For other development trends, we focused mainly on EU regulation, because it is at this level that several changes can be expected in the future, either with the MiCA regulation or in connection with the regulation of other associated issues. In the areas we addressed (definition of crypto-assets, CASPs and supervision), we have identified several shortcomings that in practice can disrupt the effective application of the adopted legal act and the real feasibility of the introduced measures, which lead us to the conclusion that hypothesis H2 has not been confirmed.

The industrial (digital) revolution 4.0 is a very strong driving force that also affects the legal sphere. Therefore, it is more than clear that financial-legal regulation will always have particular shortcomings, which will need to be responded to in a certain way; however, the goal is not to adopt a perfect legal regulation, which is not even possible in reality. It will be sufficient if the competent authorities proceed with a real solution to this problem and that it is not just an 'external' effort to solve a problem that actually exists.

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Challenges Posed to the EU Financial Market by the Implementation of the Concept of Sustainable Financing

Abstract: The subject of this study is, firstly, the identification of new obligations for financial institutions and supervisors resulting from the normative inclusion of ESG (environmental, social and governance) policy in financial market regulation. Secondly, we will answer the question of whether and to what extent the current regulatory pattern is changing in connection with ESG policy and, for this purpose, conduct an examination in the light of the provisions of the sustainable finance risk law from the perspective of a financial institution operating on the financial market, taking into account supervisory regulations in this area. The study also aims to consider various possible solutions for the optimal implementation of the policy of counteracting sustainable development risks in financial market law.
Keywords: financial market, sustainable finance, sustainability risk

Introduction

The normativization of policies for making sustainable finance (SF) and ESG (environmental, social and governance) goals a reality in the European Union (EU) financial market has been a priority of legislative and regulatory activity for several years. One expression of this activity is Regulation 2019/2088 (Regulation on Sustainability-Related Disclosures in the Financial Services Sector 2019). Recital 5 of this regulation indicates the need to harmonize sustainability information relevant to

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investors, and to participants in the financial market more broadly, in the investment decision-making process, as well as the impact on promoting environmental or social characteristics. The impact of this information on the entire EU financial market is significant and is becoming a challenge for steering regulatory trends in the financial market.

The question of the materialization of sustainable finance policies in the financial market which is addressed in this paper will be analysed from the perspective of financial institutions and national and EU supervisory authorities. In essence, the following questions will be answered: firstly, how to ensure (with what methods and legal instruments) the materialization of the concept of SF and ESG policy in the financial products and services constructed by financial institutions (FI); secondly, what the new goals, tasks and duties of FI associated with this idea and policy are, as well as the legal implications for customers; and thirdly, how to reduce the risk of actions that thwart or hinder the materialization of the concept of SF and ESG policy in the financial market. Additionally, we can also derive an answer to the questions of whether it is the capital or the banking segment that is to have a leading role within the financial market in providing SF and influence other market participants with respect to environmentally sustainable investments. Another issue analysed in the study is the question of the feasibility of and need for stronger normative integration of ESG policies and instruments in order to minimize the risks associated with the implementation of SF concepts in FI activities in the financial market.

This study asserts that a new pattern is emerging of financial institutions operating in accordance with SF and ESG policies and taking special care to supplement them with instruments to counter these risks in financial activities, so-called sustainability risk (SR).

1. Sustainability, sustainable finance and sustainability risk in the financial market as doctrinal and normative concepts

The normativization of the policy of materializing SF and ESG goals in the EU financial market, as indicated in the introduction, follows the development of a new pattern of values on the basis of which the modern economy functions. The search for a basis on which economic development could optimally take place has generated a need to define what sustainable development is and to set the course of legislative changes for SF.

Sustainable development is, on the one hand, economic development in which, public, private and commercial entities, individually and collectively, reduce social and environmental cost risks by taking into account environmental, social and

governance (ESG)[1] factors in investment and management decisions. On the other hand, it is a process of transition to a type of economy whose core is concern for the well-being of present and future generations, and the ability to meet the needs of not only the present but also future generations. The new development paradigm, combining ethical and economic elements and respect for environmental resources, has been a priority of the legislative and regulatory activities of EU Member States for several years, and the concepts of environmental, social and corporate governance risks have become normative.[2]

This is driving change in the financial sector, where increasing pressure to integrate ESG goals into specific processes and strategies is becoming apparent, both due to changes in the legal environment and the treatment of sustainability as an institutional commitment by sector participants (United Nations Environment Programme, 2011). It has also given impetus to the emergence of the notion of sustainable finance. The term is associated with two aspects: directing finance towards growth that promotes well-being and meeting society's needs in the long term, beyond generations, but also strengthening financial stability by incorporating ESG policy into investment decisions (European Commission, 2018). The term 'sustainable finance', a concept referring to the investment decision-making process in the field of private and public finance, should be associated with the consideration of environmental, social and governance characteristics in order to increase investment in sustainable development projects (European Commission, 2018). It should be emphasized that this covers a broad spectrum of factors in these areas and should apply to environmental issues as much as to respect for human rights,[3] including labour rights, anti-money laundering procedures, corruption and tax transparency measures (European Parliament, resolution of 29 May 2018).

The introduction of the requirement to integrate sustainability characteristics into the activities of financial-market participants must raise the question of the risk posed to customers, the market and the institutions themselves, which can be collectively referred to as sustainability risk. Sustainability risk, according to the wording of Regulation 2019/2088, means 'an environmental, social or governance event or condition that, if it occurs, could have a material adverse effect on the value of an investment, as defined in sector-specific legislation, in particular Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/65/EU, (EU) 2016/97 and (EU) 2016/2341, or in delegated acts and regulatory technical standards adopted thereunder' (Recital 14 of Regulation 2019/2088).

1 On the history of the meaning of the term ESG, see for example Pollman (2022).
2 See Regulation (EU) 2019/2033 of 2019; Directive (EU) 2019/2034 of 2019; and Directive (EU) 2022/2464 of 2022.
3 On linking human rights with financial-market regulation, see Nieborak (2021).

Analysis of existing regulations permits us to categorize SR by assigning particular risks to areas that constitute the three pillars of ESG goals. Thus, a distinction can be made between environmental, social and corporate governance risks. Their identification at the normative level must be done from different perspectives and objectives: the customer and the financial market and its professional participants (credit institutions, insurers, investment companies). Nevertheless, all risks associated with the integration of ESG policy into particular processes and strategies in the financial market are an element of consumer protection and financial stability, which justifies the need for the European Supervisory Authorities (ESAs) to expand their supervisory powers and responsibilities accordingly (European Parliament, resolution of 29 May 2018). At the same time, a new sustainable finance strategy is currently being implemented in the EU, with an emphasis on actions in the areas of transformation finance and financial system resilience, and banks and insurers are expected to identify and manage SR (European Commission, 2021).

Sustainability risks within the area of environmental risk which have been identified by EU legislation and documents by ESAs include emissions and other environmental risks, including climate risk,[4] climate change-related risk (European Securities and Markets Authority, 2023) and risks related to green and sustainable assets (European Parliament, resolution of 29 May 2018), and in the social arena include the risk of incidents of child labour, the risk of forced labour and the risk of corruption within the sphere of corporate governance (European Commission, 2022).

Taking an even broader perspective on the risks present in the financial market in terms of scope, we can add to those mentioned above the risks associated with the introduction of sustainable financial products. These risks include greenwashing, making misleading sustainability claims, and those associated with making green claims in any public disclosure. Undoubtedly, these are risks that will intensify with emerging regulatory requirements.

2. New tasks and duties for financial institutions concerning the implementation of sustainable finance from the EU and national perspectives

As with the other risks involved in activities undertaken by financial institutions, countering risks in the area of SF requires, first of all, proper identification of the sources of those risks; the introduction of internal mechanisms to support processes

4 According to ECB information from 2022: ‘most banks do not include climate risk in their credit risk models, and just 20% consider climate risk as a variable when granting loans. Banks currently fall short of best practices, according to which they should establish climate stress-testing capabilities that include several climate risk transmission channels (e.g. market and credit risks) and portfolios (e.g. corporate and mortgage)’ (European Central Bank, 2022).

that eliminate risks; the use of standardized models for measuring risks; supervision of FIs' activities as regards meeting requirements related to countering a given type of risk, in this case in the area of SF; and efficient management of this type of risk when it arises, its monitoring in various relevant time horizons and determining the consequences resulting from excessive SR in the activities of FIs. This raises questions about the means of mitigating these risks and the use of binding or soft law instruments, or even self-regulatory policies, as well as new sets of information and (non-financial) disclosure obligations through which a sound ESG policy is to be implemented in the financial market.[5]

Expanding the control and supervisory model to encompass SF activities means, first of all, that institutions operating in the financial market should be equipped with internal mechanisms that allow them to assess the SR of particular financial products or services aimed at specific customers or groups of customers. There are also questions about how to supervise the proper implementation of ESG policies in the financial market, at both EU and national level.

The legal obligation for banks, listed companies and insurance companies to disclose their policies on environmental, social, labour, human rights, and anti-corruption and anti-bribery issues (non-financial information) as part of, for example, their management reporting, derives from Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Companies and Groups. This Directive 2014/95/EU deals with the provision of information on a company's own activities, while Regulation 2019/2088 covers reporting on its own financial products and services but which is based on information on third-party activities that these products or services finance.

New tasks and duties for FIs with respect to SF and ESG policy are set forth, inter alia, in Regulation 2019/2088, and are primarily related to the requirement to disclose certain information on the ways in which market participants and financial advisors incorporate sustainability risks into their activities and take into account adverse sustainability impacts. These duties are to be carried out in order to achieve the goal of a level playing field and to compare financial products across Member States with respect to related environmental, social and governance risks, as well as to sustainable investment objectives. Indeed, the idea is to reduce the information asymmetry in the relationship between principal and contractor with regard to the introduction of SR into activities, the consideration of adverse sustainability effects, the promotion of environmental or social characteristics, and sustainable investments, by requiring financial market participants and financial advisors to disclose relevant information to end-investors before entering into a contract, and then on an ongoing basis when acting as contractors to those end-investors (principals). Thus the main obligation

5 On the challenges of incorporating climate risk into financial risk management, see Hertel (2021).

addressed in Regulation 2019/2088 for FIs and financial advisors is the inclusion of any SR that could have a negative material impact on investment returns or advice in due diligence (Article 4). The regulation requires financial market participants and financial advisors to specify in their strategies how they incorporate these risks into their business, and to publish these strategies (Article 3). Assessments of SR and the information made available are to be disclosed prior to contracting (Articles 8 and 9).

In particular, a requirement has been introduced that in the absence of the existence of SR in relation to a given financial product, the rationale for such a statement should be given; when the existence of such risks is established, qualitative and quantitative information on their impact on the outcome of a given financial product should be included in the obligation to disclose; and that the overall sustainability-related effects of financial products should be regularly reported. ESG policy and SR in the financial market therefore impose new tasks and duties on FIs at the national level. The question that arises is how to normatively express ESG policy and mitigate SR in the regulations that already exist in markets such as banking. While it is clear that the new disclosure and information obligations regulated in directly effective and applicable EU regulations do not require implementation in national law, their full implementation should be considered within internal systems at FIs or should lead, for example, to the creation of control units dedicated to this specific risk within those institutions. Indeed, the new tasks and responsibilities of FIs are certainly manifested in the expansion of their management and internal control systems to encompass SR and ESG policies. While it is worth noting that Regulation 2019/2088 mainly applies to the capital sector,[6] the SR analysed are, after all, also found in other market segments and may be the subject of the internal documents, strategies or internal control systems of, for example, banks (as referred to, for example, in Article 9–9f of the Act of 29 August 1997 on Banking Law). FIs are obliged to report information covered by disclosure requirements, and this may imply the need to expand analytical structures in institutions by adding specializations in SR and ESG risks. And while Regulation 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment (on the taxonomy), together with the Regulatory Technical Standards (RTS), introduces uniform EU-wide prompts for the criteria for assessing the environmental sustaina-

6 The regulation applies to financial market participants offering financial products as defined in the Sustainble Finance Disclosure Regulation and financial advisors providing insurance or investment advice. The regulation thus applies to investment products and advisory and portfolio management services, and regulates the information obligations of financial market entities. The addressees of this information are the clients of these entities – in particular, those who are purchasers of their investment products and services. Disclosure obligations are carried out through websites, as part of pre-contractual information provided to the client under the relevant sector regulations, and as part of the information disclosed in periodic reports under relevant sector regulations.

bility of a given economic activity (as the taxonomy relates – for now – to environmental issues), the internal assessment of institutions based on these criteria should be done in a structured and organized manner within FIs.

After all, it is also possible to incorporate SR issues into a bank's risk management unit to enable the independent identification, assessment, control, risk monitoring and reporting of this type of risk, as an implementation of Article 9–9f of the Act of 29 August 1997 on Banking Law and the Recommendation 20 Z of the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego), as well as in the Regulation of the Minister of Finance, Funds and Regional Policy of 8 June 2021 on risk management systems, internal control systems and remuneration policy in banks, issued on the basis of Article 9f of the Act of 29 August 1997 on Banking Law. This regulation offers the possibility of incorporating SR, in principle without making amendments to it, but only by substantively incorporating SR into the risk management system. According to § 7 of the Regulation, firstly, within the framework of the risk management system, the bank manages risk by identifying, measuring or assessing, monitoring, controlling and reporting on risk, including risk mitigation, together with assessing the effectiveness of risk mitigation measures taken, and secondly, the bank's risk management is carried out on the basis of relevant analyses independently of the operation of the bank's risk management system, based on strategies, policies, procedures and plans. Sustainability risk could find its way into these strategies, policies and plans – being implemented and taking place partly also within the framework of bank self-regulation.

Thus, another area, and one new to FIs, is the necessity of including these risks in the bank's management strategies and risk management strategies, or other policies ordered by the bank's board of directors, which would constitute the implementation of Recommendation 21 of the FSC with regard to SR. Besides, § 18 of the 2021 regulation by the Minister of Finance indicates that in implementing a risk management strategy, a bank shall introduce and update risk management policies and procedures, specifying in particular the risks that are particularly important in the bank's operations. The use of the open catalogue formula provides another opportunity for incorporating SR analysis into the area of broader risk management.

For a stronger integration of ESG policy into banks' activities, it should be noted that FSC Recommendation 29 Z also allows for the possibility of minimizing SR in the banking market and taking ESG policy into account when creating a policy for the approval of new products. In addition, § 21 of the Minister of Finance 2021 Regulation indicates that before introducing a new product, the bank must conduct a preparatory process, including in particular an analysis of the product's compliance with the bank's management strategy and risk management strategy, and the identification and assessment of significant risks associated with the product within the framework of the risk management system. Expanding the SR in question requires expansion of the bank's information policy covering disclosures. Another option seems to be for fi-

nancial institutions to conduct internal verification of ESG compliance before releasing a new financial product or service to the market.

It remains an open question how to 'hold financial institutions accountable' for their duty to implement ESG policies. On the one hand, we may see the possibilities for supervision related to the control of the implementation of disclosure and informational duties, but we may also wonder in the future about the consequences of a lack of, or defective implementation of, ESG information obligations for the benefit of a potential client, for example, prior to the conclusion of a contract. How, in practice, can tests and assessments of the environmental impact of a given product or service be conducted, when this type of activity is not encompassed in the core competencies of financial institutions? What legal effect would a defectively conducted test have? Legal issues also arise regarding protection of a misinformed customer and protection against the practice of seeking an unfair competitive advantage.

These questions and issues make clear that the financial market is only in the early stages of shaping and clarifying ESG policies, from the point of view of FIs, supervisors and legislators alike. It is undeniable, however, that the implementation of informational and disclosure obligations regarding ESG policy must take advantage of FinTech and SupTech – the latest advances (algorithms) and tools for the acquisition and analysis of Big Data (Zhao & Farinas, 2023, p. 1).[7]

3. New tasks and duties for supervisory authorities in implementing the concept of sustainable finance from the EU and national perspectives

The new control and supervisory tasks should therefore particularly manifest themselves, firstly, in control competencies linked to ESG disclosure obligations and policies, and secondly, in the regulatory competencies of EU and national supervisors in the form of issued guidelines, the drafts of Binding Technical Standards (BTS) and RTS, and recommendations of national supervisors addressing sustainability in the financial services sector. At the national level, one way to mitigate the risks analysed may be the expansion of the supervisory and control model to include matters of FI compliance with ESG policies; including new ESG issues would be a refinement of the supervisory and control model. This can be done by incorporating ESG considerations into matters that will be examined by FIs in the normative framework from the perspective of their management and internal control systems in FIs, but it must also be underlined that the financial market regulators have little experience so far with sustainability-oriented financial regulations (Zetzsche & Sørensen, 2022, p. 71).

7 On integrating ESG policies through FinTech into the operations of financial institutions, see Arner et al. (2020).

As for the EU supervisor, on the other hand, its involvement in the implementation of ESG policy should be linked to regulatory activities, issuing guidelines, and draft BTS and RTS. This is also the case; in fact, the ESAs are developing these drafts for clarifying the content, methods and presentation of information related to sustainability indicators in relation to climate and other adverse environmental effects, to social and labour issues, and to respect for human rights and anti-corruption and anti-bribery measures, as well as for clarifying the presentation and content of information in relation to the promotion of the environmental or social characteristics and sustainable investment objectives that will need to be disclosed in pre-contractual documents, annual reports and on the websites of financial market participants.

The ESAs may issue guidelines on how environmental, social and governance risks are to be taken into account in investment decisions and risk assessments in specific segments of the financial market. The ESG guidelines, issued by the European Banking Authority, as well as other ESAs, in accordance with, for example, Article 133(1a) of the Act of 29 August 1997 on Banking Law, are to be taken into account in the supervisory and control process at the national level; this also provides another opportunity for dissemination through the inclusion of SF issues in the content of supervisory and control processes in the activities of FIs.

At the EU level, the question remains of whether the competences set out in Article 9(5) of the ESA Regulations could become another 'firewall' limiting this risk in the financial market. Such an approach would, of course, require amendments to the sectoral EU financial market legislation, in line with the dispositions of Article 1(2) of the ESA Regulations. The compilation of exemplary opportunities for supervisory influence on ESG policy and its embodiment in the activities of FIs reflects the stronger normative integration of ESG policy into EU financial market activities.

The answer to the question above about the possibility of the reception of ESG policies and their implementation in various sectors of the EU financial market is positive. This policy may become most representative in the capital sector of the financial market, but FIs in other sectors of the market also have the opportunity to strengthen this policy in their activities (Chiu et al., 2022, p. 1; Katelouzou & Micheler, 2022, p. 217) and develop a new risk policy culture.[8] As an aside, it can be added that ESG issues will be integrated into risk management and supervisory systems through amendments to the CRR/CRD IV regulations[9] and the Solvency II Directive[10]. In addition, it is proposed, with the participation of the European Systemic Risk Board, the European Cental Bank and the European Banking Authority in the

8 Consideration of SR should complement the concept of risk culture in banks and its relationship to the risk management component and risk appetite presented in the literature; see Wiedemann et al. (2020, p. 301).

9 Regulation (EU) No. 575/2013 of 2013; Directive 2013/36/EU of 2013.

10 Directive 2009/138/EC of 2009.

next review of the banking macroprudential framework, to consider the introduction of macroprudential tools to address risks to financial stability associated with climate change (European Commission, 2021).

Conclusion

Reflecting on the analyses conducted in the present paper, it can be pointed out, firstly, that the control and supervisory paradigm of FIs is subject to modification, evolving towards a model of them acting in accordance with SF principles. Secondly, the supervisory paradigm in the EU financial market has been enhanced with the inclusion of risks for sustainable development and sustainable finance risks. Thirdly, it seems necessary and urgent to prepare FIs and advisors in the financial market to evaluate products and services from the perspective of ESG and SR implementation, which is primarily related to the integration of ESG policies into the management systems of FIs. Fourthly, among the urgent challenges facing FIs and advisors is the implementation of disclosure and information obligations in such a way that, on the one hand, they are effectively communicated to clients in the financial market so that they can make informed investment decisions, and on the other hand, that future obligations imposed on service providers do not disproportionately burden them. It turns out that achieving the goal of SF is possible in many areas of the financial services sector, and this can be done through both binding and soft instruments.

Indeed, ESG policy in the financial market is addressed not only to FIs and advisors, but also to national and EU legislators. An example of this is the Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA Regulation), Recital 7 of which note the necessity for solutions employed by consensus mechanisms known as proofs of work to be more environmentally friendly; it is also proposed to impose the obligation on the European Securities and Market Authority and European Banking Authority to identify (preparing drafts of the regulatory technical standards) those consensus mechanisms that may pose a threat to the environment, taking into account adverse impacts on climate and other environment-related adverse impacts, and to outline key energy indicators (European Parliament, 2023). Therefore, the White Paper on proof-of-work cryptocurrencies should include an independent assessment of a cryptocurrency's likely energy consumption (Art. 6 of the MICA Regulation). This is all the more important given that Regulation 2019/2088 is expected to apply to one of the most revolutionary regulations in the financial market in recent times in the field of cryptocurrency assets – the MiCA Regulation – as well as to cryptocurrency service providers and issuers.

The policy is also addressed to financial market customers, giving them an instrument in the form of access to sustainable financing and the materialization of

ESG policy. However, the question arises of whether this normatively expressed policy should be addressed to supervisors to a greater extent.

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Independent Fiscal Institutions: Considerations in the Context of Current Challenges in Public Finance and Law

Abstract: This paper discusses the idea of the functioning of an independent fiscal institution (IFI) in Poland according to the EU's requirements. The first section provides an overall description of the institution. Section 2 provides theoretical insights into possible institutional models of IFIs which are established in the EU: the purpose is to discern what lessons can be learnt from IFI models in other EU countries. Section 3 discusses the legal basis of and standards in this area of public-sector control; section 4 addresses how that adoption would look in Poland. The objective of the article is to determine what the challenges in the Polish state fiscal policy are.
Keywords: budgetary institutions, fiscal councils, independent fiscal institutions, legislation, public finances, transparency

Introduction

Various scholars have indicated that it is necessary not only to develop appropriate budgetary procedures but also fiscal rules (Debrun et al., 2008, p. 305; Panfil, 2021, pp. 70–76) and an independent fiscal institution (IFI) (Gołębiowski, 2010, pp. 1–4) as a crucial part of state fiscal policy. One of the reasons to create an IFI in an EU Member State is the obligation to implement the EU budget framework.[1] Member States of the EU were obligated to bring the provisions necessary to comply with

1 According to Article 2 of Directive 2011/85/EU, the 'budgetary framework' should be understood as the set of arrangements, procedures, rules and institutions that underlie the conduct of budgetary policies of general government.

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the Council Directive 2011/85/EU of 8 November 2011 on Requirements for Budgetary Frameworks of the Member States into force by 31 December 2013 (Article 15(1) of Directive 2011/85/EU). According to the Directive, strong numerical fiscal rules should be based on reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States. The question is how Poland has coped with this challenge compared to other EU Member States.

1. The concept and definition of independent fiscal institutions (IFIs)

The European Commission (EC) published a package of legislative proposals to reform the EU's economic governance on 26 April 2023 (European Commission, 2023b). The central objective of these proposals was to strengthen public debt sustainability while promoting sustainable and inclusive growth in all Member States through reforms and investment; this was a continuation of actions taken in 2015. At that time, in response to the financial crisis of the early 21st century (which turned into a budget crisis), there was a search for legal solutions that would allow monitoring and assessment of poor budgetary management. Deficit bias and growing public sector debt have led the governments of some Member States to the necessity of establishing an IFI, usually in the form of independent parliamentary budget offices or fiscal councils (Postuła & Kawarska, 2022, p. 60). The activity of these entities is intended to supplement the regulation on fiscal rules in individual EU Member States.

Today, IFIs are considered among the most important innovations in the emerging architecture of public financial management (von Trapp et al., 2015, p. 9). They are also called 'fiscal watchdogs', as they serve to promote sound fiscal policy and sustainable public finances, have the potential to improve fiscal discipline, and promote better budget transparency and accountability. The concept of IFIs is also related to an increase in the quality of public debate on fiscal policy. Independent fiscal institutions are defined by the European Commission as 'non-partisan public bodies, other than the central bank, government or parliament, aimed at promoting sustainable public finances through various functions, including monitoring compliance with fiscal rules, production or endorsement of macroeconomic forecasts for the budget, and/or advising the government on fiscal policy matters. These institutions are primarily financed by public funds and are functionally independent vis-à-vis fiscal authorities' (European Commission, n.d. b). The International Monetary Fund (IMF) characterizes them as 'independent fiscal councils', which are non-partisan, technical bodies entrusted with a public-finance watchdog role (Beetsma & Debrun, 2018; Beetsma et al., 2018, p. 3; International Monetary Fund, 2013; Kopits, 2013). Their analyses and assessments of fiscal policy help clear the smokescreens (intentional or not) often surrounding the public debate about government budgets, including the

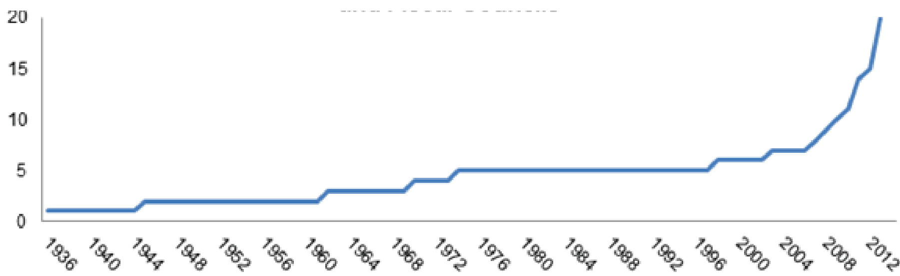
adequacy of the fiscal stance and the sustainability of public finances. In principle, better-informed voters can more easily reward good policies and sanction bad ones, leading to stronger outcomes on average (Beetsma et al., 2017; Beetsma et al., 2018, p. 3).

According to the Organisation for Economic Co-operation and Development (OECD), IFIs are independent public institutions with a mandate to critically assess, and in some cases provide non-partisan advice on, fiscal policy and performance; they serve to promote sound fiscal policy and sustainable public finances (von Trapp & Nico, 2017, p. 1). The OECD Principles (OECD, 2014, p. 5) regulate rules and good practices related to existing IFIs and the experiences of countries that have established or are considering establishing such institutions. According to this organization, IFIs are 'publicly funded, independent bodies under the statutory authority of the executive or the legislature which provide non-partisan oversight and analysis of, and in some cases advice on, fiscal policy and performance […] these institutions have a forward-looking *ex ante* diagnostic task' (von Trapp & Nico, 2017, p. 1).

IFIs should produce or endorse objective macroeconomic forecasts for budget preparation. They may independently monitor the execution of the state budget and adherence to fiscal rules and budgetary objectives, as well as assessing fiscal risks through long-term budget projections and pointing to long-term budget costs both to the public and to policymakers. Since these institutions should provide analysis, assessment and recommendations on matters of fiscal policy, studies on IFIs generally focus on international standards and independence (see Calmfors & Lewis, 2011; Debrun et al., 2009; Hagemann, 2011; Hemming & Joyce, 2013). The EC, IMF, OECD and World Bank recommend strong legal protection and operational independence for these institutions. Some scholars have indicated that IFIs should perform an increasingly wide range of tasks, constituting an important link in the process of 'early warning' but also in autonomous supervision of the implementation of state financial strategies (Gołębiowski & Marchewka-Bartkowiak, 2013, p. 2).

Both theory and practice recommend that an IFI can improve the quality of state fiscal policy. It can also help improve fiscal discipline and policy credibility and serve a useful signalling role conducive to more stable expectations and less uncertainty (Debrun et al., 2009, p. 75). Various forms of IFI have existed for decades in countries such as Belgium (since 1936), the Netherlands (1945), Denmark (1962), Austria (1970) and the United States (1974) (von Trapp & Nico, 2017, p. 1). The number of IFIs has increased in recent years (see Figure 1). Today, they are considered among the most important innovations in the emerging architecture of public financial management (OECD, 2014, p. 5).

Figure 1. Growth of independent parliamentary budget offices and fiscal councils.



Source: OECD (n.d.)

2. Institutional models of IFIs

The literature suggests that IFIs can function as either independent fiscal authorities (IFAs) or fiscal councils (FCs) (Debrun et al., 2009, p. 56). An IFA would receive a mandate to decide on specific aspects of fiscal policy within a policy framework previously defined through the political process; an FC could help reduce the deficit bias while leaving full discretion to political representatives (Debrun et al., 2009, p. 56).

The OECD also distinguishes two forms of IFIs: independent parliamentary budget offices and fiscal councils. According to the OECD, they vary significantly in terms of their governance provisions, the scope of their mandate and functions, leadership and staff arrangements, and budget. This proves the importance of local needs and the local institutional environment (including, in some cases, capacity constraints) in their design, even for those bodies that were set up to meet the same European requirements (von Trapp & Nico, 2017, p. 1). Core IFI functions, such as assessing or preparing macroeconomic and fiscal forecasts and monitoring and evaluating fiscal plans and outcomes, can help to address biases towards spending and deficits (von Trapp & Nico, 2017, p. 1).

The European Commission recognizes three groups of IFIs:

1. The first consists of a number of entities tasked with the production of macroeconomic and budgetary forecasts, which can help reduce bias in fiscal policy by eliminating politically motivated optimism. In some instances, the government is legally required either to incorporate the fiscal institution's macroeconomic projections or to justify not doing so, while in other countries the independent forecasts serve as a guideline;
2. The second group concerns entities mostly tasked with the assessment of fiscal rules as per the treaty on stability, coordination and governance in the

economic and monetary union and Regulation (EC) No. 473/2013. They are already established institutions, such as the National Audit Office of Finland or the Dutch Council of State;

3. The third group is composed of recently established, lightly staffed stand-alone bodies. Their mandate is often solely focused on fiscal issues, including periodic fiscal policy and rule assessment. An example of such an independent fiscal institution is the Slovak Council for Budget Responsibility (European Commission, 2014, pp. 54–68).

The idea of IFIs is that this institution should not directly determine fiscal instruments but may limit freedom and improve budgetary policy. The experience of some Member States shows that the institution performing the above-mentioned functions does not always have to be a specially appointed body (see Table 1). This role can also be performed by institutions such as parliamentary budget offices or state audit offices, as they have grown in number following the global financial crisis.

Table 1. Three variants of IFIs (fiscal policy councils) according to the form of organization.

Institutional models of IFIs		
stand-alone institution	institution under the executive or legislative branch	associated with other independent institution
– no organic link with policymakers beyond appointment procedures and accountability mechanisms; – often emanate from comprehensive fiscal-responsibility laws that include explicit guarantees of their independence. Examples: Germany, Hungary, Ireland, Portugal, Slovak Republic, Sweden	– a well-defined mandate and strict guarantees of independence to bodies that are an integral part of: a) the parliament (often known as a parliamentary budget office, e.g. Italy); b) a ministry (tending to extract their operational independence from the reputational benefits associated with their non-partisan role in the budget process and public debate). Examples: Belgium, Croatia, Denmark, Netherlands, Slovenia	– can be found in: a) a central bank (e.g. Austria); b) an audit institution (e.g. France); c) an independent statistical agency; – allows the IFI to immediately benefit from the independence of its host and from economies of scale, but requires clear procedures to avoid confusion regarding the respective mandates and functions of the host and the guest.

Source: based on Debrun et al. (2013, pp. 10 & 13).

3. Legal basis

Some of the most important regulations on EU fiscal governance are (i) the Council Directive 2011/85 on requirements for national budgetary frameworks, (ii) the Fiscal Compact, (iii) the ‘Two-Pack’ Regulation: Regulation (EU) No. 472/2013 of

the European Parliament and of the Council of 21 May 2013 on the Strengthening of Economic and Budgetary Surveillance of Member States in the Euro Area Experiencing or Threatened with Serious Difficulties with Respect to Their Financial Stability, and Regulation (EU) No. 473/2013 of the European Parliament and of the Council of 21 May 2013 on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area. These are the legal bases, which include detailed rules and formalize the tasks of national IFIs in order to foster budgetary discipline and to increase national ownership of EU fiscal rules.

Strong numerical fiscal rules should be based on reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States (Recital 16 of Directive 2011/85/EU). According to Article 3(1) of Directive 2011/85/EU, '[p]ublic accounting systems shall be subject to internal control and independent audits'. One of the vital matters in EU law is the effective and timely monitoring of compliance with rules, based on reliable and independent analysis carried out by independent bodies or similar bodies (Article 6(1)(b) of Directive 2011/85/EU). Member States were obligated to bring the provisions necessary to comply with Directive 2011/85/EU into force by 31 December 2013 (Article 15(1) of Directive 2011/85/EU) and should present the text of those provisions to the Commission.

Fiscal councils should not be confused with national audit offices, parliamentary budget and accounts committees and various other public review committees that meet periodically on fiscal matters (Hemming, 2013; see also von Trapp et al., 2015). Entities of this sort function alongside fiscal councils and participate in fiscal policy matters.

The global financial crisis has exposed weaknesses in economic and budgetary governance in the economic and monetary union. In light of this, the European Commission proposed two acts on 23 November 2011 aimed at strengthening the surveillance mechanisms in the euro area (European Commission, 2012). The EU Parliament and the Council have adopted directly binding regulations: Regulation (EU) No. 472/2013 and Regulation (EU) No. 473/2013. Additionally, the OECD Council adopted a recommendation on principles for IFIs on 13 February 2014, so their vital role has also been recognized in the OECD Recommendation on budgetary governance (2015).

Firstly, the European Commission proposed the creation of an advisory European Fiscal Board (EFB) in 2015 (European Commission, 2015). This new advisory entity coordinates and complements the national fiscal councils that have been set up in the context of the EU Directive on budgetary frameworks (European Commission, 2015, p. 14). It provides a public and independent assessment at European level of how budgets and their execution perform against the economic objectives and recommendations set out in the EU fiscal-governance framework (European Commis-

sion, 2015, p. 14). The EFB is also obligated to coordinate the network of national IFIs and has the same standard of independence, an important factor that should lead to better compliance with the common fiscal rules, more informed public discussion and stronger management of national fiscal policies. Secondly, the heads of European Union IFIs signed an agreement on the establishment of a network of EU IFIs (https://www.euifis.eu) on behalf of their national institutions. The IFI network was established at the EU level on 11 September 2015 (EU Independent Fiscal Institutions, 2015).

The European Court of Auditors proposed actions to improve the scope and effectiveness of national budgetary frameworks, particularly as regards medium-term budgetary frameworks and IFIs (Court of Auditors, 2019, p. 10). It is worth emphasizing that the European Commission published its proposals for fiscal reform under the economic governance review on 26 April 2023, pointing at a stronger role for IFIs (see European Commission, 2023a, Recitals 12, 13 & 14). The European Commission recommended that Article 8 of Directive 2011/85/EU should be replaced by the following: 'Member States shall ensure that independent fiscal institutions, such as structurally independent bodies or bodies endowed with functional autonomy as regards the budgetary authorities of the Member States, are established by national laws, regulations or binding administrative provisions' (see European Commission, 2023a, Article 8)

4. Is there an IFI in Poland?

There were several proposals to introduce a fiscal policy council in the context of Poland's entry into the euro area (Gołębiowski, 2010, pp. 1–4; Sławiński, 2008). One such proposal was an act in 2012 to establish an advisory institution (Sejm, n.d.); the matter has also been discussed in the literature.[2] Currently, individual types of activity falling within the scope of a fiscal institution are assigned to the Analysis Office of the Sejm (Biuro Analiz Sejmowych), the Social Dialogue Council (Rada Dialogu Społecznego), the Joint Commission of the Government and Local Government (Komisja Wspólna Rządu i Samorządu Terytorialnego) and the National Bank of Poland (Narodowy Bank Polski), as they perform advisory and consultative functions.

Powers similar to those of a fiscal council have been exercised by the Government Centre for Strategic Studies (Rządowe Centrum Studiów Strategicznych) and the Council for Social and Economic Strategies (Rada Strategii Społeczno-Gospodarczych) (Janecki, 2015; Postuła & Kowarska, 2022, p. 97). The Social Dialogue Council constitutes an institutional social dialogue consisting of three partners:

2 On whether an independent fiscal policy council should be set up in Poland, see, amongst others, Ciak & Głuchowski (2015, pp. 451 ff.); Gołębiowski & Marchewka-Bartkowiak (2013, pp. 1–5); and Krzak (2015).

employers, employees and government (see Pest, 2022, pp. 265–271). It cannot be considered an IFI because it does not have the required features, especially independence from government and technical and analytical support, as Article 6 of Directive 2011/85/EU requires an IFI to be functionally independent from the fiscal authorities of the Member State.

The Council of the European Union recommended the introduction of a fiscal council and its tasks in Poland in 2014. According to the Council, the fiscal framework would benefit from the introduction of a fully fledged independent fiscal council, responsible for *ex ante* checks of compliance with fiscal rules, an assessment of macroeconomic and budgetary forecasts and an analysis of the long-term sustainability of public finances, as well as an *ex post* assessment of compliance with fiscal rules (Point 9 of the Council Recommendation of 2014). The OECD also gave a recommendation that one of the tasks (in macroeconomic policy) for Poland is creating an independent institution to conduct *ex ante* assessment of the government's fiscal plans and long-term fiscal-sustainability analyses (OECD, 2020, p. 57).

Considering the need for an analytical background, an IFI could be established alongside the National Bank of Poland, the Parliament or the Supreme Audit Office. On the other hand, a good legal solution seems to be the establishment of an institution composed of representatives of the above-mentioned bodies, as it could be a new independent institution. A newly established fiscal council would have the most weaknesses, especially regarding those of an organizational and legal nature. It also implies high costs from the state budget because of the need to create an independent research and technical base from scratch.

The Monetary Policy Council of the National Bank of Poland meets this condition, as it is not a part of the budgetary authorities and is constitutionally independent; however, according to the definition used by the European Commission, a fiscal institution should be independent not only from the legislative and executive authorities but also from the central bank (see Delivorias, 2020, p. 3; European Commission, n.d. b). The existing differences between monetary and fiscal policy mean that the position of the IFI must be different from that of a central bank (Krzak, 2015, p. 94; Wren-Lewis, 2011).

The Supreme Audit Office (Najwyższa Izba Kontroli) plays a significant role in the control of the public finances (see Ruśkowski, 2020). In reference to local-government budgets, the undisputed position is occupied by the regional chambers of audit (*regionalne izby obrachukowe*) (see Zawadzka-Pąk, 2014, pp. 109–125). It is worth pointing out that the Scope Index of Fiscal Institutions (SIFI), introduced by the Directorate-General for Economic and Financial Affairs (the Commission department responsible for EU policies promoting, inter alia, economic growth, stable public finances and financial stability), is used to measure IFIs. The SIFI is calculated only for 'core IFIs', based on information reported by these institutions themselves. Six separate groupings of tasks constitute the SIFI score: monitoring of compliance with fiscal

rules; macroeconomic forecasting; budgetary forecasting and policy costing; sustainability assessment; promotion of fiscal transparency; and normative recommendations on fiscal policy (European Commission, n.d. a).

The Polish Supreme Audit Office is included in the calculation of the SIFI (see Table 2), but the EU authorities indicate that this cannot be considered a final solution, although attaching the IFI to the control authority works in Finland (OECD, 2021, p. 42). Combining the control function of the state budget execution with the advisory and analytical function is not a good solution;[3] however, the International Organisation of Supreme Audit Institutions aims to promote independent and effective auditing by supreme audit institutions (ISSAI, 2019, p. 4).

Table 2. Independent fiscal institutions according to the EC in 2020.

EU Member State	Name of institution	Tasks						SIFI by institution 2020
		monitoring compliance with fiscal rules	macroeconomic forecasting	budgetary forecasting and policy costing	analysis of long-term sustainability of public finances	promotion of fiscal transparency	normative recommendations on fiscal policy	
Austria	Austrian Fiscal Advisory Council	●	▲	●	●	●	●	63.57
	Austrian Institute of Economic Research	-	●	-	●	-	○	32.50
Bulgaria	Fiscal Council	●	●	●	-	○	○	55.18
Belgium	High Council of Finance (Public-Sector Borrowing Requirement Department)	●	-	-	●	-	●	40.00
	Federal Planning Bureau	-	●	●	●	-	-	30.00
Cyprus	Fiscal Council	●	●	●	-	▲	▲	66.79
Czech Republic	Czech Fiscal Council	●	●	●	●	○	●	51.25
Germany	Independent Advisory Board to the Stability Council	●	●	●	-	○	●	51.96
Denmark	Danish Economic Council	●	●	●	●	○	▲	46.25
Estonia	Estonian Fiscal Council	●	●	●	-	-	-	51.43

3 As a side note, it can be pointed out that in autumn 2022, an opinion on the planned budget for 2023 was issued by the Supreme Audit Office for the first time.

Greece	Hellenic Fiscal Council	●	●	▲	-	-	-	48.57
Spain	Independent Authority for Fiscal Responsibility	◘	●	●	●	●	●	68.93
Finland	National Audit Office (Fiscal Policy Evaluation Function)	●	●	●	-	▲	▲	37.50
France	High Council of Public Finances	●	●	●	-	-	-	46.43
Croatia	Commission on Fiscal Policy	●	●	-	-	-	○	42.50
Hungary	Fiscal Council of Hungary	●	●	●	-	-	-	51.43
Ireland	Irish Fiscal Advisory Council	●	●	●	▲	▲	●	68.21
Italy	Parliamentary Budget Office	●	●	●	●	●	-	74.29
Lithuania	National Audit Office (Budget Policy Monitoring Department)	●	●	▲	○	▲	-	55.71
Luxembourg	National Council of Public Finance	●	-	●	▲	○	▲	46.96
	National Institute of Statistics and Economic Studies of the Grand Duchy of Luxembourg	-	●	▲	-	-	-	20.00
Latvia	Fiscal Discipline Council	●	●	-	▲	▲	-	52.50
Malta	Malta Fiscal Council	●	●	●	-	●	●	72.14
Netherlands	Netherlands Bureau for Economic Policy Analysis	-	●	●	▲	-	-	39.29
	Council of State (Advisory Division)	●	-	-	-	○	▲	31.25
Poland	Supreme Audit Office	▲	-	-	-	-	●	17.50
Portugal	Public Finance Council	●	●	●	●	●	-	66.43
Romania	Fiscal Council	●	●	●	-	●	●	69.29
Sweden	Swedish Fiscal Policy Council	●	▲	▲	●	●	▲	42.86
Slovenia	Institute of Macroeconomic Analysis and Development	-	●	-	-	-	-	20.00
	Fiscal Council	●	●	●	-	○	○	55.18
Slovakia	Council for Budget Responsibility	◘	-	▲	●	●	-	44.64

Symbols:

a) ● – tasks stipulated in legal remit

b) ▲ – own-initiative tasks – proven and regular output

c) ◘ – solution between a and b

d) ○ – own-initiative tasks – sporadic output

Source: own research based on Fiscal Institutions database (European Commission, 2017), accessed 02.01.2024.

Conclusion

Steps have been taken to improve the Polish fiscal framework in the recent past. Poland is the only EU Member State that has not introduced regulations that would allow a separate IFI to act. In accordance with the arrangements suggested in this paper, such an IFI should be understood as a publicly funded, independent institution, other than the central bank, government or parliament, that provides non-partisan oversight and analysis of fiscal policy.

One of the basic and urgent challenges in the area of financial management in Poland is the appointment of such a body. As a Member State of the European Union, Poland is obliged to implement the new budget framework, and within it, to create an IFI which will forecast and monitor public revenues and spending. It could effectively complement other budgetary institutions, increase the effectiveness of numerical fiscal rules, support fiscal discipline and influence budget performance by informing the public about the fiscal policy pursued. It should ensure the greatest possible transparency and avoid the politicization of the management of public funds and prudence in spending those funds, in particular considering the long-term perspective.

National IFIs, as fiscal watchdogs, play a significant role in EU fiscal governance. They contribute to increasing public interest in the redistribution of budgetary resources. There is no 'one size fits all' model for IFIs; the concept of an IFI as an institutionalized forum for the cooperation of several subjects with an expert background seems the best solution for Poland, since an IFI will not function properly and effectively without a broad and reliable analytical background.

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Tax Instalment Plans: A Legal Instrument of Financial Sustainability in a Crisis

Abstract: The Covid-19 pandemic as well as the war in Ukraine represent the biggest hit to the Czech economy since the Great Recession. In the Czech Republic, several tax measures are being used to help economic entities overcome the current crisis and keep their businesses running. One of them is the tax instalment plan. This article aims to identify why the tax instalment plan could be an appropriate fiscal measure in times of economic crisis. The author presents a classical legal instrument in the tax area – the tax instalment plan – and analyses it from an innovative point of view rather than the usual perspective, that is, from the macroeconomic point of view. The article analyses the legal conditions for the use of this instrument in the Czech Republic, points out the difficulties of interpretation in practice and evaluates it in the context of the theoretical background of desirable fiscal crisis measures. The conclusions of the research confirm the hypothesis that this legal instrument is an effective and used tool for facilitating the sustainability of private and public finances in times of crisis. It combines the desirable aspects of both automatic stabilisers and discretionary measures.
Keywords: discretionary interventions, economic crisis, fiscal instruments, instalment plans

Introduction

The Covid-19 pandemic as well as the war in Ukraine are a significant burden on the economies of European countries. States and all economic actors are coping with high inflation, rising prices for essential commodities and a generally uncertain economic outlook. The Czech economy is no exception. Significant fiscal injections during the pandemic and steadily rising expenditure have meant that the sustainability of the state budget, which has faced unprecedented deficits in recent years, is be-

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ginning to be threatened. Although one of the main tasks of the authorities after the pandemic was to balance budgets and ensure the servicing of the accumulated debt (Tyniewicki & Kozieł, 2021, p. 69), this has not been successful in the Czech Republic.[1]

Thinking about financial sustainability is more important now than ever. Since taxes make up most of the revenue of public budgets, tax collection is a key item on which the state must focus. However, all taxpayers are facing the impact of the economic crisis, and the payment of tax obligations is becoming increasingly difficult for many of them in the context of rising costs. Czech politicians are therefore more and more frequently using expansionary fiscal measures in times of crisis through newly implemented tax-relief measures such as tax-rate reductions or tax waivers or abolitions. They aim to relieve taxpayers and stimulate the economy. However, each additional step represents a significant hit to public budgets. Should these measures, especially now, not follow the principle of financial sustainability? The estimate of the most costly tax change adopted during the Covid-19 pandemic is at least CZK 88 billion (Czech Fiscal Council, 2020), with some studies putting it as high as CZK 116 billion (Kalíšková & Šoltés, 2022, p. 4).[2] Furthermore, it is precisely these discretionary tax interventions in times of crisis that can be easily abused for populist interventions that are not related to the specific crisis and the elimination of its negative effects (Radvan & Svobodová, 2021, p. 79). The fall in public revenue then seems even less justifiable. Moreover, the implementation of new tax relief in times of recession has yet another pitfall: the necessity of its abolition in times of economic growth, which is very difficult politically. For this reason, economists are inclined to the option that in a crisis, the main fiscal measures that should be used are those that can be implemented based on existing mechanisms (Furman, 2020, p. 195).

This condition is fulfilled by the tax instalment plan, which is a traditional part of Czech tax legislation. This article aims to demonstrate that in an economic crisis, even 'old' instruments can serve as relief measures, and there is no need to constantly introduce new ones. Therefore, I will present a classical legal instrument in the tax area, the tax instalment plan, and will analyse it from an innovative point of view rather than the usual perspective, that is, from the macroeconomic perspective. I start from the hypothesis that the tax instalment plan is an effective and used instrument which pursues the vision of the sustainability of private and public finances and is a suitable instrument to deal with the impact of the economic crisis on taxpayers.

1 The state budget ended up with a deficit of CZK 367.4 billion at the end of 2020, a deficit of CZK 419.7 billion in 2021 and a deficit of CZK 360.4 billion in 2022 (Supreme Audit Office of the Czech Rrepublic 2023).

2 The change was the abolishment of the super-gross wage, which was a special construct of the tax base; employees had to calculate their tax from the so-called super-gross wage, which is gross wage increased by social security premiums paid by the employer (Radvan, 2018, p. 23).

The basic research question is therefore defined as: Does the tax instalment plan represent an economically desirable fiscal instrument that follows the vision of financial sustainability?

To fulfil this aim, I analyse the legal regulation of the tax instalment plan in the Czech Republic, both in substantive and in procedural law. The analysis of the legislation will be used to identify the economically desirable aspects that arise from the instalment process. Subsequently, I will evaluate these findings concerning appropriate fiscal crisis measures in the context of economic premises. To test the flexibility of this instrument in times of crisis, I will focus on the ongoing economic crisis caused by the Covid-19 pandemic. The real use of this instrument in times of crisis will be determined from data concerning applications submitted to the tax office in Brno. The data are obtained from my own source, the Tax Office for the South Moravian Region, Territorial Branch for Brno I.

1. Legislative framework

1.1. The effects of a tax instalment plan: Is it beneficial for the state and for taxpayers?

The tax instalment plan has a permanent place in Czech tax law. The previous tax administration regulations already contained this instrument, and the current ones (the Tax Code 2011) are based on the same foundations. It is therefore a traditional tool available to taxpayers that allows them to defer tax payments legitimately. Many countries have a similar instrument.[3] Its purpose is to relieve the taxpayer of his/her tax obligations by providing an extended payment period or by spreading the tax payment into instalments.[4] It is a benefit from the state, which, if the legal conditions are met, is intended to enable the taxpayer to overcome an exceptional situation that suddenly prevents him/her from paying his/her tax obligations. The essence is that the possibility of instalments relieves the taxpayer in the short term. Still, there is no outflow of public budget revenue over time because the tax payment will take place only later.

The temporary inability of the state to handle funds that should have been paid but were not is normally compensated by interest on late payments. Interest is not incurred in the case of the tax instalment plan. However, even this option is not completely ‘free’ for taxpayers. Taxpayers are obliged to pay interest on the amount repaid, which is half of the standard default interest. This solution to arrears is fiscally motivating for taxpayers; it is also a fair economic compensation for public revenue.

3 For example, in Slovakia a similar instrument is regulated in the Tax Administration Act 2009, or in Poland the conditions for repayment are set out in the Tax Ordinance Act 1997.

4 For simplicity, these two options will be collectively termed the ‘tax instalment plan’ in this article.

Another advantageous legal consequence of an instalment plan is the impossibility of execution for those tax obligations for which an instalment plan has been granted. Despite this, taxpayers often believe that by simply filing an application, they can avoid execution. However, this is not how the legal framework is constructed; execution is only prohibited in a situation where a tax instalment plan is allowed.

In most cases, the tax instalment plan is initiated based on a dispositive act by the taxpayer, in other words, an application. It should be added that the tax administrator is entitled to initiate proceedings and authorise an instalment plan *ex officio*, but such cases are rare in practice. The tax administrator decides whether a tax instalment plan is allowed or not and must duly justify his/her decision. This decision can be appealed, which is a change from the previous legislation. Following the principle of speed, the tax administrator will process the application within 30 days. It should be added, however, that failure to comply with this time limit does not affect the lawfulness of the decision. Similarly, failure to comply with this time limit does not give rise to a legal fiction that the application has been granted (Judgment of the Supreme Administrative Court of the Czech Republic 2021).

If a tax instalment plan is allowed, the decision determines the period for which payment of the tax is deferred. The maximum period is six years, as this corresponds to the period for payment of the tax, which may not be exceeded. The tax authority shall determine whether the tax is to be paid in instalments or whether the payment of the entire tax is to be deferred. Although the principle of disposition governs the procedure and is primarily based on the application of the taxpayer, the tax administrator is entitled to modify the proposed instalment plan so that the amounts of the instalments corresponds to the circumstances of the case. In particular, the tax administrator is obliged to take into account the time limit for payment of the tax and the fiscal interests of the state (Judgment of the Supreme Administrative Court of the Czech Republic 2011).

If conditions of payment are breached, the decision about the tax instalment plan ceases to have effect, with *ex nunc* effects. This is a very favourable change for taxpayers, given the interest at half the usual rate, compared to the previous legislation, which was set with *ex tunc* effects (Kobík & Kohoutková, 2013, p. 667). However, the current setting can be considered as more of a logical consequence that naturally results from non-compliance with the conditions related to the granting of the advantage rather than a negative consequence of an a priori punitive nature. The law does not link any other consequences to non-compliance with the tax instalment plan. The taxpayer may reapply at any time, even with the same arrears. The motivation to comply with the tax instalment plan can thereby be considered as considerably degraded. In addition, it places an unnecessary burden on the tax administrator, who has to issue an arguably difficult decision, despite the taxpayer abusing the benefits of the law. In Slovakia, for example, from 2020, failure to comply with the instalment plan or deferment of payment means that taxpayers will not be able to make use of this in-

strument for the following two years, starting from the date on which the tax should have been paid based on the last decision, not from the date of the violation of the conditions (Act on Tax Administration 2009). Although this concept is strict, it fully reflects the exceptional nature of the measure and forces taxpayers to comply with the conditions. At the same time, it ensures that taxpayers use the application only when they are sure that they will be able to make the payments.

Instalments or deferred payments do not affect the tax due; it remains unchanged. However, it is also possible to allow an instalment plan retroactively from the due date, an option that is highly advantageous for taxpayers considering a interest at half the usual rate. Since the legislation is silent on the limits of this option, it is necessary to rely on case law, which states that the tax administrator will only allow tax instalment plans on the grounds of exceptional circumstances. These are situations where justifiable and defensible reasons for the default exist before the application for a tax instalment plan (Judgment of the Supreme Administrative Court of the Czech Republic 2017). This possibility must be considered in the context of its fiscal impact – a reduction in public revenue – since, in effect, half of the interest on late payments will be waived retroactively. This concept was included in the law because the new procedural rules of tax administration did not allow for an interest waiver. But since 2015 the interest waiver has been a standard legal measure available to taxpayers, and therefore the retroactive authorisation of a tax instalment plan seems redundant. It could even be argued that this alternative to a waiver is not transparent, since a proper waiver is subject to certain conditions that are not reflected in the administrative consideration of the tax instalment plan.[5]

1.2. The accessibility of the tax instalment plan

The possibility of applying for a tax instalment plan is available to all taxpayers without any time or other limitation (for example on the number of applications). Universal accessibility is one of the aspects for which this tax measure is only a general instrument and not a state aid. The European Commission (1998) has stated in general terms on tax relief that tax measures available to all economic entities operating in a Member State are, in principle, general measures. They must be effectively available to all taxpayers based on equal treatment, and their scope must be unrestricted by, for example, the discretionary power of the state to grant them or other factors limiting their practical effect. It is therefore necessary that a level playing field be ensured, not only in the ability to request this relief but also in the ability to obtain it. Nevertheless, this does not mean that all discretionary practices of the tax authorities are prohibited. Although the European Court of Justice acknowledges that discretionary practices may mean that the individual application of a general measure

5 One of the legal conditions is that the waiver of accessories is possible only if the taxpayer has not breached tax administration obligations in the last three years.

takes on the characteristics of a selective measure, it adds that the presumption of state aid is not based solely on the interpretation of the general rules. If, in that interpretation, the tax administration respects the law, administrative practice and the relevant case law, instalments are a perfectly acceptable form of relief for taxpayers, since it is the implementation of a non-specific, non-selective, objective, transparent and general measure.

Only those tax obligations that are due and unpaid may be subject to an instalment plan (Judgment of the Supreme Administrative Court of the Czech Republic 2013). A tax instalment plan is not limited to 'taxes' in the narrow sense of the word but is generally possible for taxes in the broader sense, including advances or accessories to taxes, which include penalties or fines in particular. Such a broad interpretation is not chosen in administrative practice about the type of taxes that may be subject to an instalment plan. It is impossible to pay personal income tax on employees or tax deducted at source in instalments. It is not possible to pay personal income tax paid by the employer on behalf of the employee or withholding tax in instalments. The Constitutional Court stated that withholding tax cannot, by its nature, be subject to an instalment plan (Judgment of the Constitutional Court of the Czech Republic 2012).

The only direct limitation on instalment plans is the duty to pay an administration fee. Without payment of the fee, the application will not be processed and the application procedure will be terminated. The fee is CZK 400 (less than EUR 20) for each application relating to each tax. It means that even if the application is made in one submission, giving the same reasons but with a request for the repayment of different taxes, it will be charged more than once. However, the amount of the administrative fee is fixed, whether the subject of the application is tax obligations amounting to millions or tens of thousands. The tax administrator must treat all taxpayers equally and independently of the amount of their tax obligations.[6] It is clear, however, that the tax instalment plan for higher tax obligations imposes higher demands on the tax administrator's administrative discretion and, at the same time, higher responsibility regarding potential negative fiscal consequences. The assessment of an application for a higher tax obligation is, therefore, more expensive, without this being reflected in the amount of the fee. The low fee brings an additional problem – overuse of the institution. Due to the negligible fee, many taxpayers will only 'try' to see if their application is successful, without paying attention to the quality of the application. Even so, the tax authorities still have to process it, which places an additional administrative burden on them. It can be assumed that if the input cost of such an application were higher, there would be a proportion of taxpayers who would not

6 Although, for example, in civil actions, the tax rate is often set as a percentage of the amount claimed.

find it worthwhile applying. Instead, they would make more effort to be successful with the application.

1.3. Statutory reasons for allowing an instalment plan

Czech legislation (Tax Code 2011) provides five exhaustively defined reasons for which an instalment plan may be allowed. The legislature has defined the criteria in such a way as to cover the broadest possible range of situations. These are general reasons of an economic and social character, reflecting the exceptional situation of the taxpayer. Proving that at least one of them is fulfilled is a prerequisite for the application to be granted. An instalment plan may be allowed if:

- immediate payment of tax would cause serious harm to the taxpayer,
- the maintenance of the taxable person or his/her dependants would be jeopardised (applies only to natural persons),
- immediate payment of tax would mean that the taxable person's business would cease (and the proceeds from the closure of the business would be less than the tax in the next tax year),
- it is not possible to collect the tax from the taxpayer at once (not only referring to the amount of funds currently available but to the overall financial situation),
- there is a reasonable expectation of partial or total extinction of the tax obligation.

The vagueness of the legal terms (such as 'serious harm') means that the range of situations in which a taxpayer's application can be granted is wide. It makes it possible to reflect on different situations that arise for taxpayers or within the economy. The reasons for allowing an instalment plan are not primarily related to external factors but to specific circumstances affecting the taxpayer's sphere of influence. It does not preclude external factors (such as the Covid-19 pandemic and related restrictions or the current increase in the price of, for example, fuel) from being the reason for the taxpayer's inability to pay the tax. However, the taxpayer must always prove the specific effects on his/her sphere in the context of the fulfilment of one of the statutory reasons. This concept implies that the tax instalment plan should only be allowed in cases where the taxpayer is actually in an exceptional situation. It is therefore an instrument that can only be used in individually justified cases and is set up to be used only by the taxpayers affected.

A similar concept is adopted, for example, in Poland, where it is possible to spread the tax in instalments on the grounds of an important interest of the taxpayer or the public interest. The tax legislation does not contain a precise definition of these terms, therefore the related case law (for example the Judgment of the Supreme Administrative Court of the Republic of Poland 1999) has to be reflected. As in the

Czech Republic (as set out below), in Poland it is up to the taxpayer to comprehensively justify the request and provide relevant evidence.

1.4. The burden of proof on the taxpayer

The taxpayer's application for a tax instalment plan is usually the key element of the whole procedure. It must contain a qualified statement of the reasons for allowing the instalment plan, a proposal for an instalment plan (or a deferral of payment of the entire tax) and be supported by appropriate evidence to prove the taxpayer's claims. As the principle of disposition governs the whole procedure, it is up to the taxpayer to decide what to claim in the application. In deciding on the application, the tax administrator is bound by the taxpayer's proposal. The taxpayer is therefore obliged to assert the relevant reasons in his/her application and to provide evidence in support of his/her assertions. The taxpayer carries the risk that, if s/he does not voluntarily and on his/her own initiative substantiate the allegations contained in his/her application to the tax administrator, the tax administrator will be obliged to reject the application (Judgment of the Supreme Administrative Court of the Czech Republic 2015). It is up to the taxpayer to provide such evidence to show that s/he has fulfilled one of the conditions for allowing an instalment plan. The unequivocal proof fulfilling one of the grounds for an instalment plan is intended to ensure that certain taxpayers are not unduly favoured.

The idea behind this concept is simple. Since the taxpayer is asking for a benefit to the detriment of the state budget, it can reasonably be expected that s/he will not only allege the relevant facts but also propose evidence to prove them. The tax administration is not obliged, and above all not entitled, to determine what evidence the taxpayer is to produce. Taxpayers have information available on the website of the Financial Administration of the Czech Republic, where the reasons for repayment are described. At the same time, it lists possible means of evidence that can be submitted to prove that the statutory reasons are met. The tax administrator has no legal right to ask the taxpayer to provide evidence; the only possible means for the tax administrator is informal communication. But they are not obliged to take such a step, and therefore its absence cannot render their decision on the application unlawful. Following the principle of cooperation and collaboration, the tax administrator has opted for informal communication with taxpayers, especially during the Covid-19 pandemic. They sent information leaflets and, beyond the scope of their obligations, instructed the taxpayer to prove his/her allegations.

Even when the taxpayer fails to provide sufficient supporting evidence for an application for an instalment plan, it is possible to conduct the proceeding and to consider the application on its merits. The absence of supporting evidence does not mean the application cannot be processed, but only that the taxpayer's evidentiary position is more difficult.

2. The tax instalment plan as an instrument of fiscal policy

Tax policy instruments can be generally classified into two categories – discretionary measures and automatic stabilisers (Mankiw, 2016, p. 698). Discretionary measures require conscious operational intervention by government. As the name suggests, automatic stabilisers operate automatically in the economy without government intervention. Both types of instruments have their advantages and disadvantages, and economists still have no definitive consensus about which type states should predominantly use. This follows from the past: the theory of the 'visible hand of the state', which John M. Keynes came up with in the 1930s, favoured active discretionary state action, regardless of its costs. Following the embodiment of this approach in President Roosevelt's New Deal, fiscal stimulus enjoyed popularity until the late 1960s, when its effectiveness began to be questioned because of rising inflation. States re-entered a prominent role as active discretionary fiscal policymakers in the global economic crisis of 2008 (Macroeconomic Group, 2009, p. 13) and the subsequent pandemic. With the Czech Republic now facing the highest inflation in its history as an independent state, it is necessary to discuss whether discretionary measures still represent an appropriate path.

The fundamental problem with discretionary measures is that they are usually associated with fiscal costs. The aim is to transfer these fiscal costs to the economy and to act as a stimulus to economic entities. However, this does not happen to the full extent of the costs due to the multiplier effect. For example, when taxes are reduced, people save some of the newly raised money rather than using it for spending. Thus less money is transferred into the economy than the cost of the discretionary measure. The size of the tax multiplier is therefore a crucial factor in determining whether or not a government should introduce a measure, as its value depends on many factors: the phase of the business cycle, taxpayers' expectations or political activity. On the other hand, automatic stabilisers do not act so strongly that they can prevent a recession on their own; instead, their role is to dampen economic fluctuations (Fatás & Mihov, 2003, p. 1438). So it is not possible to say unequivocally which type of measure is better, and policymakers should always take into account their pros and cons and develop an appropriate combination for a given country.

The tax instalment plan has features of both an automatic stabiliser and a discretionary measure. The automatic effect is that its availability is permanent, but its 'activation' (or use) occurs only when taxpayers need it. Submitting an application is essential, because this step prevents undesirable activation of the tool. Ordinary automatic stabilisers react to the economic situation regardless of whether their action is appropriate (Kubátová, 2018, p. 114). The decision as to whether the statutory conditions for allowing repayment are met is then taken by the tax authorities – the discretionary element is applied here. This ensures a case-by-case assessment.

A related advantage is that thanks to its long-standing and traditional anchorage in the legal system, this instrument does not require an implementation process, which can be an obstacle when a rapid response is needed in times of crisis. Indeed, in general, implementation delays are one of the pitfalls of discretionary fiscal interventions (Šaroch et al., 2003, p. 662) as they slow down the response to the economic situation. The automatic activation of tax instalment plans when necessary allows for a real-time response to the economic situation (Kalckreu & Wolff, 2007, p. 9). Reaction speed is further supported by a statutory time limit of 30 days for processing the application.

The tax instalment plan is available to all taxpayers, who must prove that they are eligible for it, that is, they meet the statutory conditions. It ensures that the relief is granted only in individually justified cases to those directly affected. A frequent problem with fiscal measures is that they operate across the board, automatically benefiting those who do not need them. It is almost impossible to create a new measure in a time pressure (e.g. during an economic crisis) that would only apply to those who have actually been affected by the crisis. However, the instalment plan has this advantage.

The fundamental question for any fiscal measure is the fiscal cost. In the case of tax instalments, it is a de facto fiscally neutral instrument. When correctly applied, it does not cause any outflow of public funds in the long run. Moreover, the cost of money over time is partly offset by the special interest and administration fee. Even the administrative fee, although linked to the problems mentioned above, undoubtedly constitutes some fiscal revenue. These factors ensure the sustainability of tax revenues and thus of public finances. For taxpayers, on the other hand, the instalment plan provides short-term cash-flow relief, which is usually a significant problem in times of crisis. In general, cash-flow measures are very popular in crises, even in the euro area, because they can have a positive impact on taxpayers' liquidity at a low fiscal cost (Haroutunian et al., 2021, p. 94). It is not financial support, which, when poorly applied to non-affected entities, helps to spin an inflationary spiral. It is merely a permissible deferral of payments, coupled with the impossibility of execution. It helps to bridge the taxpayer's crisis period and ensures the taxpayer's financial background sustainability. Ultimately, this instrument is likely to positively affect the economic stability of the taxpayer and in the long term will support the production of additional tax revenue.

3. The tax instalment plan as a relief instrument in the Covid-19 crisis

During the Covid-19 pandemic, politicians came up with countless fiscal measures that they implemented to eliminate the economic consequences of the restrictions. Temporary state-aid measures at the time of the pandemic, not only in the form

of tax advantages, were also approved by the EU Commission (2020), which stated the conditions for compatibility with Article 107(3)(b) TFEU in a Communication defining the need for appropriate state-aid measures. The Czech Republic was no exception. In the area of tax, collective remission was mostly used,[7] which effectively postponed the payment of tax obligations through the remission of related sanctions.[8] At the same time, there were also changes in tax laws: the property transfer tax was abolished, electronic records of sales were suspended (and then abolished) and the tax on personal income from employment was significantly reduced (by abolishing the super-gross wage).[9] This legislative framework shows that the Czech Republic used centralised instruments, unlike, for example, Poland, where tax concessions were also adopted at municipal level (Popławski & Charkiewicz, 2021, p. 59).

The fiscal costs of measures adopted in the Czech Republic were enormous.[10] Despite this, a relatively simple and well-known tax instrument – the tax instalment plan – was not considered by political representatives. The only exception was the Minister of Finance, who occasionally mentioned this tool. However, this approach has been replaced by the tax authorities, who have realised the potential of the tax instalment plan. The highest authority responsible for unifying administrative practice instructed tax administrators that their administrative considerations should consider the crisis and the related restrictions. The tax administration was most lenient with directly affected taxpayers (travel agencies, restaurants and others). Applications from these taxpayers were assessed in the context of knowledge of the restrictive measures, and related facts did not need to be proven by the taxpayers. It would appear that the tax authorities waived the standard of proof. On the other hand, it would be redundant, burdensome and inefficient to prove something known to the tax authority from its activities. At the same time, tax officials, in line with the principle of helpfulness and cooperation, have significantly increased informal communication in the context of application procedures, although they are not obliged to do

7 Collective remission of tax and tax accessories is an instrument which is entrusted to the Minister of Finance. The minister may decide to remit the tax or its accessories in the event of extraordinary events, in particular natural disasters, or in the event of irregularities arising from the application of tax laws. This decision is published in the Financial Bulletin.

8 E.g. Decision No. MF-7108/2020/3901–2 (Ministry of Finance of the Czech Republic, 2020a), Decision No. MF-7633/2020/3901–2 (Ministry of Finance of the Czech Republic, 2020b), Decision No. MF-8592/2020/39–2 (Ministry of Finance of the Czech Republic, 2020c), Decision No. 15195/2020/3901–4 (Ministry of Finance of the Czech Republic, 2020d) and Decision No. 7413/2021/3901–2 (Ministry of Finance of the Czech Republic, 2021).

9 Act No. 386/2020 Sb.; Act No. 137/2020 Sb.; Act No. 458/2022 Sb.; Act No. 609/2020 Sb.

10 E.g. in the case of the abolition of the super-gross wage, the loss of public revenue is estimated at CZK 116 billion (Kalíšková & Šoltés, 2022, p. 4), and the abolition of the property transfer tax is associated with an estimated loss of public revenue of almost CZK 14 billion (Chamber of Deputies, Parliament of the Czech Republic, 2020).

so. This approach has ensured a flexible use of this instrument, as is evident from the data in Table 1.

Table 1. Use of the tax instalment plan during the Covid-19 pandemic

Selected tax office	**2019**	**2020**	**2021**	**2022**
Number of applications	169	434	190	143
Number of positive decisions	112	324	80	37

Source: author's data from the Tax Office for the South Moravian Region, Territorial Branch for Brno I

Data collected from the activities of the selected tax office clearly show that the tax instalment plan was widely used during the pandemic. The most exposed year was 2020, in which three-quarters of the total number of applications were granted. These were 150% more than in 2019. The second year affected by the pandemic was already less dynamic, so the onslaught of applications was gradually stabilised, and only one in two were granted. As the pandemic and restrictions faded, the tax administrator restored standard mechanisms. Then, in 2022, there was a marked dominance of refusals, which can be explained by the change in administrative practice during the pandemic. Indeed, many taxpayers became accustomed to a lower standard of proof because the tax administrator relied on common knowledge based on the established restrictions. While taxpayers continued to refer frequently to the effects of the pandemic, it was necessary to prove these effects individually, which usually did not happen. It can be added that in 2020, taxpayers started to face the impact of the war in Ukraine, but the tax administration could not adopt the same model of administrative practice as during the pandemic. The restrictions in the pandemic were specific in that they made it easy to identify taxpayers whose activities were affected. In the current situation, this cannot be deduced.

Conclusions

A tax instalment plan has all the characteristics of an economically desirable fiscal measure. It is an exceptional instrument that temporarily relieves taxpayers from paying their tax obligations. Its use is left to the discretion of taxpayers since it is only implemented when they need it. On the other hand, the need to carry the burden of proof as to whether the conditions are met ensures that repayment will only be allowed to those taxpayers who are actually in an emergency situation. It ensures the individuality of the instrument. From a fiscal point of view, it is also a win–win instrument for both parties, the state and the taxpayers. Unlike other tax measures usually associated with high fiscal costs, this is ideally an instrument without fiscal

impact on public budgets; it ensures the sustainability of tax revenues. On the taxpayer's side, an instalment plan stabilises cash flow and eliminates the negative consequences of executions; overall, repayment has the effect of stabilising their financial situation.

In the Czech Republic, the only significant problem with this measure is that it is overused in practice. This is due to the low administrative fee and the lack of explicit legal restrictions on those who abuse this benefit. This aspect must also be seen in the context of the considerable administrative burden of processing the application. The tax administrator should have clear rules to identify those not entitled to tax instalments, as is the case in Slovakia.

Despite the above conclusions, this instrument received virtually no attention from politicians during the crisis. Instead, during the pandemic, fiscally costly tax reliefs with detrimental effects on public budgets, such as the abolition of the super-gross wage or the property transfer tax, were introduced. However, this instrument was supported by the tax administration and was also widely used by taxpayers. Due to the vagueness of the legal terms in the law, the tax authorities were able to respond to the situation by temporarily changing administrative practice to reflect general knowledge of the sectors affected. The general consequences of the crisis were also taken into account in administrative considerations. The vague legal terms in the context of the reasons for allowing the tax instalment plan, therefore, appear to be advantageous, as they allow reflection of a wide variety of circumstances. During the Covid-19 pandemic, the tax administration reacted flexibly to the situation and used this instrument effectively, as is evident from the evaluated data. It has therefore been confirmed that an instalment plan is an economically appropriate tool for dealing with the crisis. Appropriately set legal frameworks allow for its effective use by taxpayers affected by the crisis.

- It can be concluded that the hypothesis has been verified. From the analysis, the following conclusions emerge:
- The tax instalment plan is an economically desirable measure in times of crisis, targeting only affected taxpayers,
- The permanent availability of the tax instalment plan in the tax laws makes it a tool that is 'spontaneously' activated in a crisis by taxpayers, not politicians,
- Tax instalment plans do not have a negative impact on public budgets in the long term, so it can be considered an instrument of fiscal sustainability.

While the tax instalment plan is not a fiscal injection that can boost the economy overnight, it is a simple and effective relief tool that can help any taxpayer in the short term in times of emergency. Even so, it is a somewhat underappreciated tool. Of course, it cannot be a surprise that it is politically preferable to make big tax changes in a crisis that affects all taxpayers. Indeed, these steps look like a real help to people and businesses. But the risk that these changes will have a negative effect on the econ-

omy as a whole in the long term is enormous. Some studies have even shown that these short-term tax concessions have often been ineffective in helping individuals and enterprises in difficulty (Sadiq & Krever, 2021, p. 218). This article is intended to make us think about whether relying on traditional or 'old' tools might not be the best way in some cases. Indeed, sometimes they can serve as well, or perhaps better, as is demonstrated with the tax instalment plan. The idea is simple: thinking about old things in a new light can be better than constantly creating new ones.

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Environmental Taxation and the Circular Economy: What Are the Prospects in the European Context?

Abstract: The transition from a linear economy model to a circular economy system heralds great opportunities: on the one hand, because by smoothing out diseconomies and reducing waste, it can favour the ecological transition and steer production in the direction of sustainability and respect for the environment; on the other, because by offering economic operators the opportunity to become more competitive and to achieve considerable advantages, it can create jobs and facilitate integration and innovation at a social and an industrial level. To this end, a dimension of environmentally targeted taxation can only assume importance, characterized by the metamorphosis from a linear taxation system to a circular taxation paradigm: the former, dominated by the principle of fiscal neutrality, loses sight of non-tax purposes to attach importance only to those of revenue, too often ending up financing expenditure for expenditure and therefore even waste; the latter, through the taxation of waste and the use of tax eco-incentives, favours reuse and recycling, fully implementing the paradigm of the circular economy. In this perspective, through the preparation of a virtuous model and the elaboration of an agenda for future European growth centred on radical changes in production and consumption processes, the circular economy system can be fully implemented, promoting sustainable development and the efficient allocation of resources.
Keywords: analysis perspectives, circular economy, criticality profiles, environmental taxation, sustainable development

Introduction

With a view to environmental sustainability (Mendola, 2022, p. 7; Uricchio et al., 2020, p. 1) and climate neutrality (Amanatidis, 2022a, p. 1; Carducci, 2021, p. 51; Gratani, 2014, p. 535), under the auspices of the 2015 Paris Climate Agreement (Ari

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& Sari, 2017, p. 175; Aristei, 2017, p. 73; Blasizza, 2021, p. 642; Gugliotta, 2021, p. 23; Klein et al., 2017; Nespor, 2016, p. 81; Savaresi, 2016, p. 16; Nishimura, 2018, p. 42), the attentions of the EU legislature has over time focused on economic models of production, marking a transition from a 'linear economy' system (characterized by a scheme of 'take, produce, use and throw away') to a 'circular economy' paradigm (based on the configuration of 'take, produce, use and recycle') (Cocconi, 2020, p. 1; De Leonardis, 2021, p. 161; Greggi, 2020, p. 25; Parente, 2022, p. 75; Soncini, 2019, p. 325; Trenta, 2020, p. 91; Uricchio, 2020a, p. 409), also through the use of taxation. In the past, the implementation of production based on the linear economy model contributed to the depletion of many natural resources, in addition to causing high levels of pollution, a source of environmental degradation.

From this perspective, by emphasizing an environmentally targeted tax (Uricchio, 2015, p. 19) within a virtuous model aimed at subjecting waste to taxation and encouraging reuse and recycling, the modern circular economy has been fully implemented, promoting sustainable development and efficient allocation of resources through the elaboration of an agenda for future European growth, centred on radical changes in the processes of production and consumption (Uricchio, 2017, p. 1861). It is an approach based on the entire life cycle, which, in addition to being destined to improve the use of secondary materials, aims to provide economic incentives, including tax incentives, to limit the production of waste and encourage its reuse (Amanatidis, 2022b, p. 6). The circular economy becomes an intermediate legal good, instrumental to the protection of two final-level legal goods: the environment and economic development (Salanitro, 2023, p. 367; Uricchio, 2022, p. 185). From this perspective, implementing a circular economy model means, on the one hand, managing resources efficiently, increasing productivity and reducing waste and, on the other, ensuring that what still has some use is recovered and reintroduced into the economy, preventing it from being disposed of in landfill (in ways that are not always legal) (Alfano & Bisogno, 2022, pp. 302–303).

This reflection, starting from a range of sources, has the objective of verifying the forms and limits within which fiscal instruments can be used, from an environmental perspective, for non-tax purposes to encourage the transition from a linear economy model to a circular economic system, through analysis of the solutions adopted by the Italian legislature in the context of EU legislation (Walker et al., 2020, p. 185), which are aimed at limiting the use of plastic products, the production and disposal of which constitute a source of environmental degradation (Morath, 2022, p. 7). In fact, the experience that best represents the attempt to fill the existing gaps in circularity is represented precisely by the tax on plastic, which stands as a virtuous example of how the fiscal lever can be used for extra-fiscal purposes with the aim of promoting policies of environmental sustainability, also thanks to the use of the related revenue to finance initiatives aimed at reducing pollution deriving from plastic and its environmental impact, and encouraging recycling. The crucial role played by

so-called 'extra taxation' (Fichera, 1973; Fichera, 1997, p. 486; Gallo, 2009, p. 399; Giannini, 1937, p. 6; Griziotti, 1951, p. 152; Stevanato, 2014, p. 419) in the promotion of solutions capable of protecting the environment and encouraging circular behaviour thus emerges (Alfano & Bisogno, 2022, pp. 289–290).

Despite being an essential resource for scientific and technological progress, plastic is one of the main causes of global pollution; it is therefore clear that the negative externalities related to its production and consumption cannot ignore the use of taxation, complying with the reparative logic of the internalization of negative externalities typical of Pigovian theory (Pigou, 1932), which also takes on particular relevance in the modern circular economy (Alfano & Bisogno, 2022, p. 301). During this investigation, reference will be made to certain national experiences (in particular, those of the United Kingdom and Spain) from a comparative perspective, where the imposition of a tax on plastic has become reality through the entry into force of the relevant forms of tax levy, although not without critical issues.

1. Taxation in the context of different forms of environmental protection

Since the circular economy is designed to reduce CO2 emissions, promoting sustainable development and the efficient allocation of resources, the most appropriate research method from a tax perspective cannot ignore an investigation of the dogmatic categories relating to 'environmental taxation', a periphrasis which outlines the complex of fiscal measures payable by the person carrying out a specific polluting activity (or by the end user) to help prevent, eliminate or limit its harmful effects (Cipollina, 2009, p. 577; Parente, 2020, pp. 624–625; Procopio, 2013, p. 1170).

On a methodological level, a clarification is appropriate: in this context, the fiscal lever does not exhaust the forms of protection available to the legislature. It is also true that 'green taxation' measures are aimed at encouraging non-polluting behaviour and discouraging polluting conduct, favouring the transition towards 'clean' production models, the use of which, in the long term, seems preferable to direct regulatory mechanisms due to the objectives pursued and the merit of inducing the taxpayer not to rest on achieved results but to invest in clean technology. But, alongside the green taxation measures, further intervention policies can be found: on the one hand, command and control tools, designed to prepare limits, prohibitions and controls, with the provision of sanctions for violators; on the other, private measures to safeguard the environment, compliant with negotiations and economic models inspired by the market-based approach.

From the perspective of the circular economy, the environmental protection regime, through the 'polluter pays' principle (Article 191(2), TFEU) (Alfano, 2012, p. 51; Allena, 2013, p. 813; Boria, 2014, p. 214; Boria, 2017, p. 314; Buccisano, 2014, p.

113; Buccisano, 2016, p. 596; Ferrara, 2005, p. 509; Lombardo, 2011, p. 722; Marchetti, 2006, p. 243; Mastellone, 2013, p. 88; Meli, 1989, p. 218; Palombino, 2003, p. 871; Sciancalepore, 2016, p. 45; Tarantini, 1990, p. 728), makes it possible to establish 'taxed' asset benefits for which the environmental factor is not only an integral part of the taxable case, but becomes a parameter for determining the taxpayer's economic capacity.

2. The distinction between environmental taxes in the narrow and broad senses and between redistributive and incentive taxes

In this view, it is easy to distinguish between environmental taxes defined narrowly or broadly. The former, defined as 'structurally environmental' taxes, presuppose a polluting factor, i.e. an event that produced the damage; the taxable case is given by the physical unit which, in the case of the use or release of a polluting substance, produces environmental effects that have been proved harmful (Boria, 2019, pp. 215–216; Cipollina, 2008, p. 560; Cipollina, 2009, p. 578; Dorigo, 2013, p. 152; Dorigo & Mastellone, 2018, p. 58; Esposito De Falco, 2004, p. 658; Gallo, 2010, p. 303; Guido, 2013, p. 224; Procopio, 2013, pp. 1168–1169; Stefani, 1999, p. 1493; Strianese, 2017, p. 397; Uricchio, 2010, p. 184; Uricchio, 2012, p. 1490; Uricchio, 2017, p. 1855). These forms of taxation are characterized by a necessary causal link, which consists of a direct and osmotic relationship, scientifically ascertained and sustainable, between the assumption and the material and objective fact that determines the deterioration of the environment (Parente, 2020, p. 643). By way of example, we may mention taxes that affect the emission of polluting gases or noise, or the extraction or production of substances, goods and products that deplete natural resources or cause damage to the environment (Gallo, 2010, p. 303; Gallo & Marchetti, 1999, p. 119; Procopio, 2013, pp. 1168–1169; Verrigni, 2003, p. 1621).

'Broad' environmental taxes are designated as having 'environmental purposes'; however, they are characterized by a traditional assumption – consumption, assets or income – which is accompanied by the purpose of protecting the environment, implemented through an incentive or disincentive for certain activities or the use or production of environmental goods (Boria, 2019, p. 216; Cipollina, 2009, p. 578; Dorigo, 2013, p. 152; Dorigo & Mastellone, 2018, p. 57; Gallo, 2010, p. 303; Guido, 2013, p. 224; Strianese, 2017, pp. 408–409; Uricchio, 2017, p. 1851).

In these types of taxes, the environment is placed outside the taxable case, on an extra-fiscal level, placing itself as a value, asset, right and goal (Uricchio, 2010, p. 184; Uricchio, 2012, p. 1490); environmental protection is a hoped-for effect deriving from the introduction of a levy, also a fiscal one, which, by determining an increase in the cost of the polluting good or activity, can lead the consumer to turn to other goods with less environmental impact (Gallo & Marchetti, 1999, p. 120). The inter-

nalization of environmental externalities, as an extra-fiscal purpose unrelated to the tax basis, thus takes on the characteristics of a mere economic effect not included in the legal tax case (Gallo & Marchetti, 1999, p. 120; Procopio, 2013, pp. 1168–1169). The 'broad' environmental tax therefore pursues predominant revenue objectives: the protection of the environment is relegated to a marginal role, constituting a simple pretext to make the tax more acceptable to the taxpayer (Cipollina, 2009, p. 592).

From a systematic perspective, a further distinction is that between 'redistributive' and 'incentive' taxes: the former aim to finance environmental protection and clean-up interventions, attributing the costs to the creators of the polluting conduct in the implementation of tax policies; the latter, in addition to targeting those who pollute, have the aim of inducing investment in clean technologies with favourable environmental policies (so-called green taxation) in order to reduce harmful activities (Cipollina, 2009, p. 573; Esposito De Falco, 2004, pp. 650–651; Strianese, 2017, pp. 406–407; Uricchio, 2010, p. 186; Uricchio, 2012, p. 1491).

3. Tax instruments designed to guarantee environmental sustainability and measures to combat irreversible situations of environmental degradation

Among the tax instruments designed to guarantee environmental sustainability, it is possible to point to multiple types of intervention: taxes on production and consumption; taxes on polluting emissions; taxes on the exploitation and depletion of environmental resources; and energy taxes (Parente, 2020, p. 638). In particular, taxes on production and consumption affect the use of products harmful to the environment in industrial processes (Verrigni, 2003, p. 1621); in these forms of levy, which can also be used from a circular economy perspective, the taxable amount is a physical unit of a resource, good or product that bears some relation to the deterioration of or damage to the environment in a general sense (Gallo & Marchetti, 1999, p. 118). In fact, from the regulation of the taxable case, an environmental justification emerges, capable of characterizing the tax authority–taxpayer relationship in legally appreciable terms: the reason for the levy lies in the need to compensate for an environmental cost and not in the mere redistribution of wealth (Verrigni, 2003, p. 1621). Even taxes on emissions – which have an impact on activities that disperse polluting substances into the air, water or soil or generate noise pollution – are based on the quantity and quality of the contamination and the damage caused to the environment (Buccisano, 2016, p. 590). For these taxes, however, the taxable amount is the physical unit of a specific pollutant, calculated by measuring polluting emissions or by making an estimate of the polluting potential (Gallo & Marchetti, 1999, p. 118). Taxes on the exploitation and depletion of environmental resources tend to cover the costs of treatment and disposal and administration costs (Verrigni, 2003, p. 1621).

The negative effects on the environment resulting from the use of energy sources justify the spread of 'energy taxes' and the provision of tax breaks related to the use of renewable energy sources (Strianese, 2017, p. 409). However, if the use of environmental taxes can favour environmental protection policies and incentivize the transition towards a circular economy model, it cannot constitute the only intervention technique to discourage polluting behaviour. In fact, the use of fiscal instruments to implement environmental protection policies suffers from restrictions, being plausible only if the deterioration that justifies the imposition is bearable, reversible and repairable in relative and not absolute terms (Gallo, 2010, p. 304; Procopio, 2013, p. 1169; Sciancalepore, 2016, p. 96); otherwise, it is necessary to intervene with more incisive instruments, such as prohibitions or criminal and administrative sanctions, which act as a deterrent to activities capable of causing forms of degradation, the tax instrument in this case being inadequate to provide effective protection (D'Andrea, 2004, p. 107).

4. The transition from a linear to a circular economy system over time

A first objective to preserve the environment and encourage the overcoming of a linear economic system was set with Directive 2000/53/EC of 18 September 2000, which relates to the reduction of waste produced by end-of-life vehicles and their components and was implemented with the forecast of a reuse and recovery rate of 95% by 2015, in order to encourage manufacturers and importers to use recycled materials. Directive 2006/66/EC of 6 September 2006 on waste batteries and accumulators aimed to improve waste management and the environmental performance of these products by setting standards for collection, recycling, treatment and disposal. A similar objective was pursued with Regulation 1257/2013/EU of 30 December 2013 concerning the recycling of ships, in order to encourage reuse, as far as possible, and to ensure that hazardous waste was subjected to environmentally sound management (Amanatidis, 2022b, pp. 2–3).

With the Communication of 25 September 2014, COM (2014) 398 final/2, entitled 'Towards a Circular Economy: A Zero Waste Programme for Europe', the European Commission made some proposals in this direction, developing the prevention and the precautionary principles, through the modification of waste-treatment and disposal processes. Subsequently, an ambitious circular economy package was prepared in the EU on 2 December 2015, through an action plan containing measures relating to the entire life cycle of products: from design, procurement, production and consumption up to waste management and the secondary raw materials market (Uricchio, 2017, p. 1862).

In the implementation of the circular economy package, the European Commission adopted the Regulation of 17 March 2016, COM (2016) 157 final, with the pri-

mary aim of encouraging the use of organic and waste-derived fertilizers, establishing equal conditions of competition with conventional inorganic fertilizers (generally extracted from mines or obtained chemically in compliance with a linear economy model), in order to favour the conversion of organic waste into raw materials that can be used to manufacture fertilizing products, at the same time reducing energy consumption and environmental damage (Uricchio, 2017, pp. 1863–1864).

In order to review the waste-management objectives, together with the 2015 action plan on the circular economy, the European Commission prepared five legislative proposals aimed at amending a series of EU regulatory acts: the Waste Framework Directive (2008/98/EC of 19 November 2008), the Directive on Landfills (1999/31/EC of 26 April 1999), the Directive on Packaging and Packaging Waste (1994/62/EC of 20 December 1994), the Directive Relating to Batteries and Accumulators and Waste Batteries and Accumulators (2006/66/EC of 6 September 2006) and the Directive on Waste Electrical and Electronic Equipment (2012/19/EU of 4 July 2012) (Amanatidis, 2022b, p. 4). These proposals were followed by the adoption in 2018 of the four Directives on the circular economy (Directive 2018/849/EU of 30 May 2018; Directive 2018/850/EU of 30 May 2018; Directive 2018/851/EU of 30 May 2018; Directive 2018/852/EU of 30 May 2018), then were implemented in domestic law in 2020 (Legislative Decree of 3 September 2020, No. 116, Implementing Directives 2018/851/EU and 2018/852/EU; Legislative Decree of 3 September 2020, No. 118, Implementing Articles 2 and 3 of Directive 2018/849/EU; Legislative Decree of 3 September 2020, No. 119, Implementing Article 1 of Directive 2018/849/EU; Legislative Decree of 3 September 2020, No. 121, Implementing Directive 2018/850/EU), with which a new waste-management model was prepared based on a logic of prevention, reuse and recycling.

5. The objectives pursued by the EU directives contained in the circular economy package and by the legislation aimed at restricting the use of plastic products, and the transition from linear to circular taxation

The objectives pursued within the EU with the directives in the circular economy package of 2018 are multiple: to bring the recycling of urban waste to a threshold of 55% by 2025, 60% by 2030 and 65% by 2035; to set recycling standards for packaging waste at 70%, to be achieved by 2030; to reduce landfill for municipal waste to a maximum of 10% by 2035; to ban landfill waste from separate collection and to impose separate collection obligations for organic waste by 2023 and for textiles and hazardous household waste by 2025; to promote economic instruments designed to discourage landfill; to simplify and improve the definitions and harmonization of calculation methods for recycling rates throughout the European Union; to take concrete meas-

ures to promote reuse and stimulate industrial symbiosis, transforming the by-product of one industry into the raw material of another; to develop extended producer responsibility schemes to bring greener products to the market; and to implement recovery and recycling systems (for example, for packaging, batteries, electrical and electronic equipment and end-of-life vehicles) (Amanatidis, 2022b, pp. 4–5).

Almost simultaneously with the adoption of the circular economy package, with the Communication of 16 January 2018 COM (2018) 28 final, entitled 'European Strategy for Plastics in the Circular Economy', the European Commission proposed that all plastic packaging be redesigned in order to allow its recycling and reuse by 2030, proposing multiple measures aimed at improving the economic aspects and quality of recycling and reducing plastic waste, so as to also limit its abandonment in the environment. Following the European Commission's proposal of 28 May 2018, the European Parliament and the Council, in order to reduce 'the impact of certain plastic products on the environment', adopted Directive 2019/904/EU of 5 June 2019 (Aristei, 2020, p. 1; Aristei, 2022, p. 490), setting new and rigorous restrictions for some single-use plastic products; in particular, plastic cutlery, plates and straws and food and drink containers in expanded polystyrene have been banned in the European Union. Furthermore, from 2025, all PET bottles will have to contain at least 25% recycled plastic; by 2030, at least 30% of the content of plastic bottles must come from recycled material (Amanatidis, 2022b, p. 5).

Subsequently, the European Parliament, with the Resolution of 13 September 2018 2018/2035 (INI) entitled 'A European Strategy for Plastics in the Circular Economy', urged the Commission to introduce requirements relating to the minimum recycled content for specific plastic products placed on the EU market, to create a single market for recycled plastics, to take measures to solve the problem of marine litter and to ban microplastics in cosmetics and cleaning products from 2020 (Amanatidis, 2022b, p. 6). Finally, with the Communication of the European Commission of 11 December 2019 COM (2019) 640 final (European Green Deal), in addition to the provision of a regulatory framework for biodegradable and bio-based plastics, the intention was announced to prepare suitable measures to ensure that by 2030, all packaging on the EU market is reusable or recyclable in an economically sustainable way, so as to limit the use of single-use plastic.

Therefore, following the increase in plastic production and, with it, the environmental problems attributable to an economic model centred on the logic of profit and waste, and therefore indifferent to the costs of the negative externalities it is able to generate, the need was felt, also by the EU institutions, to prepare suitable measures to remedy the harmful effects of disposable plastic packaging and containers in the environment – products that have revolutionized our way of life due to their flexibility (Scialpi, 2020, pp. 301–302). The goal is to achieve a real ecological transition through the preparation of a circular economy model which, in smoothing out the diseconomies, improves production upstream, reduces waste, reorients consumption

and remedies distortions; this recipe can only embrace the dimension of an environmentally targeted tax system characterized by a metamorphosis from a linear taxation system to a circular taxation paradigm (Scialpi, 2020, p. 302).

In this view, linear taxation, dominated by the principle of fiscal neutrality and unsuitable for influencing the decisions, preferences and behaviour of taxpayers, loses sight of non-tax purposes and attributes relevance only to revenue, offering the state resources to allocate to spending without having regard to the worthiness of how it is used, thus too often ending up financing spending on spending and therefore even waste (Uricchio, 2017, pp. 1860–1861). On the contrary, circular taxation, which enhances environmentally targeted taxation, limits unproductive and patronage public spending, restarting development without destroying wealth: this model, through taxing the waste and the use of tax eco-incentives, favours reuse and recycling, fully implementing the circular economy paradigm (Strianese, 2021, p. 81; Uricchio, 2017, p. 1861).

6. The European and Italian plastic taxes: Forms of levy to guide behaviour and development models

In order to promote the recycling of plastics, reduce environmental pollution and discourage the use of disposable plastic products, Article 21 of Law Decree of 31 December 2020, No. 183, converted into law on 26 February 2021 (No. 21), implemented the EU/Euratom Decision 2020/2053 of 14 December 2020, relating to the system of European Union resources, in the Italian legal system. Article 2(1)(c) of the latter introduced the 'European plastic tax' (Rinaldi, 2021, p. 154; Schratzenstaller, 2019, p. 101; Scuderi, 2021, p. 539; Selicato, 2021, p. 232; van den Eijnde, 2022, p. 243), establishing a uniform rate of EUR 0.80 per kilogram, applied to the weight of non-recycled plastic packaging waste generated in each Member State (except for annual flat-rate reductions reserved for Member States with per capita gross national income below the European average), based on the difference between the weight of plastic packaging waste generated in a given year and the weight of plastic packaging waste recycled over the same period (Sciancalepore, 2021, p. 241).

The measure differs from the Italian plastic tax (Article 1(634–658) of the Law of 27 December 2019, No. 160) (Di Salvo & Coaloa, 2021, p. 1133; Gentili, 2022, p. 26; Gianniti, 2020, p. 3323; Romito, 2021, p. 156; Salanitro, 2023, p. 339; Sbandi & Santacroce, 2020, p. 1239; Sbandi & Santacroce, 2021, p. 261; Scialpi, 2020, p. 299; Selicato, 2022, p. 33; Uricchio, 2020b, p. 185; Uricchio, 2020c, p. 371), a tax on the consumption of single-use plastic products, the entry into force of which has been deferred several times (most recently, with Article 1(54) of the Law of 29 December 2022, No. 197 and with Article 1(44) of the Law of 30 December 2023, No. 213). The tax will be applied from 1 July 2024, in an amount equal to EUR 0.45 per kilo-

gram of plastic material contained in the asset subject to taxation, to stem the growing production of packaging and containers. It is a form of levy which, in affecting the production and consumption of plastic products, pursues indirect objectives which, disregarding the typical purposes of revenue, aim to direct development behaviours and models towards more responsible and aware forms (Scialpi, 2020, p. 300).

The harmful effects that plastic has on the ecosystem allow the levy to be ascribed to the category of green taxes; more specifically, since the tax obligation arises in relation to the consumption of single-use plastics, it seems possible to bring it under the genus of environmental excise duties, the prerequisite of which is not manufacture or consumption considered alone, but manufacture or consumption if and as they produce environmental damage (Scarascia Mugnozza, 2022, p. 6). Domestic tax is levied on single-use plastics unsuitable for reuse or for subsequent transfer with the function of containment, protection, manipulation or delivery of goods or food products, including semi-finished products, preforms and objects which allow the closure, marketing or presentation of the same (Article 1(634–635), Law No. 160/2019). The plastic composition of these products, even if partial, and their destination for a single use become essential requirements for tax purposes (Scarascia Mugnozza, 2022, p. 6). By explicit regulatory provision, compostable single-use plastics, medical devices and plastics used to contain and protect medicinal preparations are excluded from taxation (Scialpi, 2022, p. 303).

The manufacturer is identified as the taxable person where the single-use plastics are made in the national territory, or as the purchaser carrying out an economic activity or as the importer for single-use plastics (purchased by a private national consumer) coming from other EU or non-EU countries (Scialpi, 2022, p. 303). Depending on the relevant hypotheses, the tax obligation arises at the time of production or of the plastics' introduction into the national territory from other countries (Scialpi, 2022, p. 303). The act of release for consumption, which makes the tax payable, coincides with the transfer to other national subjects, with the purchase or transfer in the national territory or with the definitive importation (Scialpi, 2022, p. 304).

A bonus is also envisaged, in the form of a tax credit for companies operating in the plastics sector and producers of single-use plastics; this is a facilitation measure consistent with the market-based approach strategy, which, on the one hand, prescribes the use of the tax to dissuade consumers from ecologically unsustainable conduct and, on the other hand, mitigates the tax burden on environmentally virtuous products and behaviour to encourage their diffusion (Scarascia Mugnozza, 2022, pp. 7–11). Considering that compostable products are expressly excluded from the application of the tax, the intention is to encourage the production of biodegradable plastics, in the wake of the strategy endorsed by EU legislation (Scarascia Mugnozza, 2022, p. 7).

On an abstract level, it seems that national and European legislation is destined to find joint application, in order to subject the entire life cycle of plastic to taxation

and maximize the deterrent effect of the tax (Scarascia Mugnozza, 2022, p. 8). In reality, the domestic tax differs from that of the EU: the tax developed by the Italian legislature affects the mere production of disposable plastic products, emphasising manufacturing and consumption; the European approach, on the other hand, pertains to the broader sphere of non-recycled plastic packaging, affecting its disposal (Sciancalepore, 2021, pp. 243–244). Therefore, while the imposition on single-use plastics should occur during the production process, i.e. as long as the plastic product is on the market, the application of the European tax would take place on the disposal of the product, which can be legally qualified as 'waste' once it is released from the market. Furthermore, the European levy is not aimed at the final consumer but at the Member State, and is not applicable at the stage of the production or consumption of the plastic; for this reason, the disincentive effect of the measure, which becomes a characteristic feature of the environmental levy in its proper sense, is of little importance (Scarascia Mugnozza, 2022, p. 9). However, on a concrete level, the demarcation line between 'artifacts having the function of containment, protection, manipulation or delivery of goods or food products' and 'packaging waste' is rather blurred: in fact, both regulations limit the application of the fiscal measure to non-recycled or non-recyclable products. Moreover, the European provision does not make distinctions regarding the composition of the product (Sciancalepore, 2021, pp. 243–244).

7. Further domestic experiences: the Spanish plastic tax and the United Kingdom's Plastic Packaging Tax

Unlike what has happened in the Italian legal system, in the European context, there has been no shortage of domestic legislation in which the tax on plastic has been fully implemented and has effectively come into force, with results that are, however, not always satisfactory. This is the case in Spain, which, with Articles 67–83 of the Law of 8 April 2022, No. 7, entitled 'De residuos y suelos contaminados para una economía circular', introduced a special tax, starting from 1 January 2023, applicable at the rate of EUR 0.45 per kilogram of non-recycled plastic material on non-reusable packaging containing plastic (without any distinction between primary, secondary or tertiary), on semi-finished plastic products intended for the production of packaging (such as preforms or thermoplastic sheets) and on products containing plastic materials intended to allow closure, placement on the market or the presentation of non-reusable packaging (whether empty or used to contain, protect, handle, distribute and present goods) (Palomar Olmeda et al., 2022; Patón García, 2022).

With a view to transposing the EU principles concerning the reduction of the environmental impact of certain plastic products into Spanish law, the tax pursues a dual purpose: on the one hand, to prevent the production of single-use plastic pack-

aging waste; on the other, promoting a truly circular economy by encouraging the use of recycled plastic. The tax basis refers to the use of plastic packaging at the time of manufacturing as falling within the scope of the tax or at the intra-community purchase or importation of the same. This entails a transversal application of the tax for all industrial sectors that use goods containing disposable plastic packaging: the relevant economic operators are subject to taxation regardless of whether they are engaged in the plastic sector or not, having at the same time to comply with various formal and accounting obligations, including the management and updating of specific inventories and registration in a specific list kept by the financial administration.

In order to encourage the use of recycled material for the manufacture of packaging, the taxable base of the tax does not include the quantity of recycled plastic (including mechanical and chemical recycling); however, it is necessary that the quantity of recycled plastic contained in the products falling within the scope of application of the tax is certified by an organization accredited to issue certifications according to European standards, on the basis of specific criteria which refer to the methods and chemical processes with which a product was designed, manufactured and marketed, regardless of how it is used by consumers. Therefore, the recycling factor becomes a determining element in whether or not taxation is triggered.

The law establishing the tax also provides for a series of exclusions and exemptions: the exclusions pursue the objective of exempting from taxation operations on goods which are not intended to be consumed on Spanish territory (for example, products which, although falling within the scope of the tax, are no longer suitable for use or have been destroyed or are intended to be sold directly by the producer or by a third party operating on his/her behalf in another territory; to paints, inks, glazes and adhesives applied to products subject to the plastic tax; and to disposable plastic packaging not designed for the delivery of goods). The exemptions, however, refer to drugs, medical devices, foods for special medical purposes and infant formulas for hospital use.

As with the Italian plastic tax (Villar Ezcurra & Bisogno, 2022, p. 185), for the equivalent Spanish tax, the moment at which the tax becomes payable differs depending on the taxable event: for production, the tax is due when the product is sold to the first buyer; for imports, reference is made to the moment of customs clearance together with the payment of customs duties and VAT; for intra-community purchases, payment must be made by the 15th day of the month following shipment, unless the invoice is issued before that date.

Even before the Spanish experience, in the United Kingdom, a form of environmental levy was introduced from 1 April 2022, called the 'Plastic Packaging Tax', applicable at an amount equal to GBP 200 per tonne on plastic packaging produced in or imported into the UK with a recycled plastic component of less than 30%, in order to encourage the use of recycled plastic in the production of packaging. For the purposes of the tax in question, a packaging component means a product designed

to contain, protect and be functional for the delivery of goods. This tax applies to a quantity exceeding 10 tonnes over a 12-month period, when the component of the produced or imported plastic packaging is finished, i.e. it has undergone its last substantial transformation, meaning any material made of a polymer derived from petroleum or renewable sources. The payer of this tax measure is the manufacturer or importer, who is required to pay the tax by the last working day of the month following the end of the accounting period. Also, for this form of levy, alongside specific exemptions (concerning, for example, plastic packaging made or imported for medical use), specific formal and accounting obligations are envisaged for producers and importers.

8. Criticisms and alternative solutions

On a methodological level, after having mentioned the foreign experiences in which the tax imposition on plastic, with a view to environmental protection, has begun to produce effects, it is appropriate to focus attention on the Italian legal system, in which the domestic form of the levy (not yet entered into force), homologous to the measure developed within the EU, has drawn numerous criticisms: in addition to the dubious tax nature of the European levy, defined by Decision 2020/2053 as a 'contribution', its concrete implementation is far from easy, also due to the complex coordination with tax cases already in force (primarily, with the Italian regulation of excise duties contained in the Legislative Decree of 26 October 1995, No. 504) (Scarascia Mugnozza, 2022, p. 8).

A further criticism concerns the structure of the tax on single-use plastics, which is also applicable to products 'made with the use, even partial, of plastic materials', as well as to 'semi-finished products, made with the use, even partial, of the aforementioned plastic materials, used in the production' of single-use plastics; the legislation thus seems to outline a particularly broad scope of application, so as to subject the highest number of non-reusable plastic products to taxation, maximizing the deterrent effect (Scarascia Mugnozza, 2022, p. 10). Nonetheless, such an extension raises some problems: firstly, because it is necessary to clarify the reference to 'semi-finished' products liable to be subject to taxation; moreover, since the legislation defines a link between the amount of plastic contained in the product and the amount owed, the need arises for the taxable person to acquire this information and make it available to the administrative authority, a circumstance that is not entirely easy, since the taxable person, even if s/he is not the manufacturer, may not have the necessary technical skills (Scarascia Mugnozza, 2022, pp. 10–11). Furthermore, if the aim is to discourage the production and consumption of a highly polluting material such as plastic, increasing the cost of single-use plastics by a few cents could prove to be poorly effective, especially for those who make limited use of manufactured articles

in disposable plastic; for large consumers, on the other hand, it would be necessary to quantify the consumption of material which entails the tax obligation, to determine the economic burden and evaluate its effectiveness as a deterrent (Scarascia Mugnozza, 2022, p. 13).

These circumstances, added to the complexity of the regulatory system and the implementation costs of individual taxes, lead to a broader reflection on the actual usefulness of the tax on plastics in its current configuration and on its suitability for achieving its objectives (Scarascia Mugnozza, 2022, p. 8). In fact, the efficiency of these fiscal measures as a method of combating pollution and plastic consumption appears to be of little importance: the negative factors, mainly linked to the cumbersomeness of the regulatory discipline, seem to prevail over the desired environmental advantages (Scarascia Mugnozza, 2022, p. 14). An alternative solution could lie in the provision of a 'green VAT', consisting of an environmentally oriented application of VAT through a variation of the rate linked to the non-recyclable plastic content of the product, provided that the tax burden falls on the polluter and not (only) on the final consumer, in line with the 'polluter pays' principle (Scarascia Mugnozza, 2022, p. 18). A further viable path to stimulate the green transition could lie in strengthening tax credits – instruments that have not found adequate space in the current tax system – in order to promote the recycling and reuse of plastic by operating on the side of tax breaks (Alfano & Bisogno, 2022, pp. 310–311).

Moreover, plastic has already been the object of attention by the Italian tax legislature. In a period in which the low unit costs to produce plastic bags favoured their indiscriminate abandonment, Article 1(8) of the Law Decree of 9 September 1988, No. 397, converted by the Law of 9 November 1988, No. 475, introduced a manufacturing tax on plastic bags, whose tax basis was the mere production of the bags, regardless of the product's characteristics (Alfano, 2012, p. 234; Fergola, 1992, p. 1435; Uricchio & Zavaglia, 2014, p. 85; Zecca, 1989, p. 479; Zecca, 1990, p. 541). In the Italian legal system, manufacturing taxes, included (together with consumption taxes) within the category of excise duties, originally constituted indirect levies intended to pursue mere revenue purposes; environmental protection, achieved by encouraging ecologically correct behaviour and discouraging conduct harmful to the environment, only took on importance later, allowing the use of fiscal leverage to achieve environmental-sustainability objectives (Alfano & Bisogno, 2022, p. 294).

From an environmental point of view, the experience of the manufacturing tax on plastic bags, at least initially, was positive: the results relating to the first period of the tax's validity were overall good, with a sharp reduction in the use of a highly polluting product in favour of a policy of reuse and a greater inclination towards paper bags (Scialpi, 2020, p. 308). Over time, however, this form of levy ended up betraying the original logic, as a subsequent legislative change extended the scope of its application (initially limited to non-biodegradable bags) to all plastic bags, regardless of the existence or otherwise of a sustainable component; this intervention, not assisted

by effective action to tackle clandestine producers of shopping bags, deprived the tax of its essential purpose and caused its repeal (Scarascia Mugnozza, 2022, p. 11). Despite the critical issues highlighted, the manufacturing tax on plastic bags represented a significant example of an environmental excise duty, having as its tax basis not the manufacturing or consumption itself but the manufacturing or consumption as productive of pollution (Alfano & Bisogno, 2022, pp. 300–301).

More recently, the Law Decree of 14 October 2019, No. 111, converted by the Law of 12 December 2019, No. 141 (the so-called 'Climate Decree'), implementing community obligations related to air quality, has prepared a series of measures, providing with the Experimental Plastic-Eating Programme a fund to contain the production of plastic waste through the use of eco-compactors and recognizing, on an experimental basis, a non-repayable economic contribution to neighbourhood commercial operators (medium and large) who equip spaces for the sale of loose or refillable food products and detergents or for the opening of new stores which exclusively sell bulk products (Scialpi, 2020, p. 309).

Conclusion

The transition from a linear to a circular economy heralds great opportunities for two reasons: on the one hand, because by acting as a stimulus for the modernization and transformation of economic models, it can favour the ecological transition (Uricchio, 2020d, p. 1) and direct production in the direction of sustainability and respect for the environment, nature and people; on the other, because by offering economic operators the possibility of becoming more competitive and of achieving considerable advantages, it can create jobs and facilitate integration and innovation at a social and industrial level (Uricchio, 2017, p. 1862). Among the various tools that can be used for this purpose, taxation can play a crucial role (Alfano & Bisogno, 2022, p. 310), as can the use of the related revenues to finance environmental education policies, since it has been demonstrated that educational interventions, especially in the long term, appear much more incisive than any other policy.

In March 2020, as part of the European Green Deal (Claeys et al., 2019; Comelli, 2021a, p. 44; Comelli, 2021b, p. 1969; Gallo, 2020; Gallo, 2022, p. 7; Padoa-Schioppa & Iozzo, 2020, p. 3; Rosembuj, 2019, p. 1; Uricchio, 2021, p. 149) – a programme aimed at achieving sustainable growth to contribute to full climate neutrality (Chomsky & Pollin, 2020; Moratti, 2020, p. 439) — an important action plan on the circular economy was prepared for the development of a growth-oriented programme aimed at building a cleaner and more competitive Europe, promoting sustainable consumption and aiming to ensure that the resources used remain in the economic system for as long as possible, so as to reduce the overall footprint (in terms of environment and resources) of production and consumption and provide incentives for techno-

logical innovation, sustainable businesses and zero-impact products, in consideration of the strong synergies between the circular economy and climate-protection actions. In this context, a proposal for a regulation was presented on 10 December 2020 to modernize EU legislation on batteries, so as to ensure that they are sustainable, circular, high-performing and safe throughout their life cycle and that they are collected and recycled, thus becoming a real resource. To this end, mandatory requirements have been set for all batteries placed on the European market: restrictions on the use of hazardous substances, a minimum content of recycled material, a low carbon footprint, performance and durability, labelling, and compliance with collection and recycling targets (Amanatidis, 2022b, pp. 5–6). Lastly, with the 'Fit for 55' programme (Fregni, 2022, p. 161; Monteduro, 2021, p. 447), the European Commission has presented a series of proposals designed to achieve the objectives set by the European Green Deal, consisting of a 55% reduction in net carbon dioxide emissions to be achieved by 2030 (compared to previous levels) and energy neutrality by 2050.

The hope is that the evolution of tax matters, especially in complex times like the current one (de Cogan & Brassey, 2023, p. 1), will not lose sight of the objective of effectiveness, which cannot be separated from a simple and easy application both for the interpreter and for the taxpayer, and which can also monitor interventions developed at the EU level, so that mere revenue contingencies do not affect their legitimacy (Scarascia Mugnozza, 2022, p. 18). A significant contribution would thus be offered to the transition of economic systems towards eco-sustainable models and, more generally, to the achievement of the objectives that the international community considers essential to address the main environmental emergencies of the planet (Uricchio & Selicato, 2023, p. 937).

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The Legal Construction of and Legislative Issues Concerning Tourist Taxes: A Comparative Law Case Study

Abstract: The purpose of this study is to describe the legal construction of and problems related to legislative issues concerning tourist taxes. It is based on analysis of the regulations contained in the conditions for the collection of local taxes, which result primarily from the provisions of the Polish Tax Code. These were compared with the laws of Slovakia and the Czech Republic. From a methodological point of view, we decided to focus on the regulations in force in one of the most famous tourist destinations in Poland, Zakopane, located near the border with Slovakia and the Czech Republic. The research shows that the legal solutions applied in Poland are flawed. In Poland, the tourist tax can as a rule only be levied in locations where certain levels of air pollution are not exceeded; however, this is not followed in practice. This leads to our claim that the legal solutions in this area should be changed. Maintaining the solutions currently in force in Poland leads to a situation in which legal fictions are

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allowed. We suggest the introduction of solutions similar to those found in the Czech Republic and Slovakia, where the tourist tax is not dependent on air pollution. The characteristic feature of this tax should be that it is levied on all types of stays, regardless of the purpose of the stay, the type of contract between the guest and the accommodation provider or the place where the guest stays.
Keywords: Czech Republic, local fees, Poland, Slovakia, tax law, tourist tax

Introduction

Tourism is one of the most important industries and economic sectors of many countries (Radvan, 2020). The share of tourism GDP varies from country to country. There are those where tourism accounts for several percentage points of GDP (e.g. Portugal 14%, Spain and Croatia almost 12%), but there are also those where it accounts for only a few percentage points (e.g. Austria 6.5%, France 7.4%, Iceland 8.6%, Slovenia 5.3%, Sweden 7%, Morocco 6.9%, Czech Republic 2.9%) (Radvan, 2020). The tourism industry covers a wide range of economic activities, and there are many taxes relevant to the sector. Dwyer et al. (2010) define five broad areas of taxes on tourists: taxes on airlines and airports, on hotels and other accommodation, on road transport, on food and beverages, and on tourism service providers.

Radvan (2020) and the European Commission (2017) indicate that the most common local tourism tax is the 'occupancy tax', which is equivalent to a bed or tourist tax, one of the above-mentioned tourist-related taxes that will be subject to research in this study. It is usually charged per person per night (in Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Greece, Hungary, Italy, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain). There is no tourist tax in Cyprus, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, Sweden or the United Kingdom (Radvan, 2020).

In countries where local taxes are levied on tourists, the local self-government unit, i.e. municipallity and region, usually decide on the rates of these taxes. However, the structure of the tourist tax may vary (Próchniak et al., 2016). For example, it may be based on the number of days a tourist spends in accommodation in a given destination. Under this formula, the rates can of course vary, depending for example on the standard of the hotel. The average tourist tax in the European Union is between EUR 0.40 and EUR 2.50 per night (Radvan, 2020). In some countries, however, the rate of the tourist tax depends on the amount charged for an overnight stay in a hotel or another establishment (guest house, hostel, etc.). For example, in Romania, the tax base is 1% of the room price, and in Germany, the tax rate is 5%. In Cyprus, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, Sweden and the United Kingdom, there is no tax on accommodation (European Commission, 2017).

It should be noted that there are countries where the tourist tax may depend on other factors. In the Polish legal system, the possibility of introducing a tourist (local and health resort) tax depends, among other things, on the cleanliness of the air. In

other words, it can only be introduced in places where the permissible level of certain substances in the air is not exceeded. The aim of this article is to describe the issues related to the collection of the local tax in Poland in places where these permissible levels of substances in the air are exceeded. This will be possible after presentation of the basic conditions of the Polish law which enables the collection of the local tax, resulting first of all from the provisions of the Tax Ordinance. These will then be compared with provisions in other countries. For this purpose, we decided to focus on the regulations in force in the city of Zakopane, Poland, one of the most famous tourist destinations in the country. It is also important to note that it is relatively close to the borders of Slovakia and the Czech Republic, whose legal systems regarding tourist taxes will also be analysed here. Another reason for including the regulations of these two countries in this study's analysis is the fact that there is a similar level of development of tourism in Poland and those countries close to it geographically.

To this end, it is important to clarify the following issues, which relate primarily to Polish law but also to some extent to Czech and Slovak law:

– the structure of the tourist tax levied on persons staying in the respective places for tourist, leisure or educational purposes,
– the conditions to be fulfilled by a town to be able to levy a local tax,
– the specific legal provisions setting the requirements for permissible levels of certain substances in the air (issues regulated by law in Poland).

1. The tourist tax in the Czech Republic and Slovakia

An analysis of the legislation in both the Czech Republic and Slovakia indicates that their tourism tax is in no way dependent on the level of air pollution in the places where the tax is to be charged (Radvan, 2020 Sábo, 2022; Simić, 2022; Štrkolec, 2019; Vartašová, 2022). However, we will start with a more detailed presentation of the tourism tax regime in the Czech Republic. Here, local self-government unit, within the framework of legal regulations (Act No. 565/1990 Coll. on Local Fees, as Amended), has the right to determine the rate of this levy. It may also introduce tax preferences, such as tax exemptions, although the literature indicates that the catalogue of exemptions is sufficient and there is no need to add additional exemptions (e.g. for pensioners) (Radvan, 2022). It is also stressed that all types of stays are subject to taxation, regardless of their purpose or the type of agreement between the guest and the entity providing the accommodation; the regulations concerning this charge also function correctly and do not generate major problems of interpretation, from the perspective of either the payer of the tax, the body which collects it from them, or the municipalities that are the beneficiaries (Radvan, 2022). The indirect nature of the levy is also positively assessed, which is related to the fact that the tourist, as a taxpayer, pays it along with the price of accommodation, and the levy is transferred to the tax author-

ity by the accommodation provider (the tax remitter) (Radvan, 2022). The system of this levy's operation favours municipalities for collecting revenue and controlling the obligations on tourists in their relatively simple payment of the levy, and on accommodation providers as it does not cause particularly serious problems in the collection of the levy (Radvan, 2022).

This is complemented by the obligation to keep registration books, which is an important tool that can be used by the tax authorities to control the accuracy of the fee collection (Popławski et al., 2023). In the context of problems related to the fee's functioning, we would point out that the fee is relatively low in the Czech Republic, compared to other EU countries, and thus does not generate the expected revenue for municipalities that it should generate (Radvan, 2022); however, the situation is similar in Slovakia and Poland (Vartašová & Červená, 2022). We suggest that the maximum rate should be paid, which currently amounts to CZK 50 (approx. EUR 2.20) per day (Radvan, 2022). On the other hand, it is argued that tourist fees should generally be reduced, as this will promote the competitiveness of tourism and support the local tourism sector (European Commission, 2017). The introduction of regulations similar to those applicable to the purchase of airline tickets (Radvan, 2022) is proposed. This would mean that all payments related to accommodation would be included in one final amount, and it would also be easy to take tourist taxes into account when landlords promote accommodation or when bookings are made on online platforms (e.g. Booking.com or AirBnB) (Radvan, 2022).

In the context of the disadvantages of tourism levies, it is pointed out that they can negatively affect property prices, especially in tourist cities, and even destroy the property market in these areas, due to the fact that investors often buy property in cities with the intention of renting it out (Radvan, 2022). A solution could be to raise taxes on short-term rental properties or to introduce a high tax on second and subsequent flats or houses, as well as to introduce penalties for property not designated as business premises which is used for short-term rentals (Radvan, 2022).

In Slovakia, municipalities may levy a local tax on accommodation based on Act No. 582/2004 Coll. on Local Taxes and Local Fees for Municipal Waste and Small Construction Waste, as Amended. The tax is of a facultative nature and may be imposed by any municipality regardless of its location or natural/tourist-related conditions, subject to which it is paid on temporary accommodation for up to 60 overnight stays (i.e. only short stays) in an accommodation facility, which is defined by law (hotel, motel, hostel, guest house, apartment house, spa house, treatment house, cottage, building for individual recreation, log cabin, bungalow, campsite, family house, apartment in an apartment block, family house or building serving multiple purposes, or any other establishments providing paid temporary accommodation to a natural person). The character of a stay is not reflected, thus not only tourists are affected by the tax.

The rate determination is fully in the competence of a particular municipality, with no upper or lower statutory limits, and may be set differently for different parts of the municipality or its cadastral areas, which enables the municipality to take recreational or tourist zones and other locations of the municipal area into account (Vartašová, 2021). The tax revenue is not earmarked as in the case of, for example, development fees (Vartašová & Červená, 2023, p. 526) and thus is not reinvested in the development of tourist-related benefits at particular sites; this is related to the criticism of rising rates potentially discouraging tourists (Dnes24, 2023). The tax may also be set as a flat rate (upon agreement with accommodation providers, if it suits them better), which should reduce the administrative burden laid upon the providers.

The tax is borne by the accommodated person, but it is collected and remitted to the municipality by the provider of the accommodation and, since December 2021, may also be performed by an electronic platform which acts as an intermediary (AirBnB, Booking.com, etc.), if the accommodation provider and the platform so agree (Simić, 2022). This option, however, is not yet really used in practice (which may be caused by a certain ambiguity in the wording of the law), perhaps apart from in Bratislava, where AirBnB already came to an agreement with the City of Bratislava on such a tax collection in June 2021 (Vartašová et al., 2022).

The statutory regulation imposes many administrative duties upon the accommodation provider (reporting and record-keeping), and these should be specified by the local law of the municipality which imposes the tax (a generally binding regulation), where municipalities should also define the tax rate(s) or the flat rate, the means and time limits for payment of the tax, and tax exemptions or rebates. The municipality should also determine the details and time limit of the obligation to notify the taxpayer, the extent and manner of keeping evidential records, the manner of collecting the tax, the details of tax payment certificates, the time limits and manner of paying the tax to the municipality, and any exemptions or reductions in the tax.

2. Basic legal conditions of the tourist tax in Poland

Pursuant to Art. 17(1)(1)(a) of the Act of 12 January 1991 on Local Taxes and Fees (Act on Local Taxes and Fees 1991), a municipal council may introduce a location fee and a resort fee (both hereinafter referred to as a 'local tax' or a 'tourist tax'). Such a solution, which has functioned only since 1 January 2016, means that both fees are optional, and their levy within the territory of a given municipality is decided by the decision-making body by way of a resolution. While the imposition of a particular fee itself depends on the will of the decision-making body of the municipality, the law introduces certain limitations with regard to the characteristics of the localities in which such fees may actually be levied. The local tax can only be levied in lo-

calities that have favourable climatic characteristics, scenic qualities and conditions that enable people to stay for tourism, recreation or training purposes, or which are located in areas that have been granted the status of a health-resort protection area on the terms set out in the Act of 28 July 2005 on Health Resort Treatment, Health Resorts and Health Resort Protection Areas, and on Health Resort Communes. It should be emphasised that the question of the conditions which need to be met in order for a given site to be granted the status of a health resort or a health-resort protection area has been analysed in the literature on the subject (Dowgier et al., 2021; Lizak, 2021; Potycz, 2019; Sikora, 2014).

Pursuant to Art. 17(5) of the Act on Local Taxes and Fees 1991, the list of places that fulfil the conditions specified in the law (favourable climatic characteristics, a scenic landscape and conditions that enable people to stay for tourist, recreational or educational purposes) where a local tax is levied is normally determined by the municipal council. In Art. 17(3), the legislation obliged the Council of Ministers to issue a decree specifying the minimum conditions to be met by a locality where a local tax may be levied. The obligation of the municipality, pursuant to Art. 17(5), to determine a list of localities which are characterised by favourable climatic characteristics, a scenic landscape and conditions which enable people to stay for tourist, recreational or educational purposes is independent of the actual introduction of the local tax in the territory of a given municipality. A decision to introduce a local tax pursuant to Art. 17(1) of the Act on Local Taxes and Fees 1991 (the introduction of which is at the discretion of the constituting authority) and a list of towns in which this tax may be levied – in this case, the categorical content of Art. 17(5), 'the municipal council determines' – leads to the claim that the establishment of this list is obligatory, even if the municipal council would not be willing to introduce a local tax. However, this does not mean that the list of towns in which a local tax may be levied cannot be established by other normative acts, in the nature of acts of local law other than a resolution of the municipal council.

On 1 January 2006, Art. 17(5) of the Act on Local Taxes and Fees 1991 was amended in such a way that the right to designate the localities where the local fee may be levied and which meet the conditions set out in the Council of Ministers' regulation was granted to community councils. Until now, such localities have been designated by the voivode at the request of the local council after consultation with the Minister of the Environment. Against this background, the problem arose that the existing voivodes' ordinances lost their binding force, a situation which was aggravated by the fact that the Council of Ministers' ordinance, based on the currently valid Art. 17(5) of the Act on Local Taxes and Fees 1991, was published almost two years after the amendment of this law. Aware of the fact that the mandatory authorisation of the Council of Ministers contained in Art. 17(3) of the Act on Local Taxes and Fees 1991 will be issued at an unspecified date, the Ministry of Finance, in a letter dated 21 December 2005, pointed out that until the Council of Ministers issues the

above-mentioned ordinance and the local councils adopt resolutions on the determination of places where the local tax shall be levied, the basis for the collection of the local tax will be the voivode's ordinance issued following the then applicable Art. 17(3) of the Act on Local Taxes and Fees 1991.

3. Problems with the collection of the tourist tax in Zakopane

In Zakopane, the city council determined the collection location of the local tax through their resolution of 27 March 2008, No. XXII/250/2008 on the Determination of the Locality in Which the Local Tax Shall Be Levied (2008 Zakopane Resolution). However, it was annulled by the judgment of the Supreme Administrative Court of 15 March 2018 (II FSK 3579/17). Nevertheless, the tax office in Zakopane assumed that the collection of the local tax should continue, after the Supreme Administrative Court annulment, on the basis of the city council resolution of 26 November 2015, No. XV/245/2015 on the Local Tax (2015 Zakopane Resolution).

This position seems to be in line with the interpretation resulting from the analysis of Art. 47(2) of the Act of 29 July 2005 on the Amendment of Certain Legal Acts in Connection with Changes in the Division of Tasks and Territorial Competencies (Act of 2005). According to this provision, local legal acts (in this case, Regulation No. 227/a of the Małopolska Voivode of 8 May 2001 on the Determination of Cities in the Małopolska Voivodeship in Which a Local Tax Shall Be Levied (the Małopolska Voivode Regulation of 2001)) issued on the basis of the provisions amended by the Act of 2005 within the scope of the tasks and competences transferred by that Act shall remain in force until the authorities taking over those tasks and competences issue new local legal acts.

There is no doubt about the meaning of this provision. It refers to acts of local law that remain in force until new acts of local law are enacted, and according to Art. 87(2) of the Constitution of the Republic of Poland, acts of local law are sources of law generally applicable in the sphere of activity of the bodies that adopted them. They are issued by local government bodies on the basis of and within the limits of the powers contained in the act (Art. 94 of the Constitution). In this context, it is obvious that an act of local law is an ordinance of a voivode, as well as a resolution of the local council. With regard to the legal acts regulating the local tax, the provision of Art. 47(2) of the Act of 2005 refers to the voivode's ordinances on determining where a local tax is levied in a given voivodeship.

However, this regulation did not refer in any way to the Council of Ministers' regulation on the minimum conditions that a locality should fulfil in order to be able to levy a local tax. It is impossible to recognise that Art. 47(2) of the Act of 2005 refers to the above-mentioned regulation of the Council of Ministers. This leads to the conclusion that until the local council issues an act of local law on the local fee (a resolu-

tion of the local council based on Art. 17(5) of the Act on employment in the wording in force since 2006), another act of local law is in force (a regulation of the voivode issued on the basis of Art. 17(3) of the Act on employment in the wording in force until the end of 2005). In view of this, the interpretation of the Małopolska Voivode Regulation of 2001 remains in force only until the adoption of the Council of Ministers' Regulation on the Minimum Conditions to be fulfilled by the Town where the Local Tax may be Levied. The ordinance of the Council of Ministers is not a local law referred to in the above-mentioned Art. 47(2) of the Act of 2005.

The Act of 2005 amended Art. 17(3) of the Act on Local Taxes and Fees 1991, which included the authorisation for the voivode to establish a list of towns in which a local tax may be levied, after consultation with the Minister of the Environment. It should be emphasised that the voivodes' decree was issued on the basis of legal authorisation, and only after it was issued did the local council adopt a possible decision on the local tax. Art. 47(2) of the Act of 2005 thus stipulates that the voivodes' ordinances, including the ordinance about the list of places where the local tax may be levied, remain in force until new local acts are issued by the authorities taking over the relevant tasks and powers. In this case, and in others, it is crucial that no legal act sets a time limit (a specific date) for the validity of the Małopolska Voivode's regulations. They will remain in force as long as the local council does not revoke them in accordance with Art. 17(5) of the Act on Local Taxes and Fees 1991, on new acts of local law, i.e. resolutions on the determination of the locality in which the local tax is levied.

In this context, pursuant to Art. 47(2) of the Act of 2005, the Małopolska Voivode Regulation of 2001 remains in force until the entry into force of the local council's resolution (adopted on the basis of the Act on Local Taxes and Fees 1991, taking into account the Council of Ministers' regulation on minimum conditions) determining the list of towns where the local tax is levied. As Dowgier (2016, p. 74) rightly points out, there are no provisions that would force local councils to adopt new resolutions on the list of localities in line with the conditions set out in the Council of Ministers' regulation. Therefore, it cannot be excluded that, many years after the change in the rules for determining the list of localities in which the local tax may be levied, communities (in this case the municipality of Zakopane) may continue to levy the local tax in the localities listed in the Małopolska Voivode Regulation of 2001. Such a situation concerns, among others, cases in which the fee could not be collected in those towns covered by that regulation due to the need to comply with the conditions set out in the Council of Ministers' decree. As a result, it should be noted that the failure of local councils to take decisions on the basis of Art. 17(5) of the Act on Local Taxes and Fees 1991, after the entry into force of the ordinance of the Council of Ministers of 18 December 2007 on the conditions to be fulfilled by a locality where a local fee may be levied, means that the 'old' voivodes' regulations apply in this respect.

The above position is also reflected in court rulings, where it is pointed out that the legislature may postpone the application of new legal regulations by providing for a *vacatio legis* or by introducing a transitional provision postponing the effects of the entry into force of a given legal regulation. Transitional provisions may maintain previous rules after an amendment enters into force, especially when it comes to the legal assessment of facts that occurred before the entry into force. It should also be emphasised that the form of the rules of intertemporal law depends on the legislature, which is free to formulate provisions within the existing legal order. Thus, if the legislature deems it necessary, in certain cases relating to past, incomplete or ongoing events after the entry into force of the new rules, it applies the existing rules or other rules than those introduced by the new act to them (so as not to violate the principle of non-retroactivity) by means of transitional, adjusting or introductory provisions. Therefore, if the transitional provision refers to the application of the 'old' rules (before the amendment), these rules cannot be omitted by referring to the purposive interpretation of the rules resulting from the newly amended law. Such an approach is contrary to the constitutional principle of the rule of law.

In the present case, such an intertemporal norm is contained in Art. 47(2) of the Act of 2005, the interpretation of which allows the correct resolution of the dispute. The powers transferred by the amending act in connection with the changes in the distribution of local government tasks and powers concern the determination of the cities in which the local tax is levied. Prior to the amendment to the Act on Local Taxes and Fees 1991, the determination of the cities in which the local tax was levied, in accordance with the criteria set out in Art. 17(1) of the Act on Local Taxes and Fees 1991, was within the competence of the relevant voivode. The Act of 2005 transferred the power to determine the cities in which the local tax is levied to the municipal council. Therefore, the acts of local law referred to in Art. 47(2) of the Act of 2005, within the scope of competencies related to the local tax, are the voivodes' ordinances which determine the places where the tax is levied, pursuant to Art. 17(3) of the Act on Local Taxes and Fees 1991 in the wording valid prior to 1 January 2006, i.e. before the date of entry into force of the Act of 2005. According to the provision of Art. 47(2) of the Act of 2005, it follows that the voivodes' ordinances which establish the list of municipalities in which the local tax is levied shall remain in force until the council of the respective municipality adopts a resolution on the determination of the municipalities in which the local tax is levied pursuant to Art. 17(5) of the Act on Local Taxes and Fees 1991. As mentioned above, the legislature did not specify the maximum period of validity for voivodes' decrees, nor did it impose an obligation on local councils to adopt resolutions determining the localities in which the local tax is to be levied within a certain period. The validity of the voivodes' ordinances determining the places where the local fee is to be collected depends solely on the adoption by the council of a local act determining the places where such a fee is to be collected. It follows that, despite the change in the legal status at the legislative level, the voivodes'

regulations concerning the locations of local fee collection may remain in force as long as the local council does not exercise its powers pursuant to Art. 17(5) of the Act on Local Taxes and Fees 1991.

It should be emphasised that the adoption of local law, as referred to in Art. 47(2) of the Act of 2005, is not only a situation in which the municipal council does not take any legislative initiative at all but is also a case in which a resolution has been adopted which is then removed from legal circulation due to its annulment; this will be discussed in more detail below. In connection with the application of the Małopolska Voivode Regulation of 2001, the relevant term used in Art. 47(2) of the Act of 2005 is 'shall remain in force until new acts of local law are issued by the authorities taking over the tasks and competencies', and in particular the verb 'to issue'.

Unravelling this concept requires the application of the rules of legal interpretation. It should be emphasised that jurisprudence and scholarship have developed many different ways of interpreting the law, which can be divided into the linguistic and the non-linguistic. The latter category includes teleological interpretation, also called theological interpretation, functional interpretation and systemic or systematic interpretation. Some legal scholars, however, consider it unjustified to include systemic interpretation among the non-linguistic interpretations, since it requires determining the meaning of the provision in the context in which it is found, i.e. taking into account its location in a normative act and that act's location within the legal system (Brzeziński, 2001; Mastalski, 2007; Nowacki & Tabor, 1993; Smoktunowicz & Mieszkowski, 1998). However, without entering into doctrinal disputes on the classification of a given type of interpretation as linguistic or non-linguistic, it should be generally stated that in the interpretation of legal provisions, including tax law, it is justified to use linguistic, systemic and teleological interpretation. These do not compete with each other but interact, in the sense that all of them should be used to determine the true meaning of the provision. It should also be emphasised that the interpretation of tax legislation is a complex process; therefore, it should not be reduced to a search for the meaning of individual words – of a philological nature – but should search for the real meaning of legal provisions, which requires their connection with the legal system to which those provisions belong and the purpose of the legal regulation. However, if the legislation does not refer to another legal act when determining the meaning of a given provision, the process of legal interpretation should begin with linguistic interpretation, which is fundamental in all areas of law because language (words and grammar) is the only carrier of information about the will of the legislature, and is a form of communication that reaches the addressees of legal norms.

To issue is to establish, enact, announce, or to inform the public about something; a decision, opinion, statute, resolution or proclamation can be issued. Colloquially, the term has a very broad meaning. However, taking into account the systemic aspect, it should be assumed that the phrase 'until the adoption of new acts of local

law' means the adoption by a municipal council, on the basis of Art. 17(5) of the Act on Local Taxes and Fees 1991, of resolutions on the establishment of towns in accordance with the conditions set out in the provisions adopted on the basis of Art. 17(3)(4) of the Act on Local Taxes and Fees 1991. However, it should be noted that pursuant to Art. 88(1) of the Constitution of the Republic of Poland, the entry into force of the acts listed therein (including acts of local law) is through their promulgation. Therefore, a condition for a legal regulation's entry into force is not only its adoption by a competent authority in the manner prescribed by law but also its promulgation. The promulgation (adoption) of a decision includes both the mere fact of its adoption by the council and its proper publication. Only the fulfilment of these two conditions determines the entry of a given act into the legal order (Wierczyński, 2008).

Pursuant to Art. 87(2) of the Polish Constitution, the sources of generally applicable law in the country are acts of local law in the sphere of activity of the authority which enacted them. An act of local law must be promulgated in order to be binding on the territory of a particular local government unit, which is undoubtedly the case under Art. 88(2) of the Constitution of the Republic of Poland. The rules and procedures for the promulgation of regulatory legal acts, including local legal acts, are specified in the Act on Promulgation of Legislative Acts, Art. 4 of which stipulates that normative acts containing provisions of general application, which are published in the official gazette, enter into force 14 days after their publication unless a longer period is stipulated. In particularly justified cases, it is possible to give retroactive effect to an act of local law, provided that this is not contrary to the principles of a democratic state governed by law.

From the provisions cited, it can be concluded that the condition for the entry into force of local law is its promulgation. Thus, there is no decision in the legal order of a given municipality that has not been duly promulgated. This also follows from Art. 2(1) of the Act on Promulgation of Legislative Acts. The official promulgation of a local legal act is one of the essential elements of the system ensuring the transparency of legal norms. In constitutional states, of which Poland is one, these norms are expressed in legal regulations, which are grouped together in legal acts. Therefore, the official promulgation of normative acts is one of the basic ways of implementing the openness of law. The competent state authorities must make it possible to familiarise oneself with the content of the legal provisions in force so that, for example, no one can plead ignorance of the law. In this sense, the requirement of official publication of normative acts serves to ensure the rule of law. Since the law is open and its content is generally available, citizens have a real opportunity to fulfil their obligation to respect the law.

In the case at hand, there is no doubt that the 2008 Zakopane Resolution was duly published. However, according to the ruling of the Supreme Administrative Court of 15 March 2018 (II FSK 3579/17), it was invalid. As the panel of judges rightly states in that judgment, 'the annulment of the contested resolution means its

removal from the legal order with *ex tunc* effect; it has no legal effect from the outset and is treated as non-existent'. However, the further justification of this judgment, in which the Supreme Administrative Court excludes the application of the Małopolska Voivode Regulation of 2001 and consequently negates the application of Art. 47(2) of the Act of 2005, is incomprehensible. The *ex tunc* effect of the invalidity of the 2008 Zakopane Resolution renders it invalid from the outset, i.e. as if it had not been adopted (issued).

Since, as stated by the Supreme Administrative Court, the 2008 Zakopane Resolution is treated as non-existent, this resolution was not in legal circulation at all, i.e. it should be considered that it was not issued. Taking this into account, the above considerations regarding the conditions for the entry into force of acts of local law referred to in Art. 47(2) of the Act of 2005 cannot be limited to the adoption of a resolution. This seems to be the view of the panel of judges of the Supreme Administrative Court, because 'the resolution does not produce legal effects' cannot be limited only to the annulment of the resolution in the sense of the lack of legal effects (the material effects that it produces), but also to the entire legislative process (adoption of the resolution). The annulment of a resolution invalidates both the act of local law and the procedure for its adoption. This means that, as a result of the annulment of the 2008 Zakopane Resolution, no act of local law which would take over the duties and powers of the Małopolska Voivode was adopted by the city of Zakopane. As a result, the list of cities and towns where the local tax is levied until a new resolution is adopted is based on Art. 17(5) of the Act on the list of towns and municipalities. In such a situation, it is impossible to speak of a violation of the provisions of the Constitution of the Republic of Poland, in particular its Arts. 94 and 217. The approach adopted by the legislature in determining the cities in which the local tax is levied is consistent and logical.

When arguing for the legitimacy of the local tax, it is impossible to ignore the constitutional provision that guarantees local government units financial resources for the performance of their statutory tasks. According to Art. 16(2) of the Constitution, local government participates in the exercise of public authority, and this is not possible without adequate financial resources for communities, districts and voivodeships. For these reasons, the following provisions of the Constitution guarantee these entities a share in public revenues in accordance with the tasks assigned to them. The revenues of local government units include their own revenues, as well as general and earmarked subsidies from the state budget (Art. 167(1)(2) of the Constitution). The attribute of their 'own' (local) taxes and levies is the right to determine their amount within the scope of the law and to formulate tax exemptions and reliefs from an objective point of view. The local tax is the revenue of the Zakopane community. The essence of a strong state is a strong local government which, in turn, becomes dysfunctional without the provision of sufficient income. That is why, in Art. 47(2) of the Act of 2005, the legislature introduced a norm which allows for the appli-

cation of existing local acts – the Małopolska Voivode Regulation of 2001. It should be emphasised that this regulation is of an indefinite nature.

As a result of the Supreme Administrative Court's ruling, the Zakopane municipality would clearly be deprived of its constitutionally guaranteed rights (financial independence). This situation would violate not only constitutional provisions but also the principle of legal protection of local self-government, as expressed in the provisions of the European Charter of Local Self-Government (ECLS), which Poland was one of the few countries to ratify in its entirety in 1993; a similar situation is present in Slovakia, but not in the Czech Republic (Radvan et al., 2018; Románová et al., 2019, pp. 597 & 603). The ECLS is a ratified international agreement that is part of the Polish legal system and concerns local government units. According to Art. 9 of the European Convention on Human Rights, local authorities have the right, within the framework of national economic policy, to have sufficient financial resources of their own, which they can freely dispose of in the exercise of their powers. Municipalities have guaranteed tax powers, albeit limited, but they have the right to enact (or not) legal regulations in the field of taxation, to collect tax revenues for their benefit and to manage these revenues.

In this context, the 'mechanism' of the provisions on the designation of towns where the local tax is levied is fully understandable. If a resolution of the local council on the determination of the localities where the local tax is levied has been adopted, but this resolution has been declared invalid, then it is not in legal circulation, and therefore no local law has been adopted establishing those localities. This solution guarantees that the municipalities will be able to levy their statutory fee in connection with the application of Art. 47(2) of the Act of 2005 and the corresponding regulation of the voivode issued on the basis of Art. 17(3) of the Act on Local Taxes and Fees 1991 in the wording valid until the end of 2005. The violation of constitutional provisions in the field of individual rights and the determination of public charges could only be discussed if there were no transitional provisions, i.e. in Art. 47(2) of the 2005 Act. However, this is not the case (Bobrus-Nowińska, 2019).

The fact that Art. 2 of the 2015 Zakopane Resolution does not affect the possibility of levying the local tax refers to the 2008 Zakopane Resolution. Firstly, the annulment of the 2008 Zakopane Resolution does not annul the 2015 Zakopane Resolution. Secondly, the annulment of the former does not affect the validity of the latter, since in this respect, pursuant to Art. 47(2) of the Act of 2005, the Małopolska Voivode Regulation of 2001 applies. The annulment of the 2008 Zakopane Resolution means that the part of the provision of Art. 2 *of* the 2015 Resolution has no legal effect. In this respect, the Małopolska Voivode Regulation of 2001, which has not been repealed, is legally valid; the basis for its application is Art. 47(2) of the Act of 2005.

In addition, the 2015 Zakopane Resolution is an act of local law and has *erga omnes* effect. It was adopted on the basis of current legal regulations and its application is in no way affected by the annulment of the 2008 Zakopane Resolution. The

2015 Zakopane Resolution is an act of local law and is self-contained in the sense that its application does not depend on the resolution about the list of places where the local fee may be collected, as in this respect the Małopolska Voivode Regulation of 2001 applies, which does not specify the period of its application. The act will be applied until the relevant resolution of the Zakopane city council is adopted and enters into force (will not be annulled).

Conclusion

In the Polish legal system, the possibility of introducing a tourist tax (for local and health resorts) depends, among other things, on clean air. However, the research shows that the legal solutions in Poland are flawed; they make it possible to charge a tourist fee even if the permissible level of air pollution is exceeded. This leads to the claim that the legal solutions in this area should be changed. Maintaining the solutions currently in force in Poland leads to a situation in which legal fictions are allowed. Solutions should be introduced that do not make the tourist tax dependent on air pollution. It should be emphasised that both in the Czech Republic and in Slovakia, the tourist tax does not depend in any way on the level of air pollution in places where the tourist tax is collected. The characteristic feature of this tax should be that it is levied on all types of stays, regardless of the purpose of the stay, the type of contract between the guest and the accommodation provider, or the place where the guest stays.

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A Candle in the Wind? The Tax Autonomy of Hungarian Municipalities in Light of the Coronavirus Pandemic

Abstract: This article aims to offer a brief introduction to the system of local tax autonomy in Hungary, primarily by accentuating its peculiar features compared to other systems used in the region. Particular attention is paid to the local business tax, a less typical source of local revenue, which constitutes the backbone of the Hungarian system, and to the relatively recently introduced possibility for local authorities to levy so-called 'settlement taxes' on an open-list basis. The author then describes how the coronavirus pandemic and the measures aimed at mitigating its economic consequences affected local governments' financing mechanism and fiscal capacity. Finally, by drawing conclusions from these occurrences, the resilience of local tax autonomy in Hungary is evaluated.
Keywords: tax autonomy, fiscal autonomy, Hungary, local government, local taxes

Introduction

According to the OECD, tax autonomy refers to the ability of sub-central governments to make their own decisions about taxation (OECD, 2020, p. 3). The broader the local or regional government's possibilities are in introducing its own taxes and determining their base, rate, and other elements, the higher the degree of tax autonomy is. Tax autonomy is inherently connected to sub-central governments' fiscal autonomy – in fact, it can be regarded as its key element. According to J. S. H. Hunter (1977, p. 45), the essence of fiscal autonomy is that a given tier of government, within its sphere of competence, must be reasonably free to vary its revenues and expenditures. Similarly to others (see Blöchliger & King, 2006, p. 9), Hunter also highlighted the principal role of taxes among different revenue types. Yet other authors go even

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further by practically associating fiscal autonomy with tax autonomy. For example, Hooghe et al. (2016, p. 28) define fiscal autonomy as 'the extent to which a regional government can independently tax its population'. In any case, one can safely conclude that taxing powers are the most apparent manifestation of local fiscal autonomy.

During the constitutional reform carried out after the fall of the communist regime in Hungary, a strong emphasis was placed on decentralization. Local government was seen as having a natural legal character (Kecső, 2016a, p. 205). In line with this, rules aimed at protecting local self-government, including financial safeguards, found their way into the thoroughly amended Hungarian Constitution of 1949.[1] Its Article 42 guaranteed the right of local communities to self-government, while Article 44/A stipulated that local representative bodies shall, among other things, independently manage local government revenues, be entitled to their own revenues, and determine the types and rates of local taxes under the framework established by law.

Still, the detailed constitutional regulation could not secure the proper functioning of local governments (Kecső, 2016a, p. 217). While the reasons for this are out of the scope of this article, the experience contributed to the revision of the system of local governance, and when the current constitution, the Fundamental Law of Hungary, was adopted, many of the rules mentioned above fell out of the constitutional framework. Unlike the previous constitution, the Fundamental Law does not refer to the right of self-government for local communities nor explicitly mention their own revenues. However, one crucial feature of local fiscal autonomy was kept: the authority of local governments to decide on the types and rates of local taxes within the framework of statutes (Article 32, para. 1).

The right to levy local taxes therefore currently enjoys a unique position of being guaranteed at a constitutional level. Accordingly, statistics suggest that this right is also implemented in practice: total revenues from local taxes represented 27% of all the annual budgetary revenues of Hungarian local governments (excluding loans) in 2017 (Parliament of Hungary, 2018). Yet, as shown below, most of these revenues stem from a single source, a fact which carries inherent risks. Extensive reliance on one specific type of tax can adversely affect the stability of local tax autonomy.

Building upon this presumption, I formed a hypothesis that the present imbalanced system of local tax autonomy in Hungary lacks resilience against external shocks. This hypothesis will be tested by studying the impact of the coronavirus pandemic on the local tax revenues of Hungarian municipalities, which will require the description of the measures introduced in response to the pandemic. Consequently, the methods of analysis and synthesis will be used to draw conclusions regarding

1 After the fall of the communist regime in Hungary, the constitution adopted in the early years of communist rule was not formally substituted with a new document. Instead, it underwent substantial changes to address the social and political changes of 1989 and the years that followed.

their impact, along with quantitative methods involving a statistical survey of tax revenues in selected municipalities. However, to provide necessary context, the foundations and central characteristics of Hungarian local tax autonomy will first need to be concisely described and analysed, also using some numerical indicators.

1. Local taxes in Hungary

The above-mentioned constitutional rule on local taxation is embodied on the statutory level in Act No. C/1990 on Local Taxes (the Act on Local Taxes). Its first article entrusts local authorities with the competence to introduce local and settlement taxes within their administrative territories. While such a distinction may cause confusion to someone who is not familiar with the Hungarian regulation, both local and settlement taxes roughly correspond to what legal theory conceptualizes under the term 'local taxes'.[2] The main difference between the two categories lies in the degree to which local governments can influence the elements of these taxes. Consequently, when it comes to Hungary, it is helpful to distinguish between local taxes in a narrower sense, referring to those types of taxes which are labelled as 'local' by the Act and which should be distinguished from settlement taxes; and local taxes in a broader sense, as a larger group of taxes that encompass local taxes in a narrower sense and settlement taxes as well.

Sections 6 and 7 of the Act delimit the taxing powers of local authorities concerning local taxes in the narrower sense. According to these provisions, local governments are, among other things, authorized to decide whether they wish to introduce a specific type of local tax enumerated by the Act, establish their exact rate considering the maximal rate set out in the Act, and grant additional tax exemptions and allowances besides those listed in the Act. Accordingly, in the case of local taxes in the narrower sense, subjects and objects of taxation as well as tax bases are centrally determined by the legislature. Besides, local governments are bound by maximal limits on tax rates, enumerated in the Act, and are obliged to respect the exemptions and allowances stipulated by statutory provisions. According to Section 9 of the Act, local taxes in the narrower sense are administered by the tax authority of the municipality which decided to introduce them on its territory.

Despite the above limitations, Hungarian local taxes in a narrower sense can be considered 'local' under Article 9 para. 3 of the European Charter of Local Self-Government, as they fulfil the criteria formulated within the framework of the Charter's

2 While there is no broad consensus on the precise definition of local taxes, one can quite safely determine the essential qualities of taxes operational in practice that can be categorized as local. According to Radvan (2017, p. 12), local taxes are financial levies determined to the municipal budget that can, at least in a certain way, be influenced by the municipality (e.g. in terms of the tax base, tax rate, or correction elements).

monitoring process: they constitute local revenue, they are levied by the local authorities themselves, and their rate can be, within certain boundaries, determined by local governments in municipal by-laws, along with some correction elements (Wienen, 2020, pp. 36–37).

The Act lists five types of local tax in the narrower sense: buildings tax, land tax, local (communal) tax for private individuals, tourist tax, and local business tax. The list is exhaustive; Hungarian municipalities cannot introduce other local taxes in the narrower sense. Buildings tax can be levied on buildings or their parts serving residential and non-residential purposes, while land tax may be charged for plots of land. Local (communal) tax for private individuals may only be imposed on individuals owning buildings or plots of land and individuals renting residential premises from non-natural persons.[3] Tourist tax is paid by non-permanent residents spending at least one guest night within the municipality's jurisdiction, while local business tax may be levied on business activity carried out within the administrative territory of the municipality.

It is not this paper's goal to thoroughly describe all five types of the above-mentioned local taxes in the narrower sense, as spatial constraints do not allow this. If one aims to outline the cornerstones of the Hungarian system, this is not even truly necessary, as one type of local tax dwarfs all the others in terms of significance: the local business tax. Its impact can be illustrated by comparing the share of the revenue from different types of local taxes: in 2019, revenues from local business tax accounted for 81.2% of total revenues from all kinds of local taxes in the narrower sense. It was followed by the buildings tax at 13.1%, land tax at only 2.5%, tourist tax at 1.7%, and the local (communal) tax for private individuals at 1.5% (Hungarian Central Statistical Office, 2022). For this reason, I have chosen to describe only the local business tax, as, from a systemic perspective, this is the only local tax having a genuinely significant impact on the system of local fiscal autonomy in Hungary. The paragraphs below will thus be dedicated to this type of local tax.

2. Local business tax

As shown above, local business tax constitutes the backbone of the Hungarian system of local taxation. The use of a local tax on business is a relatively uncommon method of local government financing in the region. The German *Gewerbesteuer* is based on a similar concept; nevertheless, there are notable differences between the Hungarian and German solutions, especially concerning their tax base (Kecső, 2016a, p. 384). Thanks to the peculiar definition of its tax base, the Hungarian local business tax is somewhere between a profit and a turnover tax (Kecső & Tombor, 2020, p. 57).

3 Buildings are understood as objects which would be taxable by buildings tax.

The object of the Hungarian local business tax is business activity carried out within the municipality's territory of jurisdiction. The tax is paid by entrepreneurs and enterprises conducting such activity. To simplify the application of the tax, Section 37 of the Act on Local Taxes establishes a legal presumption, according to which the entrepreneur or enterprise is carrying out a business activity within the municipality's area of jurisdiction if he/she/it has a seat or an establishment within this territory, regardless of whether the actual activity is carried out in whole or in part outside the mentioned premises.[4]

At the time of its introduction into the Hungarian tax system in 1991, the local business tax was a tax on the annual net revenue from the products sold or the services provided. At that time, it was not possible to deduct any expenses from the tax base. However, over the years, several options for deducting certain expenses from the net revenue gradually appeared among the rules on local business tax (Kecső & Tombor, 2020, pp. 41–47). As of today, the tax base of local business tax is the net revenue, which may be lowered by the following expenses: a) the combined sum of the purchase value of goods sold and the value of services mediated; b) the value of subcontracted performances; c) the cost of materials; and d) the direct costs of basic research, applied research, and experimental development accounted for in the given tax year. It is essential to add that the deduction of expenses according to point a) (purchase value of goods and mediated services) is progressively limited: the higher the total value of expenses under point a), the lower the percentage of what can be applied as a deduction. This measure negatively affects businesses that rely greatly on the resale of goods and services, such as retailers or energy suppliers (Kecső, 2016a, p. 386).

The Act specifies another, special way of determining the tax base. Small businesses meeting the requirements set by paragraph 1 of Section 39/A may choose to determine their tax base using fixed amounts listed in the Act. Depending on their actual annual revenue, businesses are divided into groups encompassing a certain range of revenues. One fictive tax-base value is assigned to each group, with each value being significantly lower than the minimal actual revenue falling into the given group. This solution largely simplifies the tax-base assessment and practically establishes the possibility of a lump-sum tax for small businesses.

As stated above, the Act on Local Taxes specifies only the upper limit of the tax rate that local authorities can determine. In the case of the local business tax, this

4 For the purposes of the Act, establishment *(telephely)* means the permanent business establishment (property) of the taxable person (regardless of the legal title of use) where s/he carries out business activities in whole or in part, including, in particular, a factory, plant, workshop, warehouse, mine, oil or natural gas well, water well, wind or solar power plant, office, branch, representative office, agricultural land, rented or leased property, and public road or railway track that can be used in return for compensation (Section 52, subpara. 31 of the Act).

limit is set at 2% of the annual tax base. However, it is important to add that while the municipalities formally have the freedom to decide on the tax rate anywhere between 0% and 2%, this ability is severely restricted in practice. The reason is that the rules on the allocation of central transfers are based on the concept of the so-called 'taxing power capacity', calculated from the annual tax base multiplied by a hypothetic tax rate of 1.4% (Ministry of Finance, 2023). This means that if the local business tax rate is lower than 1.4%, the given municipality will not receive more central transfers than it would have if it used the 1.4% rate. The only thing a municipality would achieve by a lower rate is thus lowering of its own revenues. Consequently, there is no point in setting the local business tax rate outside the scope of 1.4% to 2%.

While local authorities may grant certain exemptions and allowances from the local business tax, their leeway in this regard is also limited by the Act on Local Taxes. The most significant restriction is that exemptions or allowances cannot be granted to businesses whose tax base exceeds HUF 2.5 million in the given year. The scope of exemptions and allowances granted by local authorities must, moreover, be identical for all businesses. This means that, in practice, municipalities can only grant exemptions and allowances for smaller firms in a sector-neutral manner (Kecső, 2016a, p. 387).

Section 36/A of the Act on Local Taxes specifies that the revenue from local business tax should primarily be used for the performance of tasks connected to the operation of the local public transport system. If the revenue exceeds the amount necessary for performing these tasks, the excess amount should be spent on the provision of municipal social services. The provision expressly prohibits the payment of municipal employees' personal benefits (and related contributions) from local business tax revenues. This measure can be seen as a protection against economic mismanagement of self-governing units (Kecső, 2016a, p. 388).

One important asset of the local business tax is that it can create an effective link between local revenues and the level of economic activity in a municipal territory. A local tax akin to the local business tax gives the residents, who are bearing any negative consequences of the operation of local industrial and business establishments, their fair share of the economic benefits these activities may yield. Such a link is much weaker in the case of local tax systems primarily relying on property taxes. On the other hand, while local business taxes may prove very profitable in times of economic prosperity, they are volatile due to their dependency on commercial success. Excessive reliance on these types of taxes renders the budgets of municipalities far more vulnerable to economic hardships compared to property taxes, which tend to be more stable in such circumstances. Another substantial disadvantage is that without extensive compensation schemes, local business tax aggravates the economic differences between self-governing units. This can be illustrated by statistical data from Hungary: even though the local business tax was introduced by 91.2% of all municipalities as of 2021, 90% of all revenues from local taxes came from only 8.5% of mu-

nicipalities (State Audit Office, 2021, pp. 12, 19–20). For these reasons, discussions on how to grant local governments additional possibilities of taxation have emerged in Hungary, mainly over the last decade.

3. Settlement taxes

Concrete proposals on allowing municipalities to introduce local taxes on an open-list basis appeared at the beginning of the 2010s (Kecső, 2016b, p. 20). However, it was not until 2015 that the final regulation on this possibility went into effect. The respective amendment introduced Section 1/A into the Act on Local Taxes, which stipulated that local authorities may introduce by decree settlement taxes that are not prohibited by law. This negative definition embodies the open-list approach to local governments' tax-levying power, as, unlike in the case of local taxes in the narrower sense, the legislature does not positively specify tax elements for settlement taxes (Borsa et al., 2022, p. 26). Moreover, paragraph 2 of Section 1/A clarifies that, besides Section 1/A itself, only three other provisions of the Act on Local Taxes apply to settlement taxes: one granting local governments the right to levy taxes, one on the obligation to provide information on taxes introduced by them, and one establishing the possibility of regulating certain procedural matters not regulated by general laws in municipal by-laws.

However, Section 1/Aa of the Act also sets various important limitations concerning settlement taxes. One of them is the rule that settlement tax cannot be levied on a taxable object already falling under the scope of a public burden regulated by law. Another is that the state, municipalities, organizations, entrepreneurs, and enterprises cannot be subjects of settlement taxes. These restrictions significantly limit the attractivity of settlement taxes in practice.

The limitation on the object of taxation leaves local authorities with minimal leeway in establishing new forms of taxes, since almost all possible sources of taxation are already subject to some payment obligation (Borsa et al., 2022, p. 26). Moreover, no legislative guidance exists as to what exactly falls within the scope of public burdens (Kecső, 2016b, p. 21), causing uncertainty when considering the introduction of a new settlement tax. In addition, according to the opinion of the Curia (the Supreme Court of Hungary), settlement taxes cannot be used to circumvent local taxes in the narrower sense and eliminate the limitations specified by the Act in relation to them (Decision of the Curia's Municipal Council 2017). The exclusion of entrepreneurs and enterprises from the circle of possible tax subjects is also a significant limiting factor, as it rules out the taxation of the most 'profitable' group of taxpayers.

The Act also binds local authorities as to the purposes for which the revenue from settlement taxes can be used. According to the fifth paragraph of Section 1/A, these include development purposes and the financing of social services falling within the

competence of local authorities. While the term 'development purposes' may well be interpreted broadly, the restriction prevents local authorities from financing their operational costs and public services (excluding social ones) from settlement taxes (see Borsa et al., 2022, p. 30). According to Bordás (2015, p. 7), unrestricted use of revenues from settlement taxes could increase the motivation of municipalities to pursue financial independence much more.

Settlement taxes were introduced to the Hungarian tax system to tackle the uneven structure of local tax revenues and the general lack of own local government resources by providing additional revenue-generating possibilities. After eight years of existence, it is clear that settlement taxes have failed to provide local authorities with an impactful volume of additional resources (Bordás, 2021). Since their enactment, the share of Hungarian municipalities that have decided to introduce at least one settlement tax has hovered around 3% (State Audit Office, 2021, p. 13). Their share among local tax revenues in 2019 accounted for 0.07%, while 99.93% came from local taxes in the narrower sense (Hungarian Central Statistical Office, 2022). Moreover, since a peak in 2017, there has been a significant decline in the total sum of revenues from settlement taxes, signalling that local governments may have decided to look for alternative ways of securing additional resources (Borsa et al., 2022, p. 29).

The reasons for this failure may be found in the restrictions mentioned above on objects, subjects, and revenue usage, but also in the imprecise legislative framework. Authors point out that the list of provisions applicable to settlement taxes is too narrow, causing uncertainty and leaving out various vital rules, such as the prohibition on increasing the tax burden during a given taxable period (Kecső, 2016b, p. 23) or the definition of a public burden (Bordás, 2021; Kecső, 2016b, p. 23). While the unorthodox idea of introducing local taxes on an open-list basis strengthens local fiscal autonomy, and certain municipalities may indeed profit from this possibility, an unclear legislative framework may cause harm in the form of confusion and instability, which can ultimately outweigh the benefits.[5] Enough time has passed to come to the recognition that it is necessary either to review the regulation of settlement taxes or to reconsider whether their existence is truly worthwhile.

4. Measures affecting the tax autonomy of Hungarian municipalities during the COVID-19 pandemic

The coronavirus pandemic and the measures aimed at mitigating its consequences disrupted the evolution of local tax autonomy by bringing rapid and severe changes into the system. Numerous measures implemented by the central govern-

5 The concept of open-list taxation is exceptional among the countries in the region (Borsa et al., 2022, p. 31). For a comparison between the countries of the Visegrád Group, see Hulkó (2021).

ment to gather additional funds for combatting the pandemic or easing the financial pressure on certain subjects negatively affected local governments' financial autonomy and overall economic condition.

One such measure affected the primary income source from shared taxes, the motor vehicle tax. Before the pandemic, 40% of the revenue from this tax was redistributed to municipalities, who were responsible for its collection. These resources were valuable to municipalities, as there were no restrictions on how it was spent (Siket, 2021, p. 209). The Governmental Decree No. 92/2020 assigned the revenue from motor vehicle tax to a special fund for combatting the epidemic. With this step, local authorities lost all notable revenue from shared taxes. The legality of this measure was unsuccessfully questioned before the Hungarian Constitutional Court (Decision of the Constitutional Court, 2020; Rámhápné Radics, 2023, pp. 91–92). Despite the conclusion of the epidemiological emergency, the provision that allocated a share of motor vehicle tax revenues to municipalities was not reinstated in the Central Budget Act for 2023, suggesting that the measure may be becoming permanent.

Considering the difficult situation in the tourist industry, the government also suspended the tourist tax by Decree No. 140/2020. This measure directly interfered with local governments' tax autonomy, given that the tourist tax is a local tax in the narrower sense listed by the Act on Local Taxes. Nor were other local taxes bypassed. Governmental Decree No. 535/2020 prohibited local authorities from raising the tax rates of all local and settlement taxes during the tax years of 2021 and 2022 above the rate that was applicable on 2 December 2020. All exemptions and allowances effective on this day had to be guaranteed during this period, while there was a legislative ban on introducing any new types of local or settlement taxes.

A distinct measure targeted the linchpin of Hungarian local tax autonomy. With Decree No. 639/2020, the central government set the maximum tax rate of local business tax for small and medium-sized businesses at 1%. This step significantly limited the local tax nature of the local business tax and was particularly painful for local authorities given its budgetary impact. The measure was effective until the end of 2022 (Krokovay & Eurofound, 2021).

While the local business tax reduction and cap concerned smaller businesses, another proposal brought worries to municipalities playing host to sizeable enterprises. Governmental Decree No. 135/2020 authorized the central government to declare by decree so-called 'special economic zones' around objects of strategic economic importance. Where such a zone was declared, the competencies of the local government, along with the property necessary for their fulfilment, were transferred to the regional government, including the authority to levy local taxes. The revenue from these taxes was also diverted from the municipality to the region, leaving the former with fewer resources, although the general tasks and responsibilities of local authorities were left untouched.

The governmental decree on special economic zones has since been replaced by a statute (the Act on the Special Economic Zone, 2020), and the rules connected to taxation were integrated into the Act on Local Taxes. With this, the temporary measures initially labelled as necessary for stabilizing the national economy in times of emergency gained a permanent nature. The measure was understandably criticized for several reasons: for rendering municipalities defenceless against the discretionary decisions of the central government (Nagy, 2023, p. 166); for breaching the principle of subsidiarity; for being unsystematic by endowing selected regional authorities (which otherwise have very narrow self-governing competencies and no tax-levying authority) with broad competencies (Siket, 2021, p. 222); and for being economically harmful by dissuading local authorities from attracting large-scale investment (Hulkó & Pardavi, 2022, p. 45).

It is thus clear that the fiscal autonomy of local authorities suffered heavily as a consequence of various emergency measures implemented during the COVID-19 pandemic. As Lentner and Hegedűs have noted (2022, p. 58), the revenue capacities of local governments were severely curtailed during the temporary economic downturn, which adversely affected their freedom of management and the quality of the tasks performed. At the same time, the central government argued that the municipalities had to play their part in combatting the pandemic (Lentner & Hegedűs, 2022, p. 58; Siket, 2021, p. 211).

5. The impact of COVID-19 pandemic measures on local tax revenues in Hungary

To illustrate the financial impact of the above measures more concretely, I have analysed the economic data of 25 randomly chosen Hungarian municipalities of different sizes and characters by comparing their tax revenues from the last entirely pre-pandemic year of 2019 with the respective figures from 2020 and 2021.[6] All municipalities studied were collecting local business tax and had introduced at least one type of property tax by 2019, which made it possible to study how local business tax revenues and property tax revenues responded to the mentioned measures and the degree of correlation between these types of revenues and total tax revenues. The results of the analysis are summarized in Table 1.

6 To mitigate the distortion arising from various differences between municipalities, I have analysed the final accounts of several categories of municipalities for the budgetary years 2019, 2020, and 2021: five districts of Budapest (Districts II, IX, XI, XVI, and XXI); five municipalities with more than 100,000 inhabitants (Debrecen, Kecskemét, Miskolc, Pécs, and Szeged); five municipalities with fewer than 45,000 but more than 25,000 inhabitants (Esztergom, Gyula, Nagykanizsa, Pápa, and Vác); five municipalities with 6,000 to 11,000 inhabitants (Vásárosnamény, Celldömölk, Kunhegyes, Kunszentmárton, and Mindszent); and five municipalities with a population below 3,000 (Nyírbogát, Kevermes, Nagycsécs, Bakonyszombathely, and Kéty).

Table 1: Average volume of total tax revenues, local business tax revenues, and total property tax revenues of selected Hungarian municipalities in 2020 and 2021 (in %) compared to the respective volume in 2019 (2019 = 100%)

Types of revenue / *Types of municipality*	Total tax revenues (2020)	Total tax revenues (2021)	Local business tax revenues (2020)	Local business tax revenues (2021)	Total property tax revenues (2020)	Total property tax revenues (2021)
Districts of Budapest	85.65%	94.31%	86.46%	95.98%	97.84%	105.87%
Major cities (pop. >100,000)	89.10%	91.15%	90.95%	92.55%	99.03%	101.14%
Mid-size cities (pop. 25–45,000)	84.25%	86.98%	84.21%	85.29%	113.79%	119.08%
Small towns (pop. 6–11,000)	77.51%	84.06%	79.82%	87.01%	103.50%	105.50%
Small municipalities (pop. <3,000)	85.61%	93.96%	93.10%	104.08%	104.82%	105.91%
Average of all municipalities studied	84.42%	90.09%	86.91%	92.98%	103.80%	107.50%

Source: Own calculations (based on the data published in the final accounts of the selected municipalities)

Several conclusions can be drawn from Table 1's data. Firstly, the results do not show major differences between the various categories of municipalities.[7] Hence, it is possible to recognize certain common trends. The aggregated data from the final accounts of all the municipalities studied reveals a significant decline in total tax revenues. On average, there was a drop of over 15% in 2020 compared to the 2019 level, and this reduction persisted in 2021, with a 10% decrease still evident. The decrease was largely attributable to noticeably lower local business tax revenue during both years.

Interestingly, revenues from property taxes managed to increase over this period, showing that they were much less sensitive to the crisis situation than local busi-

7 The primary objective of the analysis was to obtain reliable aggregate data for all Hungarian municipalities. I engaged 25 municipalities in the research, which I believe provides a reasonably accurate depiction of the overall situation. I acknowledge that a limited sample of municipalities was involved in the research for the separate categories and that the inclusion of other municipalities (especially in categories encompassing smaller municipalities) could have led to different results for certain categories. Nevertheless, the consistent alignment of data across all categories with the overall results seems to support the representativeness of the data from each category.

ness tax revenue.[8] Nevertheless, the fact that total tax revenues declined slightly more than local business tax revenues indicates that other measures, such as the complete loss of revenue from motor vehicle tax, aggravated the situation further. Despite their increase, the relatively low volume of property tax revenues compared to local business tax revenue could not effectively mitigate the overall drop in total tax revenues. On average, municipalities have seen the disappearance of almost one-sixth of their total tax revenues in 2020 and one-tenth in 2021, showing structural problems in the Hungarian local tax autonomy system.

The purpose of the study was to investigate the annual tax revenues, not the total revenues of Hungarian municipalities. The volume of total revenues may show a different picture, mainly depending on the amount of transfers received from central government. Most municipalities did receive compensation for the revenue lost as a consequence of reducing the maximal tax rate of local business tax. Thanks to Governmental Decree No. 61/2022, municipalities with a population of 25,000 or less received full compensation for the lost local business tax revenue (Section 3, paragraph 1), while according to paragraph 2, those with a larger population received full, partial, or no compensation at all depending on their 'taxing power capacity' with respect to local business tax (see Section 2 of this article). If a municipality had an above-average taxing power capacity, no compensation was due. Therefore, the costs of the local business tax cap were ultimately borne by economically more affluent municipalities. However, the loss of revenue caused by other measures was not handled by this scheme.

While most measures directly limiting the tax autonomy of local authorities have been lifted by now, some others were left in place even after the repeal of the state of emergency. The economic condition of municipalities was thus not only weakened temporarily but to a certain extent also in the long term. Balázs and Hoffman (2020, pp. 13–15) note that the strengthening of centralization and improvised decision-making are natural responses to crises. These occurrences were not unique to Hungary during the coronavirus outbreak (see Ferraresi & Gucciardi, 2022, pp. 3–4). But when some of their results are here to stay even after the end of the crisis, they must be subjected to stricter scrutiny (Balázs & Hoffman, 2020, pp. 13–15). While the investigation of whether the above measures were justified and proportional is out of the scope of this paper, the pandemic showed how fragile and vulnerable local governments' tax autonomy is in times of crisis.

8 Property taxes include land tax, buildings tax, and local (communal) tax for private individuals.

Conclusion

The sections above have shown that local tax autonomy in Hungary is highly reliant on one pillar, the local business tax. The attempt to reduce municipalities' overdependence on local business tax by introducing settlement taxes on an open-list basis was unsuccessful. The present situation carries inherent risks, caused by the high responsiveness of local business tax to economic changes. This was illustrated by the effects of the pandemic on municipal budgets, when most of them, especially the smaller ones, saw a dramatic drop in their tax revenues. It can thus be concluded that the above hypothesis has been confirmed, as the current system of local tax autonomy is struggling to provide financial stability for Hungarian municipalities in turbulent times, leaving them especially vulnerable to economic downturns.

With the pandemic barely subdued, the ongoing economic downturn continues to threaten already-exhausted Hungarian local governments. Adjustments aimed at stabilizing the current system are increasingly necessary. However, as Kecső (2016a, p. 446) argues, the solution is not the replacement of the local business tax, which has plenty of relative advantages compared to other types of local tax. Instead, he suggests elevating another type of local tax to a dominant position besides local business tax. I share this view: an ideal equilibrium could be achieved if, besides the very profitable but volatile local business tax, local governments could rely on another, more stable element of local tax autonomy. One solution would be to put more emphasis on property taxes, which are already part of local tax systems, albeit, compared to other countries of the region, playing a much less relevant role in terms of revenue.[9] Increasing revenues from property taxes during the pandemic showed that they might be capable of fulfilling such a complementary function. Another option could be introducing an entirely new type of local tax. A surcharge on personal income tax could also provide local governments with a significant amount of stable revenue.

Given that all components of the tax system are interconnected, thorough reforms would undoubtedly require reconsideration of the whole domestic tax structure, which demands careful preparation and precise execution. The real question is whether, in these challenging times, the central government is willing to prioritize the issue of local tax autonomy enough to provide sufficient financial and human resources to carry out these reforms.

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9 For a more detailed view on local property taxes in Hungary, see Fehér & Hulkó (2021).

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Municipal Tax Policy in State Emergencies

Abstract: A significant part of the revenue supplying municipal budgets in Poland comes from taxes that are subject to municipalities' constitutionally enshrined powers. This income is mainly generated by contributions connected with the right of property ownership, among others. Apart from a fiscal function, taxes may also stimulate specific processes. Positive stimulation within the scope of tax policy is mainly based on various types of tax preferences. They may be applied as a tool of tax policy which fulfils specific economic and social objectives. These issues have become particularly important during emergencies taking place in the state, such as the COVID-19 pandemic, the migration crisis or the war in Ukraine. In the wake of the recent occurrence of such types of quasi-extraordinary measures, it is reasonable to ask a question about the need to adjust the legal limits of municipal tax powers in this regard. Concurrently, the necessity to maintain balance between support provided to specific categories of entities and the financial needs of municipalities may not escape notice. The Polish experience shows that as a consequence of emergencies, ad hoc solutions of a merely occasional nature have been introduced to the tax law system. Hence a thesis may be formulated according to which it is reasonable to approach this kind of phenomenon in a systemic way, which should be reflected in the introduction of standard and stable tools that could enable municipalities to undertake specific action. The purpose of this study is to verify this assumption, relying, most of all, on the experiences and needs that have emerged in Poland in recent years.

Keywords: extraordinary measures, local government, tax policy, taxes

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Introduction

Revenue from local taxes and charges is one of the basic categories of income for municipalities, which are the lowest tier of local self-government in Poland. Generally, these revenues are contributions implemented by municipal tax authorities, while municipal legislative bodies (councils) may, to some extent, affect their shape. A possibility of exerting an impact on the amount of taxes and charges by municipalities is provided by the standard designated in the European Charter of Local Self-Government drafted in Strasbourg on 15 October 1985. Municipalities' powers therein, both at the level of enacting and applying tax law, are of fundamental importance within the context of pursuing tax policy by local government units. It is one of the instruments of fiscal policy understood as a selection of sources and methods for collecting public income, as well as trends and types of public expenditure to achieve specific goals set by public authorities (Fedorowicz, 1998, p. 7). Since tax policy deals with taxation, tax revenues should be shaped in such a way as to achieve previously set goals, not only fiscal but also socioeconomic (Sekuła, 2011, p. 211).

The dynamics of socioeconomic changes necessitate a pursuit of an appropriate tax policy. This issue becomes particularly important in emergencies related to the phenomena that have been taking place recently and that are still happening now. These are, most of all, the economic crisis connected with the COVID-19 pandemic, the migration crisis or the ongoing war in Ukraine, which entail certain social and economic consequences. These phenomena substantiate the question about the necessity to adjust the state's fiscalism (Maksimczuk, 2021), including the legal limits of municipal tax powers within this scope (Radvan, 2023). Concurrently, the necessity to maintain a balance between the support provided to specific categories of entities and the financial needs of municipalities may not escape notice. The experience of recent years allows the formulation of a thesis, according to which it is reasonable to approach this kind of phenomenon in a systemic way, which should be reflected in the introduction of standard and stable tools that could enable municipalities to undertake specific action. However, the legislature's response in the Polish legal order has been only ad hoc in nature. Although this does not mean that in the system of local tax law there are no mechanisms that provide taxpayers with support in emergencies, these seem insufficient. The purpose of this study is to verify this assumption, relying, most of all, on the experiences and needs that have emerged in Poland in recent years.

1. The scope of municipal tax powers in Poland

Pursuant to Article 168 of the Polish Constitution (Constitution of the Republic of Poland 1997), local government units have the right to set the amount of local taxes and charges to the extent established by statute. However, in the Polish legal order, only municipalities have their own income of a tax nature. The power result-

ing from the above-mentioned regulation is exercised within statutory limits, which means that the statute determines municipalities' actions, both at the level of enacting and applying the law.

Referring to the first case, the level of tax burden may be shaped by acts of local law, i.e. resolutions of municipal councils (Etel, 2004). Under special statutory provisions regulating the structure of local taxes and charges constituting municipalities' income, their law-making bodies are vested with the powers to influence the amount of these taxes and charges. This may take place in relation to the individual structural elements of these contributions. In particular, attention should be paid to the obligation to determine a proper tax rate for a given accounting period, which, however, takes place within statutory limits. Such a structure occurs in the most common municipal tax, i.e. a property tax. The maximum rates of this tax are stipulated by statute, whereas municipal councils determine their specific amount for a given tax year, including the statutory thresholds of these rates. Sometimes, however, as is the case with motor vehicle tax, the rates are determined by a resolution of a municipal council within the statutory limits of minimum and maximum rates.

The obligation to determine the rates should be distinguished from the powers to differentiate their amounts. This takes place when a municipal council, within the statutory categories of rates, distinguishes additional rates, which are usually lower (Etel et al., 2020, pp. 501 – 503). With regard to a property tax, this may be based on exemplary criteria set forth in the act regulating this contribution (e.g. a location, use, building type, technical condition or age).

To a large extent, municipal councils also exercise the right to introduce exemptions in local taxes and charges. Again, the limits of the powers of these bodies are set by law. Resolutions of municipal councils may not duplicate statutory exemptions, and in addition, they may not be subjective in nature. Thus tax exemptions can be granted to certain objects of taxation (e.g. buildings, land and means of transport) but not subjects. This is consistent with the wording of Article 127 of the Polish Constitution, according to which, among other things, the categories of subjects exempt from tax are determined solely by statute.

On the other hand, at the level of the law's application, attention should be paid to the possibility by tax authorities, including municipal ones, of granting relief from paying tax obligations, as regulated in the Act of 29 August 1997 – Tax Ordinance. As a rule, at the request of a taxpayer, these bodies may remit tax arrears as well as defer due dates or spread dues into instalments. Formulating the prerequisites of their application, the legislature availed itself of general clauses in the form of the important interest of a taxpayer or of public interest. Due to their general nature, these notions have been clarified primarily in the case law of administrative courts, which indicate that the premise of the public interest is understood as a rule of conduct, wherein it is necessary to consider values that are common to the whole of society, such as justice, safety, trust in authorities and rectification of their wrong decisions. The important

interest of a taxpayer, in turn, is the situation when, due to extraordinary or chance events, a taxpayer is unable to pay his/her tax arrears. This will include the loss of earning capacity, accidental loss of a property and the taxpayer's economic situation.

Finally, it should be pointed out that regulations on state aid are a significant constraint on municipal tax policy, which exerts an impact on the economic situation of entities pursuing a business activity. The EU's legal rule on the protection of competition precludes supporting this category of entity from public funds, subject to certain exceptions (Marquardt, 2007). Such assistance may involve not only direct funding of these entities in the form of subsidies or grants but also the application of tax preferences which reduce their burdens (Kalinowski & Zalasiński, 2003). Hence, all kinds of tax relief and exemptions, including those applied by municipal bodies, are subject to this regulation. For this reason, they must generally be individually approved by the European Commission, unless they belong to the category of aid that has already been accepted by this organ in relevant legal acts. From a practical perspective, *de minimis* aid is of the greatest importance within this scope and recently was also the support provided in connection with the COVID-19 pandemic.[1]

2. Emergencies and extraordinary measures

A traditional solution for modern constitutions of democratic states is the specification and regulation of states of special threat. These mostly involve so-called extraordinary measures, which may be defined as a legal regime introduced in the event of the occurrence of a particular threat that may only be eliminated with the use of exceptional measures. This regime is mostly characterized by the restriction (suspension) of the specific rights and freedoms of the individual. There may also be a shift of competence among public authority bodies, or they may be vested with special powers to eliminate the threat. They have been regulated in the Polish Constitution in Chapter XI, 'Extraordinary measures', which distinguishes martial law, which may be declared as a result of an external threat; a state of emergency, which may be introduced as a result of an internal threat; and a state of natural disaster, which may be introduced in order to prevent the effects of natural catastrophes or technical failures bearing the characteristic features of a natural disaster (Prokop, 2020, pp. 437 ff.). All extraordinary measures are based on uniform general principles, regardless of their territorial scope and duration, i.e. exceptionality, legality, proportionality, expediency, protection of the foundations of the legal system and protection of representative bodies. The Polish model of extraordinary measures assumes, most of all, the restriction (suspension) of specific individual rights and freedoms. Apart from

1 See European Commission (2020). The rules on granting this aid are regulated, inter alia, in the Regulation on the Application of Articles 107 and 108 2013.

the Constitution, detailed regulations are included in three ordinary laws dedicated to extraordinary measures.

However, the issue of the situation of special threats to the state is not limited solely to extraordinary measures. The legal system envisages intermediate institutions that are bridges between extraordinary measures and the ordinary functioning of the state, which, however, has been duly examined by the Constitutional Tribunal. Such special situations may include a crisis situation or a state of epidemic. However, according to the above-mentioned objection raised by the Constitutional Tribunal, they should rather be understood as a counterbalance to extraordinary measures and therefore should be included in the subcategory of 'the ordinary functioning of the State'.[2] Neither extraordinary measures nor other situations of threat bear the attribute of self-sufficiency, whereas their introduction and manner of implementation depend on the free assessment of the prerequisites and the will of specific state bodies.[3]

With regard to the threats mentioned above, state authorities have not approached them in a uniform way. As far as the COVID-19 pandemic is concerned, despite the occurrence of the premises envisaged in the Act on the State of Natural Disaster (2002), the authorities decided not to introduce this state but only the state of an epidemic threat instead, which was then followed by the state of epidemic.[4] As a result of the border crisis, a state of emergency was introduced in part of the state's territory (Bodnar & Grzelak, 2023, pp. 57 ff.; Kużelewska & Piekutowska, 2023, pp. 39 ff.; Zdanowicz, 2023, pp. 103 ff.), while for the conflict in Ukraine, so far the legal level has been limited to the introduction of new special regulations at the statutory level. Thus we are dealing with three different approaches to the state's extraordinary measures, which, in turn, give rise to a different scope of action for state bodies.[5]

3. Legal instruments allowing adjustment of municipal tax policy for extraordinary measures and emergencies

As indicated above, despite the fact that extraordinary measures were not introduced in Poland (with the exception of the state of emergency in the area bordering Belarus), we were certainly dealing with situations that required special legislative

2 The Tribunal emphasized that the existence of the constitutional closed catalogue of extraordinary measures provides for the ban on such new measures enacted by statute; Judgment of the Constitutional Tribunal 2009.

3 Compare the Ruling of the Supreme Court of 2020.

4 As examples of the impact of the implemented legal solutions on the functioning of the state, see, for example, Domańska (2022, pp. 147 ff.); Grabowski & Grabowska (2022, pp. 193 ff.); Hoffman & Kostrubiec (2022, pp. 31 ff.); Jabłoński & Kuźnicka-Błaszkowska (2022, pp. 207 ff.); Ożóg (2022, pp. 237 ff.); and Syryt et al. (2022, pp. 55 ff.).

5 It should be noticed that various threats may impact just the same areas of the state's activity; compare, for example, Szwed (2022, pp. 17 ff.)

intervention, including in the area of tax law. Interestingly, such solutions were introduced in connection with the COVID-19 pandemic, and yet they were not provided for the above-mentioned state of emergency that was in force in part of the territory of the Republic of Poland.

Legal regulations that can provide the grounds for the adjustment of municipal tax policy in Poland to emergencies should be divided into two categories: permanent and ad hoc. The former should include instruments that were already incorporated into the legal system many years ago and that may be applied in the event of such phenomena. On the other hand, ad hoc instruments were only episodic in nature and responded to socioeconomic phenomena connected with the occurrence of the COVID-19 pandemic (Maksimczuk, 2021).

Polish tax law provides for special solutions connected with the occurrence of a natural disaster. Referring to the Act on the State of Natural Disaster (Article 3(1)), this term should be understood as a natural catastrophe or technical failure, the effects of which threaten the life or health of a large number of people, assets of substantial value or the environment over a large area, while assistance and protection may be effectively undertaken only by the application of extraordinary measures in cooperation between various bodies, institutions and specialized services and formations operating under one leadership.

Within the scope of agricultural tax constituting municipal income, Article 13(c) of the Act of 15 November 1984 on Agricultural Tax allows tax authorities to grant a relief involving a waiver of tax assessment or collection in whole or in part in the event of a state of natural disaster. Therefore, this relief may be solely applied when such a state is introduced by a relevant regulation of the Council of Ministers. Its amount depends on the scale of losses suffered by a farm as a result of the disaster. On the other hand, with regard to the extension fee, i.e. an additional contribution, which is connected with the issuance of a decision by a tax authority deferring due dates or spreading dues into instalments, Article 57(5) of the Tax Ordinance stipulates that it is not charged when such a decision has been issued because of a natural disaster. In this case, the legislation does not refer to a state of natural disaster, which allows the assertion that this institution is applied in the occurrence of factual states that fulfil the prerequisites for the introduction of such a state, no matter whether it has been formally introduced (Etel et al., 2022, p. 702).

What is more, it is worth noting that the application of tax preferences in the event of a natural disaster has also been envisaged in Article 67(b) § 1(3)(a) of the Tax Ordinance, although not directly. This provision allows business entities to be provided with relief from paying tax obligations by deferring due dates, spreading dues into instalments or remission. The prerequisites for granting this relief take the nature of general clauses (the important interest of a taxpayer or the public interest), but in addition they must, with respect to the designated entities, comply with the regulations on state aid. For this reason, the Act stipulates the specific nature of such

aid; among many different purposes, the Act lists state aid granted to redress damage caused by natural disasters or other extraordinary events.

The above-mentioned regulations are, in fact, the only ones that have been permanently introduced to Polish tax law. In addition, there has been a catalogue of legal instruments introduced in connection with the COVID-19 pandemic that municipal tax authorities could and, to some extent, still can use. These solutions have been placed in the statutes regulating the structure of local taxes or in the Tax Ordinance, while their source was the repeatedly amended Act of 2 March 2020 on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Emergencies Caused by Them (the COVID Law). Among a number of legal solutions (so-called shields) included in this Act, there were also those of the nature of tax preferences that could be introduced within the scope of local taxes by municipalities. Their addressees were primarily entrepreneurs who were affected as a result of the restrictions related to business activity. The most far-reaching solution introduced by the COVID Law (Article 31(zzm)) was the discontinuation of the collection of a market fee in 2021 (Dowgier, 2021). The cause of this suspension, contained in the reasons for the draft Act, indicated that 'this fee is collected almost exclusively from small entrepreneurs who do not have a commercial infrastructure, [and] sell their products in person, with the help of family members, or one or two employees. For such entities, the obligation to pay even a small fee is a real burden. Therefore, no obligation to pay this fee would be a real support' (Sejm, 2020a). As a consequence of the enacted regulation, no municipality collected a market fee in 2021. However, the legislature provided a mechanism to compensate municipalities for the revenue lost due to this (Dowgier, 2021). Property-tax preferences were also addressed as business entities. According to the reasons for the Act that introduced these solutions, '[i]t became necessary to develop a shielding package for businesses preventing, in particular, the loss of liquidity in their activity' (Sejm, 2020b).

Pursuant to Article 15(p) of the COVID Law, municipal councils could introduce by resolution, for a part of 2020 and for selected months of 2021, exemptions from property tax on land, buildings and structures related to the conduct of a business activity for designated groups of entrepreneurs whose liquidity deteriorated as a result of negative economic consequences they suffered due to COVID-19. In this resolution, municipal councils could also introduce, on the same terms, exemptions from property tax on land, buildings and structures occupied for the activity of non-governmental organizations or other public-benefit organizations. The second solution resulting from Article 15(q) of the COVID Law vested municipal councils with the power to extend, by resolution, time limits for paying property-tax instalments due from April 2020 to the end of 2021 for designated groups of entrepreneurs whose liquidity deteriorated as a result of negative economic consequences they suf-

fered due to COVID-19. As in the previous case, the extension of time limits to pay tax instalments could also be addressed to NGOs and public-benefit organizations.

While the solution allowing municipal councils to introduce exemptions from property tax was not new within the context of the existing legal order, the institution of the extension of time limits to pay property-tax instalments has so far had no equivalent. Under the Act regulating property taxes (Article 7(3)), municipal councils are vested with a general power to introduce tax exemptions by resolution. Pursuant to Article 217 of the Polish Constitution, however, their nature cannot be subject-based because tax exemptions may only be stipulated by statute. In consequence, vesting municipal councils with the power to introduce property-tax exemptions addressed to specific groups of entities required a statutory base, which was introduced in the above-mentioned Article 15(p) of the COVID Law.

Municipal councils in quite large numbers have used their powers to introduce exemptions and extend the time limits of tax instalments; the addressees of these resolutions were generally the categories of entrepreneurs who were affected by the regulations establishing certain restrictions, orders and bans in connection with the state of pandemic (hotels, restaurants and hairdresser salons) (Czarnecki, 2020; Dowgier, 2020). It should further be emphasized that the application of the analysed preferences burdened municipalities economically, because the legislature did not provide mechanisms to compensate for the revenue lost by municipalities due to these exemptions. Nevertheless, it should be noticed that the lack of compensation was not a factor motivating municipal councils to not introduce exemptions, because the need to support entrepreneurs at a time that was economically difficult for them prevailed. Notwithstanding, even the lack of resolutions on exemptions or extensions of a time limit did not deprive entrepreneurs from the right to take advantage of the instruments of individual support in the form of relief from paying tax obligations.

As has already been mentioned above, one of the instruments used by municipalities to shape the amount of tax levies was relief from paying tax obligations, regulated in the Tax Ordinance Law (deferral, payment in instalments or remission). This institution is well established in the system of Polish tax law, but in connection with the COVID-19 pandemic, it required certain ad hoc modifications. These were related to the issue of the admissibility of granting state aid to business entities, even if the deterioration of their economic situation was a consequence of such an extraordinary and objective event as the pandemic.

Within the context of relief from paying tax obligations, attention should be paid, first and foremost, to the provision of Article 15(zzzh) of the COVID Law, in the light of which support granted to entrepreneurs, in the form of deferral of time limits and payment in instalments if the time limit to pay tax expired after 21 December 2019 or when tax arrears became due after this date, was the form of state aid to remedy a serious disturbance in the economy, applied in accordance with the terms and conditions included in the Communication from the Commission (Euro-

pean Commission, 2020, p. 1). This support could be granted to a taxpayer pursuing a business activity who suffered at least a 25% decrease in their economic turnover due to COVID-19 in any given month after 31 January 2020 compared to the previous month or a corresponding month of the previous year. The main advantage of such a solution was the exclusion of aid granted under this procedure from the obligation to notify the European Commission and the increase in the level of support up to an amount equivalent to EUR 800,000 per enterprise, as compared to the most common support in the form of *de minimis* aid.

Finally, we should also mention the waiver of the obligation to charge an extension fee resulting from Article 15(za)(1) of the COVID Law. Pursuant to this law, the provisions under which the extension fee is calculated do not apply to decisions on deferral of payment or payment in instalments in relation to taxes constituting income of the state budget on the basis of an application filed during the states of epidemic threat or of epidemic declared in connection with COVID-19 or during the 30-day period following their cancellation. This solution was addressed exclusively to state tax authorities. Within this context, however, a doubt arises as to the issue already mentioned before, i.e. whether the state of epidemic fulfilled the premise of the occurrence of a natural disaster invoked in Article 57(5) of the Tax Ordinance. The literature points out that this solution appears unnecessary while municipal tax authorities were obliged to refrain from calculating the extension fee based on the invoked provision of the Tax Ordinance (Etel et al., 2022, p. 704).

4. The adequacy of available legal solutions for the needs of tax policy conducted by municipalities during extraordinary measures and emergencies

The catalogue of legal instruments presented here, which may potentially be used by municipalities in their tax policy, should be considered adequate to the needs that emerged in the COVID-19 pandemic. The crucial point, however, is that in most cases the legal solutions introduced were only episodic in nature and applied only to the pandemic period. Meanwhile, there are also other factual situations that, in our opinion, justify the application of analogous solutions. The proof confirming this thesis was the introduction of the state of emergency in part of the territory of Poland (the Podlaskie and Lubelskie provinces, bordering Belarus). The restrictions that were introduced within this scope primarily affected the activities of entities that carried out economic activities, including tourism, in the Białowieża National Park, among others. Despite the fact that a certain system of compensation from the state budget was provided for these entrepreneurs, municipalities were not given adequate instruments to support them in the form of tax preferences. In particular, due to the constitutional stipulation related to the exclusivity of the statute with regard to the

introduction of subjective exemptions, municipal councils could not introduce property-tax exemptions related directly to entrepreneurs adversely affected by the introduction of the state of emergency in border areas. Of course, it was possible to exempt facilities such as hotels, boarding houses or agritourism accommodation from the tax, but even in this respect, municipal councils were limited by the regulations on state aid. Taking account of the fact that the basic form of granting state aid based on the resolutions of municipal councils was *de minimis* aid, some entrepreneurs benefiting from the government support also granted under this formula could not receive aid in practice.

A similar problem became apparent in connection with the refugee crisis caused by the war in Ukraine. In the initial period after the outbreak of the war, there was a need to provide housing for Ukrainian citizens. Some local governments tried to encourage and support property owners to do so through tax exemptions. Due to the wording of Article 7(3) of the Act on Local Taxes and Charges, however, the wording of the exemption had to be constructed in such a way that it referred to objective, rather than subjective, features. To put it simply, it was not possible to exempt the owners of buildings or premises in which they quartered Ukrainian citizens from a property tax. On the other hand, it was permissible to exempt buildings and parts thereof related to the accommodation and boarding of such persons (Dowgier, 2022).

Regarding the requirement resulting from Article 217 of the Constitution of the Republic of Poland to regulate subjective exemptions statutorily, as well as to the constraints imposed by state aid regulations, it is difficult to imagine that an instrument of a general nature that would enable municipal legislative bodies to conduct rational tax policy in emergencies could be introduced to the legal order. It seems that, similar to the situation during the COVID-19 pandemic, the more rational model would be to introduce such solutions in ad hoc acts. On the other hand, it should be postulated that the powers of both municipal councils and municipal tax authorities should be expanded by new competencies. A relevant example would be to allow, on the basis of a systemic solution, the modification of statutory time limits to pay local taxes, for example by extending these limits (Etel, 2020, p. 8). This institution was used during the COVID-19 pandemic and could also find application in other emergencies.

Another solution which may be put forward is the extension of the catalogue of relief from paying tax obligations to include a waiver of tax assessment or remission of tax obligations. This is even more reasonable because municipalities would decide independently about the application of these preferences, which is actually an inherent part of their tax authority. Moreover, such solutions may be of a universal nature, i.e. their application should also be possible with regard to taxes supplying the state budget.

We believe that currently, the most adequate legal instrument to be used within the area of tax law during extraordinary measures is relief from paying tax obligations. Local government tax authorities may relatively easily use these preferences

in relation to their receivables, whereas flexibility of action within this scope results from only generally defined premises of granting them (the important interest of taxpayers or the public interest). Notably, the judicial practice of administrative courts during the pandemic attributed a peculiar meaning to these terms. We may indicate case law in the light of which the difficult economic situation of entrepreneurs resulting from the restrictions and bans in the pandemic period satisfied the above-mentioned premises and supported the application of relief (Olczyk, 2021).

Conclusions

According to the thesis formulated at the beginning of this study, the system of local tax law contains mechanisms allowing taxpayers to be provided with support in emergencies, but they seem insufficient. In the light of the considerations thereof, this thesis has been positively verified. We may indicate certain legal instruments that should be introduced to the system of tax law which would result in the extension of the constitutionally enshrined scope of the tax powers of municipalities. The proposals may be referred to both the level of law enactment and application. With regard to the former, following the example of the solutions adopted in connection with the COVID-19 pandemic, it is possible to authorize municipal councils to modify the time limits to pay local taxes by means of a resolution allowing their prolongation. Within the area of tax-law application, in turn, municipal tax authorities should also be able not only to remit tax arrears but also remit tax obligations, or even waive their assessment.

With regard to the extension of municipal powers within the scope of their impact on the amount of tax burdens, difficult barriers to overcome are, on the one hand, constitutional provisions and, on the other, limitations connected to state aid. A response to emergencies in relation to specific categories of entity would require the creation of precise statutory powers. Notwithstanding, in the present legal status, it is admissible to introduce exemptions of a subjective nature which, in economic terms, always have beneficiaries in the person of a specific taxpayer. However, if they are business entities, due to the fact that the support provided to them may constitute a form of state aid, the introduction of tax exemptions must comply with EU and national regulations in this regard. This does not preclude the use of exemptions, which, however, may be significantly limited due to the aid limits that are sometimes in place.

Generally, though, we should opt for potentially extensive powers for municipal councils and tax authorities, since it is reasonable for municipalities to decide themselves about their revenue, which, in fact, mostly comes from taxes. The recent time of economic and social emergencies is therefore only a contribution to a broader discussion on the extension of municipal powers in this regard.

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The Application of the Public Order Clause on the Financial Market as One of the Elements for Building Sustainable Finance in a Comparative Perspective

Abstract: The public order clause is an instrument of private international law that limits the possibility of applying the law of a designated country in cross-border contractual relations. The role of the clause is to protect the specific interests and values of a given legal order, the importance of which is so significant that it justifies refusing to apply foreign law or limiting the scope of its application. From the point of view of the subject of this study, the public order clause could potentially be applied by national supervisory authorities in a situation of a threat to the security and stability of a given financial market. Thus the purpose of this article, in which the author uses the functional approach of the comparative legal method, the historical-descriptive method and the dogmatic method, is to verify the thesis about the possible use of the public order clause as an instrument supporting the process of building sustainable finance, along with its limitations in the form of the French concept of *effet atténué* and also from a comparative and cross-border perspective.
Keywords: public order, financial markets, sustainable finance, French law, *effet atténué*

Introduction

The global financial crisis of 2008 (Zajdler, 2013, p. 28), the pandemic and the war in Ukraine have meant that some economic and financial assumptions have begun to be questioned, while others, such as the idea of sustainable finance, have begun to gain significantly in importance. It has been noted that legal security and financial stability are values that should not only be built over the years, but should also be constantly protected. Thus the financial market, which is the subject of analy-

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sis in this article, has turned out to be an environment not fully capable of self-regulation, and in consequence requiring actions and regulatory instruments to allow it to return to equilibrium or to prevent destabilization. The increased role of cross-border relations on the financial market and the need to make use of rules about conflicts of law have made international private-law regulations more important than before (Mariański, 2020, p. 19). One such non-obvious instrument, developed on the basis of conflict-of-law rules, that could be applied in relation to the development of a sustainable financial market, may be the public order clause. The application of this clause on the financial market as an additional security mechanism, to strengthen legal security and legal certainty, also results from the fact that, after the bankruptcy of Lehman Brothers, we are no longer talking about the absolute security of global financial institutions, and thus about the absolute security of the entire market.

This security of the financial market, understood broadly as an environment in which the exchange of capital is carried out, can be ensured by implementing the idea of sustainable development as a basis for building a stable and crisis-resistant financial system in the long term. The concept of sustainable development may be defined as a tool leading not only to economic growth, but in the long term also to the elimination of the disproportions and instabilities within a given society. In this context the financial system, composed of financial institutions and markets, plays a key role in the realization of goals of sustainable development. This is why the potential application of a public order clause could be an interesting mechanism that would ensure the system's stability. The interconnection between the financial market, sustainable finance and a public order clause refers to the fact that today, we have overlapping processes on the financial markets between general investment based on financial efficiency and investment concerning social responsibility – including environmental, social and governance (ESG) criteria (Dziawgo, 2019, p. 24) [or] even general clauses about public morals (Kubuj, 2022, p. 101). Also, in the light of the growing importance of the concept of sustainable development and turbulence in the economy caused by exogenous factors (the Covid-19 pandemic and the war in Ukraine), new methods of assessing the functional risk have an increasingly important role (Rogowski & Lipski, 2022, p. 33). Thus the purpose of the present article is to verify the thesis about the possible application of a public order clause as an instrument supporting the process of building sustainable finance, along with its limitations in the form of the French concept of *effet atténué*, and also in a comparative and cross-border perspective. The verification of the potential effectiveness of a public order clause in the specific legal framework of the financial market and in relation to sustainable development rules will require the analysis not only of the specifics of the financial market but also of the limits of how the public order clause might be applied.

The methodology used to achieve the goals of the article refers to the functional approach of the comparative legal method, the historical-descriptive method and the dogmatic method. The comparative legal method in relation to financial markets and

sustainable development can be perceived not only in theoretical terms as *ex post* guidance for legislatures, but above all in a practical sense as an element which is useful in the application of legal regulations (Tokarczyk, 2008, p. 25). Comparative law is both a science and a research method, and the effects of research conducted from this perspective is not limited to only one legal order. Comparative legal studies are aimed at learning and understanding law in a broad context, at the level of legal relations related to more than one country, and therefore at the supranational level (Szymczak, 2014, p. 37). It is this aspect that makes comparative research extremely important in the field of financial-market and sustainable-development rules, which are both characterized by their cross-border and often international nature.

Thus the modern supranational financial market, in which parties can choose the law applicable to their transactions, should be subject to certain restrictions, which may include, among others, a public order clause. This clause may, in addition, support and secure the economic, environmental and social perspective that is necessary in conducting sustainable risk-management processes. It is also worth noting that financial markets and sustainable development are fields that interpenetrate each other. This is related to the fact that they have both a cross-border and, often, an international nature. Also, sustainable development needs to be financed through the mechanisms ensured by the financial market, and the financial market is a legal environment where new, innovative solutions are very quickly adapted and implemented.

One of the many aspects of the gradual implementation of the idea of sustainable finance on the financial market is the requirement to publish a strategy for tackling risks related to sustainable development within a given activity and ensuring the transparency of such an introduction, based on the EU disclosure regulation of 27 November 2019.[1] In addition, the EU has introduced a legal framework for classifying financial products and services as compliant with the implementation of environmental objectives, regulations providing for the obligation to take into account the sustainability risk, regulations addressed to brokerage houses concerning a product management area (product governance) or taking into account customer preferences related to sustainable development in the distribution process. This process is supported by the development of regulatory technical standards by the authorities which form the system of supervision over the financial market in the EU – the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Supervisory Authority.[2] The creation of this supervision system at the European Union level was preceded by a long debate

1 The disclosure regulation (EU 2019/2088), in conjunction with the Taxonomy Regulation (EU 2020/852), defines new standards for dealing with sustainability risks, negative sustainability impacts and advertising social and ecological aspects, as well as sustainable investments.

2 Those bodies shall develop further regulatory technical standards to specify the content, methods and presentation of information related to sustainability indicators.

(Jurkowska-Zeidler, 2010, p. 95), and the final impulse to accelerate work in this area was the financial crisis of 2008 (Nieborak, 2010, p. 97). It was this crisis that made us aware of the need for a new approach to institutional regulation of the financial market that would take into account the cross-border aspect to a greater extent than before (Mariański, 2020, p. 267). French doctrine emphasizes that the crisis has shown the limited effectiveness of national supervision in relation to processes of a supranational nature (Valette, 2013, p. 22). Thus there was a need to create a model that would strengthen national supervision in relation to the cross-border, complex and technologically innovative nature of operations on the financial market. The doctrine rightly points out that the modern financial market additionally intensifies the development of a digital economy, and in consequence changes in the traditional method of regulation (Szostek, 2021, p. 44) as well as the process of financialization, understood as increasing the impact of the financial sphere in everyday life (Nieborak, 2021, p. 161).

Financial market law as a new research specialization was distinguished in France as early as the 1980s (Causse, 2015, p. 23), while in Polish doctrine it was fully recognized after Poland's accession to the European Union (Kosikowski & Olszak, 2010, p. 195). Its cross-border nature, understood as a connection with more than one legal area, allows the parties to transactions on the financial market to shape their legal relationship in a way in which they can choose the final law applicable. In this context, there is an additional risk, consisting in the possibility of using conflict-of-law rules in such a way as to avoid EU regulations in the field of sustainable finance. Therefore, there is a risk that many entities on the financial market, for whom ESG criteria are a cost and an organizational problem, will look for legal systems where such requirements do not apply. One of the mechanisms developed by private international law capable of protecting the financial system against the use of conflict-of-law rules to avoid the application of the principles of sustainable finance could be the public order clause.

1. The concept of the public order clause in the financial market

It needs to be emphasized that the goal of sustainable finance is to ensure long-term financial and legal security. At the same time, due to the internationalization of the financial market and the frequent connection of transactions concluded within it with more than one legal area, it is necessary to find a mechanism that could protect European regulations against the indication of such applicable law that would avoid regulations in the field of sustainable development. Thus, if we consider that regulations relating to sustainable finance and sustainable development are part of the basic principles of a given legal order (Polish, French or European), then it would be possible to apply the public order clause known in private international law. It is worth noting that the jurisprudence of French courts has identified the principles that con-

stitute *l'ordre public* and, among other things, the possibility for every country to create the scope of this term independently and individually. I will therefore very often refer to French law as a legal system where the analysed clause, as well as its limits, was developed and afterwards adopted in many other EU Member States.

The public order clause is understood as a way of protecting a given legal order against the interference of foreign legal solutions, but only when the effects of this interference would be irreconcilable with the elementary legal principles of this legal system (Ziemblicki, 2014, p. 97). It may potentially be very important in the case of protecting participants in the financial services market (Lijowska, 2006, p. 699); therefore its role in ensuring legal security and the stability of regulations relating to sustainable development may be significant. It is worth underlining that the doctrine of financial-market law has already noted the possibility of a subsidiary application of this clause as a tool to strengthen institutional market supervision (Mariański, 2020, p. 184).

The public order clause is an instrument of private international law (understood as conflict-of-law rules) that limits the possibility of applying the law of the state designated by the parties as applicable. The role of the clause is to protect the special interests and values of a given legal order, if the importance of these values is so significant that it justifies the refusal to apply foreign law (Bagan-Kurluta, 2017, p. 168). From the point of view of the subject of this study, the potential application of the public order clause could limit or eliminate the use of conflict-of-laws rules to avoid the application of national or EU regulations on sustainable development on the financial market.

As part of the comparative law aspect, it is worth noting that the concept of the public order clause has its roots mainly in French law. The basis for this statement refers to Art. 6 of the French Civil Code, which, despite the reform of 2016 that made revolutionary changes in terms of *causa* (Cvetkova, 2021, p. 91), continues to exist unchanged (Lemonnier & Mariański, 2017, p. 295). The article in question states that it is not possible to circumvent legal provisions falling within the scope of public policy (*l'ordre public*) or good morals by means of contractual arrangements. French doctrine emphasizes that this article contains many vague terms and therefore should be analysed each time by the competent court or authority that intends to refer to it (Terré, 1996, p. 3). In view of this, it is assumed in France that we are dealing with many national public orders, not with one universal and common public order even at the European level (Redor, 2001, p. 85). In addition, especially with regard to cross-border financial markets functioning largely on the basis of so-called soft law regulations, an alternative concept of international public order has appeared, referring, among other things, to global security and financial stability (Poillot-Peruzzetto, 2009, p. 93).

In Polish law, the concept of the public order clause was originally contained in Art. 55 of the Obligations Code of 1933. This article provided that parties conclud-

ing a contract may arrange their relationship at their discretion, as long as the content and purpose of the contract are not contrary to public order, law or good morals. However, the public order clause was not maintained in the Civil Code of 1964, and appeared in Art. 6 of the Private International Law Act of 12 November 1965. The original wording of this article provided that foreign law could not be applied if its application would have consequences contrary to the fundamental principles of the legal order of the People's Republic of Poland. Subsequently, the new Private International Law Act of 2011 also incorporated this clause, specifying in Art. 7 that foreign law shall not apply if its application would have consequences contrary to the fundamental principles of the legal order of the Republic of Poland. It is also worth noting that both Polish and French law have a certain common part relating to this clause, as it is also present in international and European Union law, such as, for example, the Rome I regulation (Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations, 2008).

From a historical perspective, going beyond Polish and French law, the origin of the public order clause has been found by some authors as early as in the views of the medieval statuters, and especially in the concept of the so-called *statuta odiosa* (Zachariasiewicz, 2018, pp. 6–7). Provisions with a similar function to today's public order clause were also developed in the 12th century by the Bologna scholar Aldricus, who argued in particular that one should take conflicting norms into account and apply the one that seems more right, which from the judge's perspective is the one that will allow the obtaining of a fairer result. Although this theory was not significantly developed in European continental law, it nevertheless survived in the common law system in the form of Robert A. Leflar's better-rule test as a tool for strengthening the international rule of law and applying a legal standard better adapted to given circumstances. It is also worth noting the concept of the Italian lawyer Bartolus de Saxoferrato, who justified the refusal to apply foreign law not only by its contradiction with the fundamental principles of a given legal order, but also by its territorial scope (Zachariasiewicz, 2018, pp. 7–8).

A contemporary way of understanding the construction of the public order clause, both in French (Poillot-Peruzzetto, 2009, p. 94) and Polish doctrine (Ludwiczak, 1990, p. 74), is with an analysis through the prism of its purpose, which is related to the sufficient protection against the application of foreign law providing the regulations that threaten the basic (including constitutional) values accepted in a given legal order (Pazdan, 2011, p. 28). Thus the public order clause is a kind of reservation of a certain legal system, as a result of which the provisions of foreign law indicated by conflict-of-law rules are, exceptionally, not applied, and is in the procedural dimension – that a foreign judgment is not recognized or declared enforceable if it would be difficult to accept from the perspective of the interests of the forum state (Przyśliwska, 2017, p. 69). Due to this, this clause is often identified as a certain security filter, which in some important cases may limit the application of foreign law. So,

for example, the Polish Supreme Court, in its decision of 11 October 2013, reference I CSK 697/12, confirmed that the public order clause sets the limits within which the application of foreign law is allowed. It is also aimed at protecting the significant political, social, economic or moral values preferred by the legal system of a given state. The analysis of the public order clause in reference to French law is related to the fact that the Polish legal system has modelled itself on French solutions in this field, as well as in the field of financial-market law and sustainable development.

It is worth mentioning that the reference under the public order clause to effects contrary to the fundamental principles of the legal order applies not only to principles that are hierarchically the highest in the legal system, but also to those that are particularly important due to their functions in the legal system. Therefore, apart from the fundamental constitutional principles, this category also includes the guiding principles governing individual areas of substantive and procedural law, including in particular civil law, but also financial law or financial-market law. The Court of Justice of the European Union has also commented on the application of the public order clause to the norms of EU law. For example, in the judgment on *Diageo Brands BV v. Simiramida-04 EOOD* of 2015, it was stated that Member States remain free in principle to determine what the requirements of their public order are, according to their own national conceptions, and what the limits of that concept are. Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State. In another judgment, *Rūdolfs Meroni v. Recoletos Limited* of 2016, it was added that a judgment shall not be recognized if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. This shows an awareness of the use of the above-mentioned institutions also in relation to EU law, and thus in the context of European regulations and standards in the field of sustainable development related to the financial market.

2. Limits of the public order clause

As the application of the public order clause is considered an instrument of last resort, doctrine and jurisprudence have developed a number of limitations in its application. In my opinion, the public order clause, despite its limits, could be a very useful tool for protecting the domestic financial market against the operation of cross-border entities trying, for example, to admit products or solutions onto the EU market that were created without respecting the principles and requirements of sustainable finance and development.

Restrictions on the possible use of the public order clause have been most fully developed in France, where the concept is referred to as *effet atténué* (weakness effect), translated by representatives of Polish doctrine as the concept of restrained interference of the public order clause (Zachariasiewicz, 2018, p. 241). The idea of *effet atténué* has its genesis in the jurisprudence of the French Supreme Court (Cour de Cassation); it was expressed for the first time in the judgment of this court of 17 April 1953 in the case of Rivière (Legrand, 2020, pp. 62–69), related to matrimonial matters but having a much broader application. Thus, the French Supreme Court ruled that the reaction to a provision contrary to national public order cannot be automatic and identical every time. Based on this judgment, part of French doctrine states that the application of the public order clause is significantly weakened in a situation where only the disposition of the law of a foreign state previously indicated as applicable to a given legal relationship is going to be applied or recognized. In other words, the scope of impact of the clause is different when a given entity, based on applicable foreign law, demands a new interpretation or the creation of certain rights by French regulations, compared to when the entity only requests that the effects of the applicable foreign law be taken into account. The condition that somehow activates the weakening of the scope of the public order clause is the emergence of a given legal relationship at a certain distance, which may be spatial or temporal. The spatial character refers to the emergence of a legal relationship in a foreign territory; the temporal nature refers to the emergence of the relationship at an appropriate time interval, which would justify the French authorities tolerating the relationship (Hammje, 1999, p. 87).

We may also underline the connections between the French concept of *effet atténué* and the theory of acquired rights. Thus an additional justification for limiting the scope of the potential application of the public order clause is respect for the sovereignty of other legal systems (Zachariasiewicz, 2018, p. 242). French doctrine has also developed the concept of *ordre public de proximité*, which refers to certain territorial restrictions in the application of the general public order clause (Foyer, 2005, p. 297).

The practical effect of the influence of restrained application of the public order clause is a rather sceptical attitude on the part of the judiciary regarding its application. Apart from the precedent-setting judgment in the Rivière case already discussed, French jurisprudence is very cautious in applying the public order clause, in line with the case law adopted in 1953. In addition, the requirement to apply the clause with restraint was extended by the Cour de Cassation judgments of 28 January 2009 on property matters, of 1 December 2010 on the issue of liability for damages and of 7 November 2012 on the validity of the legal form of a document issued abroad. Also, in Polish jurisprudence, the public order clause is rarely used; much more often there is a refusal to apply it, as was the case in the judgments of the Su-

preme Court of 11 October 1969, 12 June 1980and 20 January 1983, and in many other judgments that refer to these (Pazdan, 2001 73).

In my opinion, the use of the public order clause by national institutions, including financial-market supervisory authorities and courts, to protect the financial market may have significant potential to be used in the future. Currently, the concept of the weakened effect of the clause derived from French law seems to be quite firmly established in the European legal order and jurisprudence. However, this concept was shaped on the basis of matrimonial cases, i.e. cases of a completely different nature from transactions concluded on the financial market that are characterized by the mutual penetration of public and private law. The latest French doctrine, including that dealing with the problem of indirect regulation of the financial market (Mariański, 2023, p. 60), also with the use of the public order clause, recognizes its possible application in order to block the possibility of concluding certain financial transactions whose elements are foreign to European legal standards (Mariański, 2020, p. 192). In addition, the doctrine emphasizes that the scale, scope and efficiency of trade on the financial market result not only from the provision of an appropriate organizational environment, but also from the standardization of legal relations. Although international transactions are a permanent element of the global financial market, legal regulations in this area are not free from interpretation problems regarding the indication of the applicable law (Glicz, 2022, p. 56). This undoubtedly affects the level of legal security in this field, and the public order clause is an element that, especially in the context of the unconditional application of the principles of sustainable finance, can additionally strengthen legal security in the dimension of conflict of laws.

To sum up, doctrine emphasizes that the public order clause is not an instrument whose era of application has passed, and that the experience of recent years proves that new, previously unknown challenges appear before this instrument (Szpunar, 2022, p. 211). However, one should be aware that in practice, the protection of fundamental rights and values, which also include the fundamental rights and values of sustainable development in the European Union, may be implemented by means of various instruments, and the public order clause, with all its limitations, may be one of them (Szpunar, 2022, p. 213). Also it seems that sustainable development has become such an important issue that its protection and respect of the rules regulating it have the potential to be part of public order, and thus to have special protection, at least in EU Member States.

Conclusions

The key element of building sustainable finance and a financial market that respects the principles of sustainable development in its regulatory environment is to ensure legal certainty not only in classical terms, but also from a conflict-of-laws per-

spective. Thus, from a cross-border perspective, the public order clause is an instrument that may contribute to the sustainable development of the financial market. The key issue determining the application and effectiveness of this clause seems to be the recognition of ESG integration standards, under European Union regulations and directives on financial products (e.g. ELTIF[3], UCITS[4], MiFID II[5] or PRIIPS[6]), as basic principles of the legal order both at the national and the EU level. With this assumption, the public order clause could support the implementation of the goals set out by the United Nations in the 2030 Agenda for Sustainable Development, from a conflict-of-laws perspective, i.e. related to more than one legal area,.

Thus, by providing greater opportunities to ensure legal certainty, the public order clause could positively affect a faster and more durable standardization of a sustainable market by allowing investors to compare different sustainable-investment products and make their choices without the possibility of violating ESG standards. This may be an incentive to accelerate the development of safe and stable market standards referring to sustainable finance, such as the rules on green bonds, a framework defining the features of a financial product that provides financing for sustainable development (such as the French TEEC label)[7] or the rules of ecological investment funds (Dziawgo, 2013, p. 74).

At the same time, it should be emphasized that from the perspective of a stable and predictable legal framework, an investor must be aware that when starting business in a given country, the law may change, but in a way that maintains certain standards and basic principles of the legal order. These standards include the sustainable development regulations that the public policy clause may protect. Summing up, the potential use of the public order clause to protect and ensure the development of the financial market in accordance with the standards of sustainable development is possible, although it is difficult to implement immediately due to the lack of case law

3 Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules (ELTIF).

4 Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

5 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

6 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)

7 Under TEEC *(fr. Transition énergétique et écologique pour le climat),* threshold requirements determine how funds should invest in green industries.

in this area. This, along with technological progress, may change in a situation where courts will update their jurisprudence, including in particular if they come to the conclusion that the security and stability of the domestic financial system, combined with the idea of sustainable development, is one of the fundamental principles of the legal order in EU Member States. Thus, in my opinion, the inclusion of conflict-of-law provisions in both EU and national regulations on sustainable-development standards on the financial market is a postulate worthy of attention. In this regard, the choice or indication of the applicable law by the parties will be limited by the application of the public order clause as an institution that may protect the basic principles of a sustainable financial market. Thus the thesis about the possible effectiveness of the public order clause in the process of building sustainable finance, along with its limitations in the form of the French concept of *effet atténué*, has been positively verified. The potential application of a public order clause in the specific legal framework of the financial market and in relation to sustainable development rules is not only possible but also requested.

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Institutional Financial Consumer Protection in Czech Republic and Poland: Differences, Strengths, Weaknesses, and Challenges

Abstract: The financial market plays a crucial role in economic growth, but it also poses risks to consumers, who may not have the expertise to navigate its complexities. This article examines the importance of consumer protection in the financial market and the legal background for regulation, including the stable and effective institutional set-up of consumer protection in Poland and the Czech Republic. It also discusses various initiatives that have been implemented to safeguard consumers in the financial market, such as regulations and policies designed to prevent deceptive practices and fraudulent behaviour. Finally, the article highlights the challenges facing consumer protection in the financial market regarding the institutions dealing with it, including the need for more effective enforcement mechanisms.

Keywords: consumer credit, consumer protection, financial market, financial regulation

Introduction

Financial market regulation reflects efforts to create a stable environment that ensures a level playing field for the various players in this market. Regulatory rules limit information asymmetry and efforts by financial institutions to misuse information that is not available to other market participants. Individual measures and

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government interventions aim to ensure competition, safety, and the overall health of financial institutions and the financial system. At the same time, it is important to ensure access to financial services (non-discriminatory access) and to promote macroeconomic stability and growth. Poorly designed regulation can be pro-cyclical and foster economic fluctuations, which is another reason for getting regulatory measures right (Stiglitz, 2009, p. 13).

The financial sector is one of the most important sectors in the economy, and for this reason its functioning is subject to regulation. Regulation is used to limit the negative effects associated with the financial market; the main objectives of regulation include promoting transparency, ensuring credibility, and consumer protection (Rajtl, 2016, p. 63). We would like to present research about consumer protection as one of the key objectives of financial market regulation in Poland and Czechia. This article examines institutional consumer protection in both Poland and the Czech Republic and seeks to highlight weaknesses and challenges in this area. In the conclusion, we also try to compare the legal regulation of institutional consumer protection in the financial market in both countries. The methodology adopted in this work involved the analysis of legal texts, both European and national, as well as a review of the literature related to the research topic. Comparative analysis was significant, contributing to the identification of similarities and differences between legal systems in Czechia and Poland, as well as the assessment of their significance in ensuring the proper level of consumer protection.

To achieve our aim, it is necessary to describe and critically analyse consumer protection from the European Union perspective, but also from the local perspective of Poland and the Czech Republic. Also, analysis of the consumer protection institutions which deal with financial services will be carried out in the research section. The conclusion contains the summaries of our findings and makes suggestions for better consumer protection in the future. *De lege ferenda* suggestions are included, especially connected with the financial arbitrator and its legal powers to decide disputes in connection with financial services where consumers and financial institutions are involved.

1. The concept and characteristics of a consumer and consumer protection

The law of the European Union is currently characterized by a multitude of consumer protection instruments and a high level of consumer protection. Initially, protection was perceived primarily as a *sine qua non* for the proper functioning of the internal market, especially within the framework of competition mechanisms. It was singled out at the treaty level as an independent objective and policy of Union action in Article 169 of the Treaty on the Functioning of the European Union (TFEU),

which aimed at promoting consumer interests and ensuring a high level of protection for them. This should contribute to the protection of consumers' health, safety, and economic interests, as well as supporting their right to information, education, and organizations to safeguard their interests.

The horizontal clause indicated in Article 12 of the TFEU, which states that consumer protection requirements must be taken into account in defining and implementing other EU policies and actions, is also of fundamental importance for the protection of consumer rights. Horizontal clauses should be applied in such a way that the consumer becomes a central actor in EU policy, thereby elevating consumer policy to a higher level as one of the policies taken into account in defining and implementing other Union actions. Consumer protection also finds its place in the Charter of Fundamental Rights; according to Article 38, a high level of consumer protection is ensured in the policies of the Union. Ensuring an appropriate level of consumer protection is also essential in connection with the ongoing process of financialization of citizens' lives (Nieborak, 2021, pp. 181–182).

The concept of a consumer used in the treaties has an autonomous meaning, and the reason for distinguishing this category of entity is their weaker position in the free market compared to professionals. In order to level the playing field for financial market participants, the treaties emphasize the role of increasing financial skills, as well as the need for consumer organizations for more effective representation. The treaties do not narrow the concept of a consumer subjectively or objectively. The decisive factor is whether a particular group of entities is in a weaker position in the market, which requires regulatory intervention to level the playing field to realize the principles of a free market, where transactional decisions are made voluntarily, knowingly, and fairly by all its participants.

Due to the negative consequences of the fragmentation of regulations protecting consumers, Directive 2011/83/EU was adopted, which was intended to comprehensively regulate the rights and obligations of consumers, to consolidate definitions contained in various legal acts, and to harmonize regulations in the individual legal systems of EU Member States. According to the directive, the definition of a consumer includes natural persons acting for purposes that are outside their trade, business, craft, or profession. Although not directly stated in the definition, it follows that consumer contracts are concluded with traders. A trader means any natural or legal person, irrespective of whether privately or publicly owned, who is acting for purposes relating to his/her trade, business, craft, or profession in relation to contracts, including through any other person acting in his/her name or on his/her behalf.

The definition of a consumer introduced in the directive reflects earlier regulations contained in the legal acts repealed by this directive and is consistent with the meaning attributed to the consumer in other directives. Although the basis for providing the consumer with special protection is their structural weakness compared to a professional, this weakness usually is not part of a legal definition. In many cases,

Member States have the option of extending consumer protection to other entities, including non-governmental organizations, start-up companies, or small and medium-sized enterprises, under the so-called national options.

2. The necessity of institutional consumer protection in the financial market

The main premise for distinguishing consumers in the financial market was their lower level of knowledge about the goods or services offered and their weaker economic position compared to the professional trader, which could lead to a violation of their rights. Based on the theories of the free market, it was assumed that such situations were to be corrected by market mechanisms and competition among entrepreneurs, forcing them to offer the best possible goods or services. Therefore, it was assumed that the free market had a natural tendency towards self-regulation, preventing the violation of the rights of its participants, including consumers. Any deviations from this principle were to be corrected *ex post*, through individual protection on the ground of private law. Regulatory interference in the functioning of the free market seemed unnecessary, as the essence of this market was freedom of activity. The introduction of orders or prohibitions could disturb the desired natural balance between entrepreneurs and consumers, which was one of the foundations of the free market economy. However, this assumption turned out to be incorrect. While market mechanisms worked well in commonly concluded daily contracts, they proved ineffective in complex financial services. This led to a change in the original paradigm of the consumer not requiring special protection, towards providing regulatory protection for their basic rights. The paradigm of protection through information strengthened the balance and competitiveness of the market. It maintained the theory of the self-regulation of the market and its natural tendency towards balance, which, thanks to providing consumers with all the necessary information to make rational decisions, would receive additional support. Gradually, the systemic importance of consumers began to be recognized, but until the 2007 crisis, regulators underestimated the systemic risk generated by consumers' inadequate protection. Supervision did not focus on consumer protection; it protected their rights, but indirectly, by ensuring the proper functioning of supervised institutions.

Another redefinition of the consumer protection paradigm came with the financial crisis that began in 2007. Instead of trust in the rationality of financial markets and the belief that there was no need to intervene in the financial system, which is efficient and safe thanks to private risk management at the level of individual institutions subject to microprudential supervision, a new consensus emerged. According to the new paradigm, the market is unstable, pro-cyclical, and tends to exhibit herd behaviour. Its instability is further amplified by the excessive complexity of

the financial systems and business models in use, as well as by the financial innovations introduced into circulation (Baker, 2013, pp. 112–139). For the new consensus, a macroprudential perspective and the protection of consumer rights and interests are of fundamental importance. Although the crisis had many systemic causes, one of the most important was improper consumer protection related to the granting of excessively risky loans (sub-prime credit). The assumptions of behavioural economics questioning the rationality of consumer choices began to be taken into account, leading to a change in the regulatory and supervisory paradigm and emphasizing the need for regulatory and supervisory intervention in the financial market (Monkiewicz & Monkiewicz, 2015, pp. 13–14). It was recognized that the complex nature of financial services and the interrelationships between their participants create risks that even the best-informed consumer cannot estimate. This led to the expansion of regulations protecting consumers. Pan-European supervisory bodies were introduced, aimed at increasing the stability of the European financial market, including by increasing confidence in this market. In the national systems of EU Member States, existing solutions were also assessed for their effectiveness in maintaining the stability of the financial system. The architecture of the safety and protection of consumer interests in the financial services market has become one of the most important areas of security in society (Czechowska, 2017, p. 16).

Challenging the rationality of choices made by consumers justified the need to replace the passive role of the regulator in the consumer market with an active one. This also meant assigning a new role to financial institutions, which must take much more responsibility for the choices made by consumers. The dogma of the rational consumer has been replaced by the dogma of the rational regulator and the rational professional participant in the financial market, who play by fair rules. The new paradigm significantly raises the importance of national and international public institutions responsible for maintaining the stability of the financial market. It presents the financial market as too complex for consumers and challenges the assumption that they always make rational choices. It represents a form of institutional paternalism, which in extreme cases can even prohibit participants from entering into unfair agreements. Through the possibility of intervening in the market through both regulations and supervision, institutions are able to limit the fundamental characteristic of a free market – the freedom to enter into agreements. The infallibility of financial markets and their natural tendency towards stability were challenged by introducing a regulatory and supervisory paradigm in the financial sector. This is associated with an increased role of the state in managing macro-financial systems and their risks (Monkiewicz & Monkiewicz, 2019, p. 33).

3. Institutional consumer protection on the financial market in Czechia

There is a different situation in the Czech Republic, especially connected to experience with loans burdened with currency risk. There was no stress situation similar to the Polish experience in 2006–2008 regarding the 'Swiss franc' loans, and therefore the pressure for new consumer protection regulation in the following period has not been so strong. The competitive environment within the Czech credit market is at a high level, not only from the perspective of banks, but also from the perspective of non-bank providers, which offer somewhat different products than banks but share a part of the market. Consumers can choose from a range of available credit products that differ in price, maturity, amount provided, and other characteristics. But how is the consumer protected from over-indebtedness and moral hazard? Regulation in this respect harmonizes rules across the banking and non-banking markets and is largely based on European standards (Rajtl, 2006, p. 7).

The primary authority responsible for consumer protection in the Czech Republic's financial market is the Czech National Bank (CNB). The CNB's mission is to maintain price stability, ensure the stability of the financial system, and protect the rights of consumers in the financial market. Since 2016, it is also the supervisory authority for the consumer credit area. Based on the EU regulation mentioned above, the Act No. 257/2016 Coll. on Consumer Credit was adopted, valid from 1 December 2016. There were no real restrictions for entities providing services prior to December 2016, which was the reason why too many people went into debt, were prosecuted, or faced personal bankruptcy. This regulation brought strict conditions for those entities interested in providing credit.

Credit registers are a very important source of information in the context of consumer credit; however, these are not maintained by any public institution, but by various private institutions. As part of its supervision, the CNB recommends that non-bank providers of consumer credit participate in credit registers and use the data available from them as part of their lending processes. In this regard, the CNB takes inspiration from the Slovak National Bank, which is in an easier position as participation in the credit register is compulsory for consumer credit providers in the Slovak credit market. In the Czech Republic, the Consumer Credit Act does not mandate the use of credit registers; however, from the regulator's perspective, participation in registers is recommended (Rajtl, 2019, p. 34).

The CNB has several departments that deal with consumer protection issues, including the Consumer Protection and Financial Innovation Department, which is responsible for promoting fair and transparent practices in the financial market and protecting consumers from abusive practices. It receives consumer complaints and alerts, answers relevant questions, publishes interpretative opinions, and conducts examinations of supervised financial institutions. The CNB is the supervisory

authority for compliance with consumer protection rules on the financial market by selected entities providing financial services.

Professional care is one of the areas which the CNB emphasizes. The subject of supervision in this area is, among other things, the examination of whether financial institutions which are in the position of a financial services provider, i.e. in the position of a stronger contracting party, act towards consumers in accordance with the law (e.g. informing consumers sufficiently and transparently about relevant facts, charging them fees and interest, or handling complaints in accordance with the law). Public complaints from consumers pointing out shortcomings in the activities of financial institutions are therefore a valuable source of information for the CNB's activities.

The Financial Arbitrator is an independent body appointed by the Czech Ministry of Finance. It provides an alternative dispute resolution mechanism for consumers who have complaints against financial institutions. The Financial Arbitrator has the power to issue legally binding decisions, which can be enforced by the courts. The biggest question arises in connection with the specific classification of the Financial Arbitrator's position among public authorities, where there is often speculation from the public as to the anchoring of the Financial Arbitrator in the system of the separation of powers and his/her procedural authority (Smolik, 2006, p. 277).

In the event of a dispute with a financial services provider, it is preferable for consumers to go to the Financial Arbitrator first. This out-of-court protection body aims to resolve disputes at the lowest possible cost and in the shortest possible time. However, it can only resolve them until a court decision has been taken or legal proceedings have been initiated. The arbitrator exercises his/her function independently and impartially. The role was established on 1 January 2003 by Act No. 229/2002 Coll. on the Financial Arbitrator. The term of office is five years, and s/he is appointed by the government on the basis of a proposal by the Minister of Finance. S/he is part of the FIN-NET organization, which brings together similar institutions from the European Economic Area. Compared to other countries, the Czech arbitrator has extremely limited powers; only Cyprus, which does not even have a similar institution, is worse off. The Czech Financial Arbitrator cooperates with foreign institutions for out-of-court protection.

Dispute resolution is free of charge and takes place within a maximum of 90 days from the time when all the necessary circumstances have been established. On average, the Financial Arbitrator declares a dispute resolution time of 98 days, which is significantly faster than the average court resolution time of 271 days. However, the Financial Arbitrator's powers are limited, although they have expanded over time. Currently, the arbitrator is empowered to rule in disputes with (a) a payment service provider in the provision of payment services; (b) an electronic money issuer in the issuance and redemption of electronic money; (c) a creditor or intermediary in the offer, provision, or arranging of a consumer loan or other credit, loan, or simi-

lar financial service; (d) a person managing or administering a collective investment fund or offering investments in a collective investment fund or comparable foreign investment fund; (e) an insurer or an insurance intermediary offering, providing, or arranging life insurance; (f) a person carrying on a foreign exchange business; (g) a building society or an intermediary offering, providing, or arranging building savings; or (h) a securities dealer, tied agent, investment fund manager, or investment intermediary providing investment services or carrying out activities pursuant to Article 11(1)(c)–(f) of the Act No. 240/2013 Coll. on Investment Companies and Investment Funds.

The Financial Arbitrator, like the Czech National Bank, is obliged to publish an annual report on its activities in an appropriate manner. It must be made available for remote access and published once a year, no later than 30 June of the following calendar year. It must include a description of the disputes pending before it without identifying the claimants (Financial Arbitrator, 2021, p. 1). The latest annual report declares that the number of applications received for initiation of proceedings reached 1,709; compared to the previous year, this is an increase of 39%. Consumer credit was the most frequent subject of pending disputes in 2021, accounting for a total of 75% of all pending disputes.

The Czech Trade Inspection Authority (CTIA) is a government agency responsible for enforcing consumer protection laws in the Czech Republic. It monitors business practices and investigates complaints from consumers regarding unfair or deceptive practices by financial institutions. It is a state administrative body that falls under the Ministry of Industry and Trade; it is not primarily focused on the financial market, but it can deal with certain situations. The most frequent cases concern unfair commercial practices, incorrect or incomplete information about rights when making a complaint about a service, or failure to deal with a complaint within the statutory 30 days. It also investigates a consumer's submission if they believe that a credit agreement did not contain all the necessary information. Unlike a financial arbitrator, this body acts only as a mediator and does not issue decisions in private law disputes. However, it can rule as an administrative authority in the event of breaches of legal obligations by individual financial institutions towards consumers. It also operates a European Consumer Centre, which consumers can contact if they need help resolving disputes related to the purchase of a product or service from other EU countries, Norway, and Iceland. All services are free of charge.

The Ministry of Finance of the Czech Republic plays an important role in protecting consumers in the financial market. It is responsible for ensuring that financial institutions and other entities operating in the market comply with relevant laws and regulations, and that consumers are treated fairly. Specifically, the Ministry of Finance is responsible for implementing and enforcing laws related to financial products and services, such as consumer credit, insurance, and investments. It also oversees the activities of regulatory bodies, such as the Czech National Bank and the

Czech Securities Commission, which are responsible for ensuring that financial institutions and markets are operating in a fair and transparent manner. In addition, it is responsible for educating consumers about financial products and services, and for providing resources to help consumers make informed decisions. This includes providing information about the risks and benefits of different financial products, as well as information about consumer rights and how to file complaints.

4. Institutional consumer protection on the financial market in Poland

The level of consumer protection in Poland can still be considered inadequate. This is particularly evident in the case of loans burdened with currency risk, which were especially popular in Poland in 2006–2008. The institutions responsible for consumer protection did not ensure proper enforcement of borrowers' rights and were too slow to counter banks' unfair practices. As pointed out by the Supreme Audit Office, public administration entities did not ensure the proper enforcement of borrowers' rights and were too slow or insufficiently effective in countering the risks arising from the nature of these loans and the unfair practices of banks. The low activity of the consumer protection authorities, their lack of effective tools, and the design of the protection model, which requires a lengthy court process to establish the existence of unfair clauses, were the reasons for the institutional inefficiency of consumer protection. According to the Supreme Audit Office, the undefined competencies of the Financial Supervision Authority in protecting the interests of financial market participants also had a negative impact on the effectiveness of consumer protection (NIK, 2018, p. 55). As a result of these weaknesses in the consumer protection system, banks benefited from the use of unfair contractual provisions. Meanwhile, with few exceptions, they did not incur financial penalties for this, and the burden and risks associated with recovering these amounts were transferred to borrowers. So far, no systemic solutions have been implemented to solve the problem of these loans, and consumers are forced to assert their rights independently through lengthy and costly legal proceedings (Cyman, 2022, p. 125). Problems related to indexed loans have shown that even formally meeting the obligation to provide the consumer with all necessary information does not always allow for maintaining a balance between the parties. This led to the expansion of protection to institutional protection.

In 2015, the institution of the Financial Ombudsman was established, whose aim is to support clients in disputes with entities operating in the financial market. This has contributed to eliminating a significant gap in the protection system resulting from the lack of a specialized entity offering assistance in individual cases in the banking market. The Ombudsman has taken active information-providing and supportive measures to help borrowers in their quest for justice. Its scope of competence includes both the financial services market in general and the protection of individ-

ual consumers in the financial market. The Ombudsman may bring an action on behalf of clients of financial market entities in cases involving unfair market practices by such entities, and with the consent of the plaintiff may participate in proceedings that are already underway. It is also authorized to give opinions on draft legal acts concerning the organization and operation of financial market entities and to request that competent supervisory authorities initiate legislative initiatives, as well as informing relevant control authorities of any irregularities detected. Its role in educational and informational activities is also significant. It should be noted that the Financial Ombudsman plays a very active role, manifested in a significant number of initiatives taken to increase consumer protection. In 2022, the Financial Ombudsman registered approximately 4,600 applications and inquiries from clients of financial market entities (Rzecznik Finansowy, 2023, p. 6).

Another institution responsible for consumer protection is the President of the Office of Competition and Consumer Protection (Urząd Ochrony Konsumenta i Konkurencji – UOKiK). The President of UOKiK has broad competencies, including conducting proceedings in cases of practices that violate the collective interests of consumers, conducting proceedings to recognize model contract provisions as invalid, and publicly disclosing consumer warnings when there is a particularly justified suspicion that an entrepreneur is engaging in practices that violate the collective interests of consumers. The President of UOKiK is also equipped with the ability to express opinions in individual cases that are the subject of a court proceeding.

The Financial Supervision Commission (FSC) is the competent authority in matters of supervision over the financial market. As part of consumer protection, it undertakes monitoring, analytical, and supervisory actions and uses its supervisory powers to eliminate illegal market practices by supervised entities. It also analyses the construction of financial contracts offered to consumers and directed at them through advertising, and influences legal regulations affecting the rights and obligations of recipients of financial services by reviewing or preparing draft legal acts and inspiring self-regulation of the market. To ensure proper protection, it cooperates with entities aimed at protecting consumers, including the President of the UOKiK, the Financial Ombudsman, the Ombudsman for Civil Rights, and non-governmental organizations in matters of complaints, contractual patterns, and other matters relating to the protection of the interests of non-professional participants in supervised markets. The arbitration court at the FSC also plays a significant role. Although it is not a consumer court, as all participants in the financial market can be parties to it, it deals practically with cases related to the violation of consumer rights.

The protection of consumer rights is also one of the tasks of local government. This is achieved by appointing a district (city) consumer ombudsman, whose primary task is to provide free consumer advice and legal information on the protection of consumer interests. Within their competencies, they may also submit requests for the establishment and amendment of local laws and regulations and approach entre-

preneurs in matters of consumer protection. They may bring legal action on behalf of consumers and, with their consent, participate in ongoing proceedings concerning the protection of their interests.

The central bank is starting to play an increasingly important role in consumer protection in the financial market, primarily due to its efforts to maintain the stability of the entire financial system. It takes action in the field of economic and financial education, disseminating knowledge about the functioning principles of the financial market, supporting entrepreneurial attitudes, shaping responsibility in making financial decisions, raising the level of knowledge about economic issues, popularizing knowledge about the national economic heritage, and promoting modern attitudes that affect the shaping of capital within society. Furthermore, the central bank indirectly influences the protection of consumers of financial products and services by participating in the creation and management of macroprudential policy. The National Bank of Poland is the leading institution in the collegial body of macroprudential supervision, the Financial Stability Committee.

To sum up, it should be noted that in many cases, consumer protection in Poland was insufficient, introducing risks not only for individual consumers but also for banks and even the entire banking sector. However, it is important to emphasize that in recent years, the role of consumer protection institutions has strengthened. There is noticeably broader reference to the European consumer protection model, as well as to the significant importance given to the judgments of the Court of Justice of the European Union. A weakness of the Polish legal system is the lack of consistent systemic solutions concerning out-of-court dispute resolution; examples include the current disputes between banks and clients who took out loans indexed to foreign currencies. Appropriate mechanisms in this regard would contribute to a more comprehensive and multifaceted protection of customers of financial institutions.

Conclusions

While both the Czech Republic and Poland have implemented consumer protection measures in their respective financial markets based on European law, there are some differences worth noting. In terms of financial regulation, the Czech Republic has a stronger regulatory framework than Poland, which has experienced some issues with weak enforcement and insufficient penalties for financial institutions that violate consumer rights. The Czech National Bank has a well-established system of supervisory control over financial institutions, which helps to prevent financial misconduct and ensure the safety of consumer investments. On the other hand, Poland has implemented some innovative measures to protect consumers in recent years. For example, the Polish Office of Competition and Consumer Protection has introduced a system of 'mystery shopping' in financial institutions to detect any irregularities in

the provision of financial services. Additionally, Poland has created a centralized database of consumer complaints, making it easier for consumers to file complaints and ensuring that financial institutions are held accountable for their actions.

Consumer protection in out-of-court dispute resolution is very effective in this respect and is being used more and more by consumers every year. In Poland, there are alternative dispute resolution institutions in place, but there is a need to advocate for increased usage of them. The majority of disputes are resolved in courts, which leads to a significant increase in costs and length of proceedings. This is due to a lack of awareness among consumers about the possibilities of resolving disputes out of court, as well as the occasional reluctance of financial institutions to submit disputes to arbitration or mediation.

Overall, while both the Czech Republic and Poland have made efforts to protect consumers in their financial markets, there are differences in the strength of their regulatory frameworks and the specific measures they have implemented. However, both countries recognize the importance of consumer protection in maintaining a stable and trustworthy financial system and continue to work towards ensuring the safety and wellbeing of their citizens in financial matters. In both countries, institutional consumer protection is also being strengthened, based not only on guaranteeing the provision of adequate information, but also on active support, both direct and indirect, in the financial services market.

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Central Bank Digital Currency as a New Form of Money

Abstract: The possibility of introducing another form of official money, the Central Bank Digital Currency (CBDC), recognised by legislation, has long been discussed worldwide. This paper aims to analyse the advantages and disadvantages of such a solution, as well as to highlight the challenges facing legislatures about the possibility of legalising digital currency and, above all, protecting the rights and freedoms of citizens participating in the process. Due to its technological nature, CBDC is characterised by a much lower level of anonymity than conventional cash, which is often presented as a disadvantage. However, an analysis of this solution seems to weigh in favour of its advantages. One of them is the possibility of using CBDCs to support the process of financial inclusion referred to in the United Nations document *Transforming our world: The 2030 Agenda for Sustainable Development*. This is an important subject of academic research that can be carried out under the doctrine of financial-market law. Undoubtedly, this matter also has an increasing impact on the practice of financial-market functioning and fiscal and monetary policy decisions. In particular, financial law plays a key role in solving socio-economic problems and is becoming an instrument for achieving the goals set by the United Nations. The research subject of CBDC is innovative and exploratory, as money, no matter how it is perceived, is, has been and will continue to be an instrument to change the world for the better.
Keywords: Central Bank Digital Currency, central banks, money, new technologies, sustainable development, trust

Introduction

To meet the technological changes taking place in the financial market (Zalcewicz, 2023, pp. 23–25), which results in the creation of new forms of financial instruments, central banks have for some time been considering issuing a new form of money – digital money. The aim of the present article is to identify the basic objec-

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tives of and needs for the creation of this alternative to the current traditional forms of money and the regulatory challenges associated with it, as well as to redefine the role of central banks in the era of the progressive digitalisation of the financial market.

This digitalisation, which permeates most of our daily lives, represents a kind of amalgam of contradictions. On the one hand, it supports numerous activities in our daily lives, allowing us to save precious time. On the other hand, its specific nature, based on the need to collect and process large amounts of data, creates certain risks. The most important of these is restriction of freedom due to the uncontrolled acquisition and use of sensitive information, the transmission of which is usually due to ignorance of the technological processes involved. There are many examples of such abuse, such as the constant monitoring of consumer preferences on websites, the use of specific data on social networks, etc. This is because the very nature of IT solutions is that they leave a specific trace, making our lives less anonymous. Furthermore, the phenomenon of financialisation, which according to Epstein can be defined as the increasing role of financial motives, markets, actors and institutions in the functioning of national and international economies (Epstein, 2005, pp. 3–5; also see Aalbers, 2008, pp. 148–166; Engelen, 2008, pp. 111–119), is becoming increasingly important today. In practice, it materialises in the increasing penetration of financial elements into the real world and everyday life (Nieborak, 2016, p. 83). Against this backdrop, traditional money in the form of banknotes and coins may appear to be a relic, an element of tradition that has not kept pace with modern times. It is being replaced by modern forms of money, which is electronic and cashless, and in the future, perhaps also the Central Bank Digital Currency (CBDC). Conversely, the sentiment associated with the use of traditional money is often due to a feature that its modern successors do not possess: the anonymity of the transactions, which can certainly be regarded as fundamental to the guarantee of individual rights and freedoms. However, this feature can also be seen in a different light, as anonymity is also a desired feature in the criminal world.

What is indisputable, however, is that regardless of the form of money, the modern world cannot exist without it nor without its sustainable development, as referenced in the United Nations document *Transforming our world: The 2030 Agenda for Sustainable Development*. This identifies several factors that are important for development to increase the prosperity of all countries. Certainly, the improvement of the monetary settlement process through its progressive digitalisation for so-called financial inclusion can be a factor supporting this process. Evidence of this can be seen, for example, in the e-money solutions implemented in the past in Ethiopia (National Bank of Ethiopia, 2021), which allowed the country's payments network to be developed at relatively low cost. Arguably, the success of such initiatives was one of the factors that triggered the discussion of virtual currencies that would be issued by central banks. Although we are still at the beginning of this journey, given the speed

of change, it makes sense to undertake a comprehensive analysis of the subject of central bank digital money. The aims are to present the main elements of this solution, to consider its advantages and disadvantages, to analyse case studies, to answer the question of the validity and feasibility of its actual application, and to point out the challenges of implementing the digital solution in practice.

1. A few words about the nature of money

The analysis of CBDCs as a new form of money should be seen in a broader perspective that encompasses the nature of money as such. It could well be preceded by a Latin maxim, which despite the passage of time has not lost its relevance, perfectly describing the nature of money: *Pecunia vis est, non est materia*, that is, 'Money is power, not a thing.' The aptness of this maxim stems from the fact that, despite the changes in the forms of money over the centuries, the elements that make up money and that are used in the process of recreating a legal definition of it remain the same. These are the money symbol, the monetary unit and the monetary sum. The first of these is a particular kind of 'thing' (Latin: *res*) to which a specific meaning of money is customarily or legally ascribed. This means that the medium of exchange can take different forms, although nowadays it is mainly associated with the cash form of money, i.e. banknotes and coins. It should be remembered that this form of money has not always been ubiquitous; the history of money is replete with examples of its sometimes surprising forms, such as kauri shells, cocoa beans or the copper crosses of Katanga (Davis, 2002, pp. 35–66). The fact that they became money was due to two important factors that must be taken into account every time a new form of money is considered for introduction: rarity and trust, which are closely related. Of course, it is rarity that gives a given thing (money) its value. To maintain this value at an optimal level, it is necessary to constantly maintain trust in money, which is now the responsibility of the central bank, executed by controlling the supply of money and, indirectly, by monitoring the stability of the financial market, in recent years through what is known as macroprudential supervision (Fedorowicz, 2019, passim; also see Borio, 2003, pp. 4–9). To better understand this relationship, it is worth quoting one of the definitions of trust given by Sztompka, who in his reflections also emphasises the importance of the so-called culture of trust. According to Sztompka, 'trust is perceived as a specific kind of moral bond between specific persons, which is referred to as the category of social bonds. This bond exists between specific persons, i.e. the one granting trust and the one who is or is not trustworthy, and who fulfils or does not fulfil the expectations formulated towards them by the trusting person' (Sztompka, 2012, p. 346; also see Luhmann, 1980, p. 64) This definition perfectly captures the kind of tension between the parties that also exists in relationships (ties) whose object is money. It is therefore probably no coincidence that 'trust' (Latin: *fides*) is a term

used to describe one of the forms of money, namely fiat money, which is commonly associated with contemporary cash, the value of which does not derive from the material from which it is made, but from the social trust placed in it by a particular individual and, indirectly, from the trust placed in its issuer (the central bank). This relationship is also part of the analysis of CBDC, which, unlike contemporary money, is not defined by the element that constructs it, namely the money symbol.

However, CBDC will certainly be associated with the other two elements mentioned earlier, namely the monetary unit and the monetary sum. The former refers to the abstract substance of money; it is the unit of measurement of value introduced by the state (e.g. euro, dollar). Without its existence, it would not be possible to define the monetary sum, which is an abstract aggregate of value. The traditional carrier of this value is the money symbol, but the monetary unit and the sum can function in isolation from it. This is the case, for example, when a certain amount of cash is deposited at a bank counter and this real-time transaction is reflected in a bank-account entry. Moreover, this transaction also leads to a change in the form of money, from cash to non-cash money. It also proves that it is difficult to imagine the idea of money functioning without the acceptance of a certain fiction by those who use it. This was well put by Friedman and Jacobson Schwartz (1963, p. 696) when they wrote that money owes its existence to society's acceptance of the fiction. But this fiction is not an ephemeral, unstable creation, and its power derives from the universal need to have common money.

Whatever the form of money, it is necessary to ensure the conditions that guarantee its stability and security, which are necessary for the maintenance of its proper value; this is nowadays identified with the inflation target, the achievement of which is the responsibility of the central bank. The central bank pursues the inflation target by shaping the relationship between the supply of and demand for money in the market. In doing so, the central bank uses specific monetary policy instruments and the financial market as the so-called transmitter of the monetary impulse. However, it leaves the subjects of this market (banks) to a certain extent free to create money in the form of credit (money is born through credit and dies through its repayment). These interdependencies must be taken into account when constructing a monetary system in the form of CBDCs – money which, while certainly not a money symbol, is nevertheless a formal means of payment, recognised by legislation and constructed by a designated monetary unit and a monetary sum. A secondary (but socially extremely important) issue in this context is the name of the money and the medium by which it is transferred. It is worth mentioning the Sand Dollar here (World Bank Group, 2021, p. 25), which is already in use in the Bahamas (as will be discussed later in the article), and the long-standing definition of 'electronic money' in Article 2(2) of the EU Directive 2009/110/EC, which provides that 'electronic money' means electronically (including magnetically) stored monetary value as represented by a claim on the issuer which is issued on receipt of funds to make payment transactions as de-

fined in Article 4(5) of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer. It must be noted here that in the provision of the Article cited above, the EU legislature referred to Directive 2007/64/EC (so-called PSD1), subsequently repealed by Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and Repealing Directive 2007/64/EC (Article 4(3)). This definition is an excellent example of the EU legislature applying the concept of technological neutrality. In brief, this means that regulations should be drafted in such a way that they do not interfere with the use of new technologies in the future; they should therefore be linguistically flexible. Taking the above definition of e-money as an example, one detail that may not be obvious at first glance is how the value of the money is stored – 'electronically' or 'magnetically'. This distinction becomes clearer when we compare the two types of hard disk drives commonly used today: the classic HDD, i.e. a magnetic platter drive, and the modern solid-state drive, SSD. Within the regulatory philosophy presented, we find another important definition of 'payment instrument' relevant to the matter discussed here, which, according to the wording of Article 4(14) of Directive 2015/2366, means 'a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used to initiate a payment order'.

Another noteworthy definition, often quoted in the CBDC debate, is the concept of a crypto-asset in Article 3 of Regulation 2023/1114 of the European Parliament and of the Council of 31 May 2023 on Markets in Crypto-Assets, and Amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, where a 'crypto-asset is referred to as a digital representation of a value or a right that can be transferred and stored electronically using distributed ledger technology or similar technology'. This instrument has also been framed by the legislature in the spirit of technological neutrality.

The juxtaposition of these definitions perfectly illustrates the relationship between the elements that make up the legal concept of money – money which, whatever form it takes, will always perform the same functions, the most important of which is that of a measure of value and a means of settling obligations. An obligation may be discharged by the payment of a certain amount by the debtor to the creditor. This payment consists in the transfer to another person of an abstract sum of value (the said monetary sum) expressed in monetary units. It is important that the creditor should receive the specified value from the debtor. The withdrawal of monetary units from circulation or a change in their form (e.g. into CBDCs) does not extinguish the debt. It will continue to exist even if, for example, it is expressed in another monetary unit, even if dematerialised, but transferred by means of a traditional transfer order or any other instrument that can be identified as another form of the medium of exchange.

An analysis of the nature of money is important in order to understand its essence and its potential new form, i.e. CBDC, the introduction of which poses many challenges, not only technical but also legal and social. Whether we like it or not, money, understood as a universally accepted legal and customary means of settling obligations, fulfilling the role of a universal equivalent, has been, is and will continue to be one of the most important elements in people's lives, guaranteeing them the possibility of living a life of dignity (although defining the limits of this dignified life is not easy and is conditioned by many factors – cultural, religious, social). The source of its evaluation should certainly be a correct understanding of human dignity, which, as a characteristic of every human being, should constitute an end in itself and not a means to an end, however noble that end may be (Carozza, 2013, pp. 345–359; Kojder, 2015, p. 50; Piechowiak, 2012, pp. 126–146). The state should thus create the conditions for its citizens to strengthen their self-esteem and self-respect, based on the positive moral, spiritual and social qualities they possess. A tool for developing and sharing such qualities is certainly money and people's access to it – for example, to develop someone's personality through education, health care and access to health services, not to mention the provision of basic needs such as food.

Human dignity is also a fundamental constructive element of the 2030 Agenda for Sustainable Development, adopted by all United Nations member states in 2015, which provides a shared blueprint for peace and prosperity for people and the planet, now and in the future. In the preamble to the document, we read that 'the goals and targets will inspire action over the next fifteen years in areas of critical importance for humanity and the planet'. The most important subjects of these goals are people. For their benefit, action must be taken to eradicate poverty and hunger in all their forms and dimensions, and to ensure that everyone can fulfil their potential in dignity and equality and in a healthy environment.

The question arises: Could the introduction of CBDCs by central banks, the characteristics of which could be discussed in dozens of pages of analysis, be helpful in this regard? In advance of such analyses, it is worth mentioning here two potential benefits associated with the use of CBDCs, namely the promotion of financial inclusion in society and the faster and more efficient direct distribution of public aid in emergency situations. The potential programmability of CBDCs also makes it possible to target such aid and to monitor the reliability of its use.

2. The concept of CBDC

The debate on the feasibility and challenges of CBDC issuance has been ongoing for several years, with a number of the themes highlighted above relating to social, economic and legal issues. Participants include both practitioners, especially those representing central banks, and scholars. At present, CBDC seems to have become

one of the leading topics of discussion alongside AI (Kusak, 2022, pp. 209–219), probably due to the fact that CBDC and AI share the same technological and social issues. In the case of the latter, many questions arise as to how the proposed solutions should be controlled, particularly in terms of human freedoms and rights. There is concern that basing systems on such advanced technology may limit or even infringe these rights. A characteristic thread of the CBDC debate in this regard is the problem of anonymity and the state's desire to limit it. Indeed, the CBDC project envisages the possibility of programming and tracking the use of monetary means created in this way. It is also significant that the leaders in the mass introduction of CBDCs include states that are widely regarded as authoritarian, although there are also Scandinavian countries (notably Sweden), widely regarded as models of civil liberties, which are characterised by the widespread use of non-cash forms of money.

The multifaceted nature of the discussion on CBDC requires a focus on selected relevant elements. The focus of this article is the search for a justification for the creation and use of CBDCs in terms of social benefits. The present analysis requires a definition of central bank digital currency, commonly referred to by the abbreviation CBDC. To date, no single universal legal definition of CBDC has been established, probably due to the variety of technical solutions that can be applied to the design of this new form of money. Although dozens of central banks around the world are working on it, analyses of CBDC most often cite definitions proposed by four global financial-market players: the Bank for International Settlements (BIS) (Bank for International Settlements, 2020), the European Central Bank (European Central Bank, 2020), the Financial Stability Board (Financial Stability Board, 2020) and the International Monetary Fund (IMF) (Bossu et al., 2020). The reports of these entities repeatedly point to the difficulty of defining CBDC. Nevertheless, attempts are made and it is worth quoting two proposals here. The first, by the BIS, identifies CBDC as a new form of central-bank liability, denominated in an existing unit of account which serves both as a medium of exchange and a store of value. CBDC is a digital form of central-bank money that is different from balances in traditional reserve or settlement accounts (Committee on Payments and Market Infrastructures, Markets Committee, March 2018). In addition, it should be pointed out that this form of money is characterised by the four key properties of money: issuer (central bank or other), form (digital or physical), accessibility (wide or restricted) and technology (Barontini & Holden, 2019, p. 1).

In one of the IMF's documents, CBDC was defined as a new form of money, issued digitally by the central bank and intended to be legal tender (Mancini-Griffoli et al., 2018, p. 7). From the definitions presented, which are simple in their form, it follows that CBDC is to be a legally recognised new form of money, issued in digital form, to which all the traditional functions are to be ascribed, i.e. payment, valuation, settlement of liabilities and store of value. This confirms the thesis that the essence of modern money is expressed in its functions and not in its form (Iwańczuk-Ka-

liska, 2018, p. 182). An analysis of these definitions of CBDC suggests that they are of the same nature as e-money or cryptocurrency, with the difference being that, firstly, CBDCs are issued by central banks and, secondly, they are recognised as a legal form of money on a par with cash and non-cash money. Their issuance is to be centralised and thus subject to certain controls, which may increase the security of its mass use. The comparison of CBDCs with cryptocurrencies also suggests that the latter are controlled by the crypto-network market, where anonymous users make rules by consensus, which affects the security of their use. Conversely, the centralisation of central-bank money makes it possible to shape its supply and thus control its value, which is important if we recognise that money must be considered a public good whose protection should be vested in the state (Zellweger-Gutknecht et al., 2021, p. 38). This may be seen by some as the price to be paid for increased security in CBDC transactions, but by others as a means of restricting civil rights. In the debate on CBDC, the contingent risk of increased surveillance and control of citizens through CBDC is repeatedly highlighted, although this is not a foregone conclusion in every case as it depends on the technical solutions and the model to be applied. In an extreme case, of course, the central bank could have the ability to take full control of determining the purchasing power of its CBDC, its period of validity or even the amount of CBDC in a particular citizen's account to be used as relief in a situation such as a natural disaster. The programmability of CBDC could also be used as a tool of punishment, denying access to those who prove disobedient to authority.

As can be seen from the above, but also from numerous other publications on CBDCs, the instrument can be seen as a classic example of the Scylla and Charybdis dilemma. A comprehensive analysis of the use of CBDCs makes it possible to identify many arguments both for and against their use. Among the positive elements associated with CBDC, the following are the most frequently mentioned (Nowakowski, 2021, pp. 10–11; SWIFT, 2021):

- the promotion of the above-mentioned financial inclusion, in particular of the most vulnerable groups, who are excluded, inter alia, as a result of their lack of access to a bank account and, in many cases, to cash; in many parts of the world, cash is rapidly disappearing, with the result that the number of bank branches and ATMs is falling, often leaving people in remote areas to fend for themselves;
- the reduction of risks associated with the use of cryptocurrencies;
- the reduction in the use of tangible money and thus in the costs involved;
- increased innovation by exploiting the benefits brought about by the inevitable digitalisation of everyday life;
- support for the phenomenon of 'keeping up' with others, as in the case of Europe, which seems to be losing its position as a global leader in technological innovation to other regions of the world;

– the need to strengthen and protect monetary sovereignty, commonly identified with the role and objectives pursued by the central bank (and indirectly commercial banks) in terms of monetary policy, which is undermined by, among other things, FinTech solutions, including, for example, stablecoins issued by global digital services companies;
– improved efficiency of existing payment systems;
– improved cross-border transfer of funds;
– the reduction of criminal phenomena such as money laundering.

Central banks, taking into account the above arguments, are faced with the dilemma of which model (type) of CBDC to use to, on the one hand, maximise the benefits of its use and, on the other, avoid the potential risks associated with it, in particular regarding market stability and security, while ensuring market competition, for which the two-tier banking system is currently the guarantor (Kaczmarek, 2022). After all, CBDC has the potential to take over that part of the market so far reserved for traditional commercial banks, from which they could be 'pushed out' by the central bank. Moreover, as has been indicated, the success of money, whatever its form, depends on the trust placed in it. Therefore, CBDC must be in a form which is attractive to the consumer and therefore easy to use, cheap, quick to apply, secure and widespread. It must also take into account specific characteristics of the local market and the habits and customs of the society concerned.

For this reason, various models for CBDC issuance are being considered in work on the subject (Hess, 2020, pp. 12–15). Solutions developed for the needs of virtual currencies have been reached first, most notably Distributed Ledger Technology (DLT), which supports the distributed recording of encrypted data, and thus enhances its security, and is commonly associated with blockchain technology. DLT used on a massive scale, which will certainly be the case for CBDCs, will, however, need to be technically adapted in terms of its fluidity, speed and the scaling of the computing infrastructure, not to mention the technical facilities (Syrstad, 2023, pp. 10–12). Central banks will not be able to risk any problems in this case, as the security of the country's or even the world's financial system would be at stake. This is probably why, despite numerous successful simulations, as in the case of the Swedish e-crown or the Chinese eCNY (whose pilot involved 140 million users), the journey from concept to final implementation of CBDC is extremely long (Cheng, 2020). The former is based on DLT technology, in which CBDC relies on the existence of a database that collects records and arranges them into blocks, each of which is linked to the others by cryptographic encryption. The second technology is based on tokens that embody the assets whose ownership they confirm. It is possible to use a wholesale version of this solution, intended mainly for interbank and financial-market clearing, and a retail version based on digital tokens, available to all entities in a sim-

ilar way to cash – 'digital cash', token-based, general purpose CBDC (Bank for International Settlements, 2022).

3. Case study: The Sand Dollar

So far, only a few countries have decided to issue CBDCs. However, many are well advanced in the implementation process. The Bahamas and Nigeria are at the forefront of the process and can boast practical use of the new form of money. The former has already introduced a currency called the Sand Dollar, while Nigeria has brought in a currency called the eNaira (Ozili, 2022, pp. 125–133). Among the many reasons given for their issuance, financial inclusion (in the Bahamas) and social inclusion (in Nigeria) are the most commonly mentioned. To understand these, it is necessary to take a closer look at the specifics of the countries in question; given the breadth of the subject under analysis, attention will be focused on the first of these countries, where a CBDC – the Digital Bahamian Dollar, known as the Sand Dollar – has been in circulation since 20 October 2020. The Sand Dollar is designed to be a safe and cheap alternative to existing forms of money. The name comes from a species of flat, burrowing sea urchin of the order *Clypeasteroida*, also known as sea cookies or snapper biscuits. Their association with money probably stems from a story in which dead sand dollars represented coins lost by mermaids or the people of Atlantis. Interestingly, ten sea urchins are also part of the official logo of the Central Bank of The Bahamas (See Figure 1), which was established on 1 June 1974 to carry out the independent monetary policy and financial-sector supervision functions entrusted to the Bahamas following political independence from the United Kingdom in 1973.

Figure 2. The official logo of the Central Bank of The Bahamas

Central Bank of The Bahamas

Source: Central Bank of The Bahamas (n.d.)

To understand the rationale behind the introduction of CBDC in the Bahamas, it is important to note that the country, with a population of around 400,000, is made up of more than 3,000 islands, cays and islets in the Atlantic Ocean, which are frequently hit by hurricanes. The real challenge for the monetary authorities there is to

ensure the smooth functioning of the banking system and the continuity of the payment system, including cash (cash distribution). With limited access to infrastructure and banking services, the introduction of the new solution, preceded by pilots on the islands of Exuma and Abaco and accelerated by the COVID-19 pandemic, is also intended to promote the financial inclusion of the local population. Key objectives for the launch of the Sand Dollar include (Sanddollar, n.d.):

– increasing the efficiency of the Bahamian payments systems through more secure transactions and faster settlements;
– providing non-discriminatory access to payment systems without regard to age, immigration or residency status;
– achieving greater financial inclusion, cost-effectiveness and providing greater access to financial services across all of the Bahamas;
– strengthening national defences against money laundering, counterfeiting and other illicit ends by reducing the ill effects of cash usage.

The legal basis for the operation of the Sand Dollar is contained in the Central Bank of The Bahamas Act 2020 (No. 24 of 2020), which in Article 5 sets out the norms for the operation of the central bank and its tasks, including promotion of stable monetary payment conditions, credit and balance of payment conditions in order to protect the exchange rate regime and facilitate the orderly and balanced growth of the economy; contributing to the stability of the Bahamas' financial system through collaboration with other domestic and foreign regulatory authorities; supporting the general economic policy of the government by providing sound economic, financial and monetary advice; and determining and implementing monetary policies. Article 8 of this Act provides that the currency of the Bahamas shall comprise notes, coins and electronic money issued by the Bank under the provisions of this Act. In exercising the powers conferred by Section 15 of the Act, the Central Bank of The Bahamas enacted the Bahamian Dollar Digital Currency Regulation (Ministry of Finance, S. I. No. 88 of 2021). This Act sets out the key rules for the issuance of the Sand Dollar and defines the Bahamian Dollar Digital Currency as an electronic version of the Bahamian dollar issued by the Central Bank pursuant to the authority conferred upon it by the Act, fully backed by the reserves held by the Central Bank and representing a direct claim against the Central Bank (Article 2).

The Sand Dollar implementation process is spread over time in order to include as many users as possible in the system. This is because achieving a sufficiently large critical mass will make it possible to test a variety of scenarios and the ways this CBDC is used, taking into account the transactions carried out as well as instruments (applications, handsets) and specific types of digital wallets. This experience will certainly be useful to other countries that decide to implement CBDCs.

Conclusion

Bearing in mind the positive aspects of the introduction of a new form of money, as indicated in this article, CBDC seems an excellent solution for the future to be commonly used as a supplementary form of money. However, its introduction must be preceded by a detailed analysis that weighs the arguments and consequences identified here, of which the most important ones are (Narodowy Bank Polski, 2021 pp. 35–51):

- the impact on the banking system and financial stability;
- the impact on the conduct of monetary policy;
- the impact on the payment system;
- the impact on the central bank's balance sheet and profit and loss account;
- legal issues relating to the issuance of CBDCs; and
- social aspects of the introduction of CBDCs.

There is no doubt, however, that a well-managed digitalisation process accompanying the implementation of CBDCs can be an important instrument to support sustainable development, in individual countries and globally. Efforts towards development and peace should not cease, despite the numerous and constantly emerging adversities. Humanity should be guided by the idea expressed in the Agenda for Sustainable Development that it is necessary to

> seek to build strong economic foundations for all our countries. Inclusive and sustainable economic growth is essential for prosperity. This will only be possible if wealth is shared and income inequalities are addressed. […] All countries stand to benefit from having a healthy and well-educated workforce with the knowledge and skills needed for productive and fulfilling work and full participation in society.

To this end, it is important to 'strengthen the productive capacities of least-developed countries across all sectors, including through structural transformation, and to adopt policies that increase productive capacity, productivity and productive employment; financial inclusion; sustainable agriculture, pastoralism and fisheries development; sustainable industrial development; universal access to affordable, reliable, sustainable and modern energy services; sustainable transport systems; and quality and resilient infrastructure'. Of particular significance here is financial inclusion, which a well-designed and implemented CBDC system can certainly help to promote – a system that, while serving citizens, will not infringe on their rights or control their lives, but will contribute to the development and prosperity of all. Indeed, it is worth pointing out, following Parajon Skinner (2023, pp. 26–52), that money can be seen as a bundle of rights; sovereignty, property and privacy are the keywords. We might even be tempted to say that money constitutes the essence of humanity, being the foundation of human dignity and human rights, regardless of

how these rights are perceived in different cultures and different legal systems. Their common denominator, however, is money, without which, whether we like it or not, it would be impossible to lead our everyday lives. The role of the legislature, in turn, is to guard these values in all areas of daily life, including those concerning finances. It should be remembered that control over money, its issue and its value is crucial for the stable and secure development of the state. Money is also a source of enormous power, which is perfectly reflected in the words attributed to Mayer Rothschild: 'Give me control of a nation's money supply, and I care not who makes its laws.' These words are well worth keeping in mind, as real power always involves the control of money, whatever its form. And money, it should be remembered, was created by the people and for the people.

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Towards the Greening of Banking: A Comparison of the Polish and Czech Financial Markets

Abstract: The role of the banking system in promoting and implementing the Sustainable Development Goals in Europe has recently become very significant. As an important part of the financial sector, green banking helps to achieve the goals of sustainable development, which, in times of global financial, economic, climate, and social crises and of war, is very important. The authors aim to present the general approach to 'green banking' in Poland and the Czech Republic as represented by the banking sectors themselves and the national regulatory and supervisory authorities, with reference to the EU legal framework. They posit that 'green banking' is an increasingly important trend in the development of the Polish and Czech financial markets and conclude that EU regulations are the biggest driver of change in green finance, resulting in an increased awareness of environmental, social, and corporate governance (ESG) factors. What is required, however, is greater systemic involvement of the institutions that constitute the financial safety net, especially central banks. The research has used a theoretical and dogmatic-legal method, based on content analysis and the availability of source information, i.e. theoretical-legal publications, overview sector reports, and, in particular, legal regulations key to the topic.

Keywords: green banking, green finance, sustainable finance

Introduction

Social, environmental, and economic sustainability has been one of the most important trends in financial markets in the last decade. 'Sustainable finance' is under-

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stood at the European Union level as financing that promotes economic growth while reducing environmental pressures so that the ambitious climate and environmental goals of the European Green Deal can be achieved, taking social and governance aspects into account. This is possible by directing private investment to a transformation towards a climate-neutral, climate-resilient, resource-efficient, and equitable economy, as a complement to public funding (European Commission, 2019).

‘Green finance’ provides funding for climate-change adaptation and mitigation (‘climate finance’) but also includes other environmental objectives, while ‘sustainable finance’ expands its domain to include environmental, social, and corporate governance (ESG) factors. Sustainable finance is therefore an evolution of green finance and refers precisely to the process of taking ESG aspects into account when making investment decisions in the financial sector, leading to more long-term investment in sustainable economic activities and projects (Spinaci, 2021). The term ‘green banking’ reflects this type of ‘sustainable’ approach in the banking sector. It means the implementation of sustainable financing in the banking sector; it refers to the banks’ compliance with environmental requirements towards the economy and society, as well as the fact that they should take all social and environmental factors in their activities into account and incorporate environmentally friendly measures into their strategies, such as the use of environmentally friendly financial solutions and instruments (Ziolo et al., 2018, p. 35). Therefore, ‘greening’ must be an integration of three levels: environmental, social, and economic.

Banks and the financial market still remain the main source of external finance for the European economy (European Banking Federation, 2022). It is banks that are the ‘hub’ of all modern markets; they enable funds to flow into the system, enabling innovation, growth, and prosperity (Związek Banków Polskich, 2023, p. 17). They will therefore play a key role in closing the investment gap in the transition to a more sustainable economy and the mitigation of climate risks. At the same time, however, it is important to note that financial institutions themselves may be exposed to economic development risks, commonly known as environmental, social, and governance risks, including climate-change risks. It is impossible to quickly catch up the delay in the climate transition to zero carbon with the current state of technology without triggering the risk of economic and financial catastrophe (Mikliński, 2023, p. 13).

It is important to bear in mind that the role of financial institutions is changing, moving increasingly beyond their original function as financial intermediaries. Rather than maximising short-term profits, they are now beginning to look at the long-term prospect of achieving the Sustainable Development Goals identified in the United Nations Agenda 2030 (United Nations, 2015b). Banks, as expected by the public, should no longer be involved only in economic growth, but also in supporting sustainable development in response to global risks. While financial institutions do not directly impact society and the environment overall (beyond their own internal

operations as environmentally and socially responsible institutions), they can do so indirectly through their influence on the financial products they create and the businesses they finance, eliminating those that harm the environment, undermine human rights, and involve serious negative impacts on local communities. Importantly, research indicates that access to financing for social and environmental sustainability generates a positive impact on banks' business performance, particularly financial performance. This positive impact is felt through credit growth and management quality (Nizam et al., 2019, p. 35). By implementing green measures, financial institutions can build a positive image in their environment. In terms of climate-transformation issues, banks play a special role, as they can create and offer green banking products to their customers. Products of this type are directly aimed at supporting investments intended to change the existing way of operating to a more sustainable one (Kozar, 2022, p. 143).

Environmental sustainability is, arguably, the key societal challenge of our time. Achieving this goal will require a significant level of funding and investment, and the role of the banking sector is fundamental here. This is also the reason that the issue of climate change is also increasingly becoming a focus for central banks (NGFS, 2023). Given the global experience, climate change and the transition to a greener economy undoubtedly have implications for the exercise of central banks' core mandate, namely the conduct of monetary policy, but also for financial stability (ESRB, 2021). Therefore, central banks, as well as the other regulatory and supervisory institutions that make up the financial safety net, should play a key role in a concerted global effort to address the urgent and universal challenge of the Sustainable Development Goals.

1. The EU legal framework for green banking

The 2015 Paris Agreement has long been recognised as a landmark event that gave a new impetus to global economic policy, redefining and renewing commitments and obligations for investment and emissions reductions (Gugliotta, 2021, p. 23). As part of the Paris Agreement, many countries around the world committed to providing financial flows consistent with a low-carbon and climate-resilient pathway to help achieve long-term climate goals (United Nations, 2015a). In this area, the European Union adopted the ambitious Action Plan on Financing Sustainable Growth in 2018, as well as the Strategy for Financing the Transition to a Sustainable Economy in 2021. In addition, in October 2019, the EU, together with Argentina, Canada, Chile, China, India, Kenya, and Morocco (more countries joined later), launched an action through the International Platform on Sustainable Finance to mobilise private capital for ESG investments (European Commission, 2023a).

There is no single act that comprehensively regulates the principles on which sustainable finance is created. ESG elements have been introduced in a number of EU acts and with varying legal force. To address the ESG challenges, the EU has, since 2018, put in place three pillars for a sustainable financial framework, as intended, facilitating private finance for green and transition investments (European Commission, 2023b):

- The EU Taxonomy, a common dictionary for economic activities which substantially contribute to the EU's climate and environmental objectives, allowing financial and non-financial companies to share a common definition of economic activities that can be considered environmentally sustainable (in particular Taxonomy Regulation 2020 and supplementing Regulations 2021/2178, 2021/2139, and 2022/1214);
- Rules on disclosure and reporting for both companies and investors, to ensure proper transparency for all stakeholders and where the regulator has placed the qualification of financial products for sustainable objectives under the legal regime (in particular the Sustainable Finance Disclosures Regulation 2019 (SFDR) and supplementing Regulations 2022/1288 and 2023/363);
- Tools such as standards and labels for Climate Benchmarks and the EU Green Bond Standard (COM/2021/391 final).

In its conception, this coherent and systematically expanding mesh of legislation is intended to enforce transparency in the area of double materiality, i.e. the impact of investment decisions on sustainability and, conversely, the impact of sustainability risks on the value of investments. The concept of the double materiality of climate risks is based on the recognition of a feedback loop between climate change and the financial system (Gourdel et al., 2022, p. 6). As a result, the EU's holistic approach to the implementation of the new regulatory governance has made legislation applicable (both directly and indirectly) to a wide range of market actors.

The range of the above regulations (both new acts and amendments to existing ones) that are related to ESG obligations and impose new requirements on banks is diverse, concerning different dimensions of banks' activities (customer relations, products provided, ESG risk management, internal organisation, and bank operations). Consequently, this means that banks are now faced with the challenge of 'decoding' a complex regulatory and conceptual grid in which a number of new requirements are emerging. The fact that the Taxonomy Regulation and SFDR offer uniform rules included in regulations rather than in directives is clearly a positive feature from the viewpoint of sustainability-related harmonization (Busch, 2023, p. 303).

To ensure a common approach to ESG risks in the EU, the European Commission presented a package of reforms to EU microprudential regulation in autumn 2021 (European Commission, 2021a) which review EU banking rules: the Capital Requirements Regulation and the Capital Requirements Directive. The reform aims

to strengthen the resilience of the banking sector to ESG risks and to ensure that all supervisory authorities take into account the ESG risk exposures of supervised banks.

Some help is provided by the activity of European banking supervision. On the 13 December 2022, the European Banking Authority (EBA) published a roadmap setting out objectives and a timetable for implementation in the areas of sustainable finance and ESG risks. The roadmap explains the EBA's sequential and comprehensive approach to its key priorities for 2022–2024 to integrate ESG risks into the banking framework and support EU efforts to move towards a more sustainable economy. Among these, it also includes, as a flagship element of the European supervisory ambition, the regulation of mechanisms to inhibit greenwashing in the financial market, identified as a practice in which an institution's publicly disclosed sustainability profile and the features and/or objectives of its financial products and related processes do not adequately reflect its sustainability risks and impacts (EBA, 2022).

An example of good practice in aligning central-bank activities with climate objectives is the approach of the European Central Bank (ECB). The bank and supervisor of the euro area has prepared a climate agenda for several years and is gradually implementing it (ECB, 2022). The ECB has three main objectives guiding its climate-change work: managing and mitigating financial risks associated with climate change and assessing their impact on the economy; promoting sustainable finance to support an orderly transition to a low-carbon economy; and sharing expertise to support broader changes in market behaviour and social attitudes (Spinaci et al., 2022).

2. The approach of the Polish banking system towards the implementation of ESG requirements

Green banking products are the very future of modern banking systems. With the help of new technologies, many Polish banks are offering eco-friendly services, such as electronic accounts, loans, credits, and subsidies for green solutions such as wind farms or solar panels, green credit cards, and much more (Zioło et al., 2018, p. 32). Moreover, green banks also promote pro-environment lifestyles and care for the planet. According to data, the climate transformation of the Polish economy will require unprecedented investments of 1–2% of GDP, over and above what would be needed to sustain the energy or transport system in the baseline scenario (Związek Banków Polskich, 2023, p. 15). Poland's banking sector is not one of the strongest in terms of capital in Europe, and its relative size to the Polish economy is becoming smaller with each passing year. Therefore, the current capital situation of the Polish sector significantly limits the possibilities for credit expansion, especially on the scale required by the challenges facing the Polish economy: energy transition, falling pro-

ductivity as a result of unfavourable demographics, or the reconstruction of Ukraine (European Financial Congress, 2023, p. 2).

The Polish banking system is, of course, being brought into line with European green banking regulations, but in the opinion of the institutions themselves, mere 'compliance' is not enough to turn the challenge of financing the climate transition into a lever for the development of the Polish financial market. Despite significant progress in the introduction of green finance in Poland, there are also practical problems that financial institutions face.

A very good source of knowledge in this area are the *Green Finance in Poland* reports (Zielone Finanse w Polsce), which show the state of green finance and current trends, analyse changes, identify challenges, and present the prospects for green finance in Poland (so far, four reports have been published in consecutive years from 2020 to 2023). These reports indicate that a number of banks in Poland have, over the last few years, adopted multiyear sustainability strategies that set out their long-term goals, related, among other things, to achieving climate neutrality in their operations (ZBP, 2022). In addition, the majority of banks in Poland are already required to produce non-financial disclosures, which not only identify positive examples of initiatives undertaken by banks, but also measurable targets, such as carrying out building and infrastructure modernisation, reducing the number of business trips, increasing the number of remote meetings, vetting clients for their environmental impact, and taking measures to offset emissions. The actions taken by banks contribute not only to the achievement of specific targets, but also, more broadly, to the promotion of ESG topics among their customers.

However, the banks themselves also point to the most important challenges for the sector in meeting the ESG criteria (ZBP, 2023, p. 144). These include:

- The availability of the data needed to meet regulatory obligations and create appropriate financial products, including the challenges of adapting the infrastructure and IT tools to be able to adequately analyse, compile, and aggregate this data;
- The regulatory dispersion of the requirements for sustainable finance and the fact that we are dealing with regulations that have no previous enforcement practice. This requires the development of a correct and coherent system for interpreting regulations that often refer to technical issues related to climate and the environment, which requires the development of the competence of banking staff;
- Cooperation with supervisory authorities and public institutions: here, there is a need for a better dialogue on the challenges in the area of sustainable financing and support to guarantee access to high-quality data and to develop correct interpretations for complex and fragmented regulations.

The Polish financial supervisory authority (the Financial Supervision Commission (Komisja Nadzoru Finansowego - KNF) and its office (Urząd Komisji Nadzoru Finansowego - UKNF) is still taking a careful approach to sustainable financing, although significant progress is evident since 2020 (KNF, 2022). Incorporating ESG criteria into an institution's investment process and risk management system requires the local financial market to rapidly develop appropriate standards and management tools. It is therefore necessary to develop methods for analysing, evaluating, and auditing the new generation of 'green' financial instruments, such as sustainability-linked bonds. Part of the measures to support supervised entities is the amount of information published on the KNF website under the heading 'Financing Sustainable Development' (KNF, 2022). Announcements on engagement in ongoing legislative work on ESG issues and non-financial reporting will be published there. At the end of 2022, the UKNF joined an initiative launched by the Ministry of Finance, the Non-Financial Reporting Working Group of the Sustainable Finance Platform, which includes a wide range of financial market representatives and organisations of financial market regulators. This confirms that sustainable finance is currently the most relevant issue for Polish financial market supervision and regulation.

It is increasingly argued that climate change also cannot be ignored in central banking. Indeed, it has a direct impact on price stability and therefore falls directly within the core mandate of central banks. Climate risk also increases financial risks, which are relevant both for risk management in central banks' own operations and for banking supervision. The instrument for assessing the resilience of the financial sector to climate risk is the corresponding 'climate stress test', and its conduct is another new task for central banks. Central banks have an important role in promoting and leading the implementation of ESG policies, and while the ECB's position, as expressed in its climate agenda, is that they cannot and should not take over the tasks of governments, neither should they, as publicly accountable institutions serving the public, remain mere observers in the transition to a zero-carbon economy.

The threats posed by climate change to the financial sector have already been recognised by central bankers around the world. In 2017, the Network for Greening the Financial System (NGFS, www.ngfs.net/en) was established. It is an initiative of more than 100 central banks and financial regulators to accelerate and scale up green finance and develop recommendations on the role of central banks in the area of climate change. The NGFS includes, among others, the European Central Bank, the Federal Reserve Bank, and the Bank of England; as of 13 June 2023, the NGFS consisted of 127 members and 20 observers. On the Polish side, the KNF has joined the network for the time being and has been involved in its work since December 2020.

Unfortunately, the subject of the potential impact of climate risks on macroeconomic variables, monetary policy transmission channels, and the financial stability of the banking system has still not been given as much prominence by the monetary authorities in Poland as in the case of the ECB, which has had a work plan for several

years on greening the euro area financial system (Kotecki, 2023, p. 43). According to the president of the Polish central bank, the role in this area is, primarily, to identify and monitor the impact of climate change and climate policy measures on financial and price stability. If it is perceived that climate risk or transition risk threatens financial stability, the central bank, in cooperation with other institutions of the financial safety net, will take appropriate measures to increase the resilience of the financial system to this risk (Godusławski, 2022).

3. Sustainable finance and green banking in the Czech Republic

Although sustainable finance and, in particular, green banking have become a major focus for the EU in recent years, and the EU is actively working to promote sustainable and environmentally friendly financial practices to support the transition to a low-carbon, climate-resilient economy, the development of green banking in the Czech Republic has been rather slow. However, sustainable finance and the consideration of ESG factors are slowly becoming an integral part of Czech investment strategies and financial decision-making processes, as society becomes increasingly focused on addressing environmental and social challenges. There are signs that the financial sector in the Czech Republic has begun to take note of the growing demand for sustainable investment and the need to align financial practices with environmental and social objectives. Recognising the long-term benefits of aligning business practices with sustainable principles, some of the country's financial institutions are beginning to integrate ESG criteria into their risk assessments and investment strategies.

As shown in the preceding paragraphs, ESG factors are mainly formulated at the EU level through regulations and guidelines. EU regulations have direct effect and apply uniformly in all Member States, without requiring national implementing legislation. These regulations ensure a consistent and standardised application of ESG principles across the Union. At the same time, directives outline the broader objectives and principles and require national authorities in Member States to implement these provisions into their national laws. In the Czech Republic, the adoption of ESG principles was mainly achieved by amending the existing sector laws and by issuing or amending ordinances, which are legislative acts that supplement existing statutes and laws (Mrkývka, 2014, p. 46). In general, ordinances can only be issued by central authorities in the Czech Republic, such as ministries, central banks, and several other authorities. As for the ordinances concerning ESG principles, these were mostly passed by the central bank, the Czech National Bank. These allow for the incorporation of specific ESG requirements into the national legal framework. In general, through the amendments of laws and ordinances, the Czech Republic demonstrates

its commitment to addressing ESG issues in a manner that is tailored to the domestic context while at the same time complying with EU directives.

The principles of sustainable finance are included in several sector laws. For instance, in the area of investment companies and investment funds, the core piece of legislation is the Act No. 240/2013 Coll., on Investment Companies and Investment Funds, in which most of the relevant directives are implemented and regulations extended. Aside from this law, there is the Czech Ordinance 244/2013 Coll., on More Detailed Regulation of Some Rules Set Out by the Act on Management Companies and Investment Funds. This amendment aligns with the requirements of EU Regulation (EU) 2019/2088 on Sustainability-Related Disclosures in the Financial Services Sector, mainly in respect to consideration of risks connected with sustainability. Another example from the area of investment funds is the Ordinance 246/2013 Coll., on the Statute of the Collective Investment Fund, which lays down requirements on disclosure of sustainability data, thus supporting the SFDR Regulation and the Taxonomy Regulation.

In the area of rendering investing services, the important piece of legislation is the Act No. 256/2004 Coll. on doing business on the capital market, which only has a few provisions on sustainability but is extended by several ordinances, such as 308/2017 Coll., on a More Detailed Regulation of Certain Rules in the Provision of Investment Services, which also supports Regulation (EU) 2020/852, mainly for the determination of the target market for sustainability. As for the banking industry, there is a broad and complex net of laws, ordinances, and other acts regulating the sector. The core law in which the basic principles are outlined is the Act No. 21/1992 Coll., on Banks, in which there are references to the respective EU legislation on sustainable finance. As banks are often licensed to trade in securities, they are often covered by the above legislation. This is only an example of some of the legislation related to sustainable finance, as it is not the purpose of this paper to provide a complete list of all relevant legislation.

Aside from the legislation, there are numerous documents and studies concerning the implementation and application of the ESG principles not only into the Czech legal order, but also in practice. In his study of 2021, Křívánek researched the approach of banks in the Czech Republic to ESG principles. According to his findings, these banks consider ESG and related risks to be important. From the ESG perspective, the main impact will be on their product range and internal processes. Banks are aware that failure to meet the requirements of regulators or business partners can have a negative impact on their reputation. Křívánek's research also shows that Czech banks see ESG implementation as financially demanding, with funding and data availability cited as the main barriers. Despite potential benefits, such as improved reputation, increased returns, and reduced capital requirements, perceived barriers outweigh the benefits, particularly in managing risk and transparency.

European supervisory authorities emphasise the importance of these areas. At present, banks are more focused on monitoring the impact of ESG issues on their own activities, products, and reputation than on those of their clients. Larger banks that are part of multinational groups and that are publicly traded are more advanced in ESG adoption, due to shareholder and investor pressure and the availability of group policies and strategies. At the time of Křívánek's research, all major banks incorporated ESG factors into credit risk management and the majority into operational risks, whereas smaller banks typically did not consider ESG factors in their risk assessment (Křívánek, 2021, p. 4). Currently, the situation shows some development in this area, however: all major banks include social and internal governance factors in their regulations, and the majority also cover environmental factors. On the other hand, small banks do not cover the environmental and internal governance factors at all. Large banks often have a dedicated ESG unit and are under more pressure from their business partners, who require them to address ESG, according to all the large banks surveyed. (By business partners, we mean shareholders, investors, suppliers, and customers looking for 'greener' solutions). Small banks face less pressure to comply with ESG requirements, mainly from owners. For these reasons, among others, small banks are not planning specific organisational changes in relation to ESG factors (Křívánek, 2021, p. 5).

Some large banks, mainly part of cross-border consortiums, publicly declare their developments in the ESG area and included certain green products on their product lists. Some have introduced new products and, in addition to traditional investment loans for sustainable projects, also offer a green loan or a loan linked to sustainability goals. In addition to the introduction of new sustainable-finance products to support their clients' sustainable activities, they are also making commitments to reduce their own carbon footprint. Although such reports are not yet standard in the Czech banking sector, according to some consulting firms, it can be said that, compared to banks in Western European countries, which have been preparing for the arrival of ESG issues for months or even years, Czech banks are only slowly starting to orientate themselves in this field (Přecechtěl & Michlík, 2021). Two years on from the research cited above, the situation does seem to have improved a little.

In addition to legislative and regulatory measures, studies and research, and new products and approaches introduced by banks, the Czech Banking Association, a voluntary association of banks and building societies operating in the Czech market and currently representing more than 99% of the Czech banking sector, issued a Memorandum on Sustainable Finance which was signed by most of the participating banks. In this memorandum, the participating banks committed themselves to principles such as assessing their activities in the light of the requirements for environmentally and socially responsible business, aligning their objectives with the goals set out in the relevant UN global conventions, EU programmes, and national legislation, and applying sustainability principles not only in the management of the banking busi-

ness but also in relation to customers, suppliers, and stakeholders (Česká Bankovní Asociace, 2021). The Czech National Bank also aims to improve the general knowledge of financial market participants about sustainable finance by organising events and seminars on ESG principles, covering not only the legal and regulatory environment, but also current issues of practical application and supervisory experience in this area.

There appears to be a growing awareness among Czech businesses and investors of the potential of sustainable finance to drive innovation, enhance competitiveness, and attract socially conscious customers. As EU sustainable-finance initiatives gain momentum and awareness of ESG factors increases, it is likely that green banking in the Czech Republic will develop and will play an increasingly important role in shaping a more sustainable financial landscape in the country. ESG issues are developing not only in terms of legislative and regulatory measures, but also in the area of memoranda of understanding between members of the banking sector and at the educational level.

Conclusions

We face global challenges and a rapidly changing world characterised by multiple shocks and deep uncertainties. Environmental change needs stable sources of finance and also a resilient financial sector. The situation of banks has changed dramatically since the global financial crisis of 2008, when they were part of the problem. At that time, the architecture of the financial safety net was fundamentally changed, and greater importance was given to systemic risk assessment to better address financial crises. During the COVID-19 pandemic, banks were already part of systemic crisis-management solutions – and not only because they were in a stronger capital and liquidity position thanks to stricter regulation. Now we need banks to continue to support the meeting of global challenges and changes as part of their social responsibility. At the same time, the nature of financial intermediation in general is changing, and care must be taken to ensure that this contributes to, rather than threatens, the resilience of the financial sector: banks should not be more vulnerable to shocks and less able to support the changes on which future economic growth will depend.

Green banking is an important factor in sustainable finance and quite a new phenomenon; it is a very dynamic and increasingly important area of Polish and Czech financial systems as well. Poland and the Czech Republic, as members of the European Union, must comply with the principles of the Green Deal and sustainable-development standards implemented at the EU level. As developing countries in the process of economic change, Poland and the Czech Republic must look for new, efficient solutions to achieve a sustainable economy. The green banking sector is a very good field not only for banks, but also for private institutions that can act in the inter-

est of the common good. Sustainability and a secure financial market are a prerequisite for achieving a stable economic situation. In Poland and the Czech Republic, the need for greater impact of the Sustainable Development Goals on the financial system and the economy is recognised. Regulations are changing, and new norms and standards are being created to encourage financial institutions, consumers, and investors to go green. However, greater involvement of the institutions that make up the financial safety net – especially central banks – is needed. This is because if climate or transition risks threaten financial stability, it is the central bank, in cooperation with other institutions of the financial safety net, that will take the relevant action to make the financial system more resilient to these risks.

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The EU's Emergency Intervention against High Energy Prices: Implications for the Visegrad Group Countries

Abstract: The energy market in the European Union has recently faced significant external influences, which have resulted in turbulent developments in wholesale energy markets. The extraordinary and sudden increase in electricity prices and the imminent risk of further increases required a joint solution by the Member States at the end of 2022. On 6 October 2022, the Council of the European Union adopted Regulation 2022/1854 on Emergency Intervention to Address High Energy Prices, which establishes an emergency intervention to mitigate the effects of high energy prices through exceptional, targeted and time-limited measures. In this paper, the authors focus on the legal framework adopted to introduce the mandatory cap on market revenues to electricity producers in the countries of the Visegrad Group (the Czech Republic, Hungary, Poland and Slovakia).
Keywords: cap on market revenues, energy, financial law

Introduction

The energy market in the European Union has recently faced significant external influences resulting in turbulent development in wholesale energy markets. The European Commission writes the following in its 2022 State of the Energy Union report (European Commission, 2022):

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> Gas and electricity prices have hit all-time highs in 2022. Over the past year, electricity prices in Europe have rapidly risen to a level much higher than in recent decades This dynamic is intrinsically related to the high price of gas, which increases the price of electricity produced from gas fired power plants. Prices started rising rapidly during the second half of 2021 when the world economy picked up after COVID-19 restrictions were eased. Subsequently, Russia's invasion of Ukraine has exacerbated this situation.

Member States have gradually adopted measures to stabilise the situation on the electricity market – examples include regulated energy prices, social tariffs, energy vouchers, temporary subsidies for private and business consumers, and reductions in energy-related taxes (most often VAT) and network tariffs. The extraordinary and sudden rise in electricity prices and the imminent risk of further increases called for an EU-level solution at the end of 2022. The single solution at EU level adopted with Regulation 2022/1854 has helped to avoid serious distortions of the internal market. Rumpf and Banet conclude, regarding Regulation 2022/1854, that '[t]he adoption of short-term market intervention measures by the Council preserved (so far) the balance between continuous reliance on EU energy market rules and short-term national priorities' (Rumpf & Banet, 2023, p. 376). One of the measures adopted was the obligation for Member States to introduce a mandatory cap on market revenues for electricity producers; the role of the European Commission is only to provide guidance in the implementation of that duty. At the time of writing, the European Commission has not yet issued any guidance to Member States in this context; the absence of guidance has contributed significantly to the diversity of measures taken at Member State level. At the end of 2022, Eurelectric's report to Commissioner Kadri Simson says: 'The current patchwork of national implementation measures is harming the integrated internal electricity market and undermining investments in much-needed renewable and low-carbon infrastructure. We urge the Commission to provide clear guidance and examples of best practices to Member States on how to properly implement the Regulation' (Eurelectric, 2022).[1]

Considering the variety of national measures adopted to introduce a cap on market revenues for electricity producers, our primary objective in this paper is to define the financial legal institute of a mandatory cap on market revenues for electricity producers in Czech, Hungarian, Polish and Slovak national laws. The secondary objective is to compare the national legislations under consideration with each other. In order to achieve these goals, standard scholarly methods will be used, especially description, analysis and synthesis. Regarding sources, literature on financial law, internet sources and relevant legal regulations are used.

1 Eurelectric is the European Association of Electricity Companies.

1. Electricity markets in the EU

Electricity and gas markets in the EU are characterised by physical and commercial interconnections between Member States, so price fluctuations in one market translate into price volatility in the others. From the physical perspective, the power system should be seen as a complete network made up of interconnected generation installations, transmission and distribution systems and connected users. In terms of commercial transactions, the gas and electricity markets' state of functioning is the result of liberalising tendencies that started in the late 1990s.[2] A consequence of this liberalisation was the emergence in 2007 of a market for the supply of electricity and natural gas to all customers. The liberalisation of the electricity and gas markets has brought consumers a choice of energy supplier, transparency and easier access for energy suppliers to the markets of other Member States. On the other hand, however, customers were also often exposed to unfair practices by energy suppliers, as well as to greater risk resulting from market volatility and their low level of awareness of the risks of entering the free market. For the purposes of this paper, it is also important to note that the supply side of the wholesale market consists of electricity producers and electricity suppliers, both of which can trade electricity bilaterally or on a centralised multilateral platform.[3] Jones (2016, p. 15) states: 'The liberalisation of the energy sector is based first and foremost on the separation of the regulated network activities on the one hand and the opening of the supply and generation markets on the other. Maintaining the monopolistic structure of network operation should enable competition on the generation as well as the supply segments.'

2. Emergency intervention according to Regulation 2022/1854

Before discussing the actual nature of the emergency intervention introduced by Regulation 2022/1854, let us briefly review the process that preceded the latter's adoption. The Council's power to adopt this Regulation derives from Article 122(1) of the Treaty on the Functioning of the European Union (TFEU). As for the process of adoption of Regulation 2022/1854 itself, it should be noted that this was decided by the Council by qualified majority, without being subject to the approval of the European Parliament. The adoption of the legislation by the extraordinary legislative procedure undoubtedly made it quicker and easier to pass.

It must be noted that Regulation 2022/1854 was not clearly agreed at Council level. The Slovak and Polish delegations opposed the adoption. The Slovak economy

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2 For further detail, see Directive 90/547/EEC of 1990; Directive 96/92/EC of 1996; and Directive 98/30/EC of 1998.

3 The electricity supplier carries out the sale of electricity to customers, including its resale; see Article 2(12) of Directive (EU) 2019/944 of 2019.

minister said on the topic: 'I was against what was approved. The proposal is inadequate from Slovakia's point of view, even though there have been modifications to it. But the measures do not primarily solve our problems' (Pravda, 2022). It should be noted that not every Member State that agreed to the adoption of this Regulation accepted the application of Article 122 TFEU. The delegations of Estonia, Latvia, Poland, Croatia, Slovenia and Hungary presented differing views (Council of the European Union, 2022).[4] Nevertheless, Regulation 2022/1854 was successfully adopted and has become legally binding for all Member States.

As mentioned above, Regulation 2022/1854 constitutes an emergency intervention in the functioning of the energy market and contains provisions to mitigate the effects of high energy prices through exceptional, targeted and time-limited measures. The measures introduced by the Regulation are defined in its Article 1 and can be divided into two categories in terms of sectoral focus: measures related to the electricity market (reduction in electricity consumption; introduction of the cap on market revenues for electricity producers) and measures relating to the crude petroleum, natural gas, coal and refinery sectors (introduction of a compulsory temporary solidarity contribution to help EU companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refining sectors to contribute to the affordability of energy for households and businesses). The primary object of the research in this paper is the cap on market revenues for electricity producers, so we will deal below with this measure only. It would be well beyond the scope of this paper to examine and compare other measures in the Visegrad Group countries.

3. Measures concerning the electricity market

Regulation 2022/1854 introduced two measures concerning the electricity market: the first is a mandatory reduction in electricity consumption, and the second is the capping of market revenues for electricity producers and the redistribution of surplus revenues and congestion revenues to electricity end users. The market revenue cap is to be applied to electricity producers and, where relevant, to intermediaries.[5] According to the Article 8(1)(a) of Regulation 2022/1854, Member States may also 'maintain or introduce measures that further limit […] the market revenues of other market participants, including those active in electricity trading'. As we men-

4 At the time of writing, ExxonMobil Producing Netherlands BV (Breda, Netherlands) and Mobil Erdgas-Erdöl GmbH (Hamburg, Germany) have challenged Regulation 2022/1854 before the Court of Justice of the European Union (Court of Justice, 2023).

5 Intermediaries are legally defined in Article 2(8) of Regulation 2022/1854 as 'entities in wholesale electricity markets of Member States constituting an island not connected to other Member States with unit-based bidding where the regulatory authority has authorised those entities to participate in the market on behalf of the producer, excluding entities that transfer the surplus revenues directly to final electricity customers'.

tion in the introduction, supply in the wholesale market is represented by both electricity producers and electricity traders. In our view, this aspect (the possibility of different settings at EU level) creates an unbalanced position for electricity producers and traders on the electricity market.[6]

As mentioned above, Regulation 2022/1854 does not lay down uniform rules for the application of the measures adopted, including the cap on market revenues, but it only defines the main contours for the Member States. As stated in the introduction, this feature was also criticised by energy companies. The market revenues of producers obtained from the generation of electricity from the sources referred to in Article 7(1) shall be capped at a maximum of EUR 180 per MWh of the electricity produced (Article 6(1)). The market cap shall apply to all forms of electricity generation, including renewable sources; however, Regulation 2022/1854 also directly provides for certain exemptions (Article 7(2) and (4)). Given that the Regulation sets a cap on market revenues, Member States can be expected to set the cap at different levels for different forms of generation. For the sake of completeness, we add that, according to Article 8(1)(b) of the Regulation, Member States may also set a cap on market revenues exceeding EUR 180 per MWh for a specific source of electricity production if the investments and operating costs of the generator exceed this amount. When applying the cap, Member States may decide not to apply the cap to the full 100% of the surplus revenues, but to only 90% (Article 7(5)).

The positive aspect of Regulation 2022/1854 is that it does not allow Member States to dispose freely of the proceeds generated by the application of the cap but defines the underlying purpose for spending the allocated funds.[7] Member States are expected to ensure that all surplus revenues resulting from the application of the cap are used to finance measures in support of electricity end users that mitigate the impact of high electricity prices on those customers, in a targeted manner (Article 10(1)). With regard to the distribution of surplus revenues and in the spirit of solidarity, Regulation 2022/1854 also defines the procedure for the Member States whose net electricity imports equal or exceed 100%. In this case, the Member States concerned have the possibility of concluding agreements with the main exporting Member State on the sharing of the surplus revenue.

The temporary nature of the measure is established in Regulation 2022/1854 by limiting the time period within which Articles 6, 7 and 8 should apply: the cap on electricity producers shall apply for the period from 1 December 2022 to 30 June 2023 (Article 22(2)(c)). In the light of this, in the context of the cap on market revenues for electricity producers, it can be summarised that Regulation 2022/1854 establishes:

6 Compare Article 8(2) of Regulation 2022/1854.

7 Compare, for example, the treatment of resources from the proceeds of greenhouse-gas emission allowance trading under Directive 2009/29/EC of 2009.

– A cap on the electricity producers' market revenues at a maximum of EUR 180 per MWh, allowing for exceptions as well as the possibility of setting different caps for different technologies;
– That the cap on the market revenues of the electricity producers also applies on the energy generated by renewable energy sources;
– Earmarked (targeted) use of surplus revenues from the application of the cap for financing measures to support electricity end users that mitigate the impact of high electricity prices on these customers;
– The possibility of an agreement between Member States on the appropriate distribution of surplus revenues.

4. Czech national legislation concerning the cap on market revenues

In the Czech Republic, the cap on market revenues was introduced by Act 365/2022 Coll. of Laws Amending Act 458/2000 Coll. of Laws on Business Conditions and the Exercise of State Administration in the Energy Sectors and on Amendments to Certain Acts (Energy Act), as Amended. The cap was adopted in the form of a levy on surplus revenue as of 1 December 2022. According to Article 93(2) of the Energy Act, as amended by Act 365/2022, the surplus revenue is the positive difference between the market revenue and the cap for the levy period. The method of determining surplus revenue was established by the Czech government by Decree 407/2022 Coll. of Laws on the Method of Determining the Amount of Surplus Revenues from the Sale of Generated Electricity.

It is noteworthy that the legislature applied the levy on surplus revenue at the lower limit allowed by Regulation 2022/1854. Act 365/2022 stipulates that the levy on surplus revenue shall apply to 90% of surplus revenues (§95(a)); this levy shall be collected for December 2022 for the first time. It is important to note that the last levy period is 2023, and pursuant to Article 95(c) of the Energy Act, as amended by Act 365/2022, the provisions of Regulation 2022/1854 relating to the levy on surplus revenue will also apply after 30 June 2023. Thus, we are of the opinion that the application of a cap on market revenues for electricity producers in the Czech Republic after 30 June 2023 may put them at a disadvantage in the EU market if other Member States do not do the same.

In the context of the Czech legislation, it is important to note two specificities in relation to the cap. The first peculiarity is that the cap is defined directly in Act 365/2022 and ranges from EUR 70 to EUR 240 per MWh, depending on the type of source of the generated electricity (§ 95(b)(1)). We consider that determining the cap at the level of a law increases its transparency, as well as the predictability of its level,

compared to setting it, for example, in the form of a sub-legislative norm.[8] The second peculiarity is that in the case of electricity generation from gaseous biomass fuel, solid biomass fuel, and lignite in an electricity generation facility where the largest generating source's installed capacity is up to 140 MW, the cap is set at an amount exceeding EUR 180 per MWh (§ 95(b)(1)). The Czech Ministry of Industry and Trade commented on the method of setting the individual cap on market revenues as follows: 'The caps on market revenue for producers are set to cover in principle normal operating costs and potential investments. The specific caps on market revenue were set by an interministerial working group on the basis of an analysis of data from selected producers' (Ministerstvo Průmyslu a Obchodu, 2022). The Energy Regulatory Authority (Energetický regulační úřad) administers the levy from surplus revenues, and the proceeds of the surplus revenue contribution itself are an income for the national budget of the Czech Republic.

A summary of the national regulation adopted in the Czech Republic, which introduced a cap on market revenues for electricity producers under Regulation 2022/1854, may bring the following conclusions:

- *De lege lata*, the legal instrument is of a temporary nature, but the levy on the surplus (the cap on market revenues) is to be applied beyond the period defined in Regulation 2022/1854, also for the second half of 2023;
- In the case of the levy on surplus revenues imposed on the generation of electricity from gaseous biomass fuel, solid biomass fuel and lignite in an electricity generation facility where the largest generating source's installed capacity is up to 140 MW, the legislature took advantage of the possibility of establishing a cap above EUR 180 per MWh.

5. Hungarian national legislation concerning the cap on market revenues

In Hungary, Government Regulation 197/2022 introduced a special profit tax (*extraprofit adó*) in June 2022. In addition to other sectors of the economy, pursuant to § 3 of the Regulation, the special profit tax applied to selected producers of electricity from renewable sources with an installed capacity exceeding 0.5 MW, the so-called KÁT and MÉTÁR producers, and the tax rate was set at 65%.[9] In the context of electricity producers, it is important to note that the entities to which the special profit tax applies was subsequently extended to include providers of ancillary services (a special form of service usually provided by producers or consumers of electricity)

8 Compare with the Slovak national rules.

9 The KÁT and MÉTÁR system is a previously established state subsidy scheme. The energy generated by renewable sources is purchased at a fixed price, as written in the detailed rules.

in October 2022; the tax rate for providers of ancillary services is set at 13% on revenues in 2022 and 10% on revenues in 2023 (Article 3(a) of Government Regulation 197/2022).

After having studied the available sources, we are of the opinion that a special profit tax for selected electricity producers had already been introduced in Hungary prior to the adoption of Regulation 2022/1854, therefore the country did not adopt any special national regulation for introducing a cap on market revenues for electricity producers (or electricity traders) under the EU Regulation. In the context of Hungary's situation, the cap on electricity producers' revenues introduced by Regulation 2022/1854 is perceived as a measure targeting renewable electricity producers. Tóth notes that under Article 7(3) of Regulation 2022/1854, the Member States have the option to not apply the cap to producers with an installed capacity of up to 1 MW or to electricity generated in hybrid installations that also use conventional energy sources (Origo, 2023). Tóth also adds: 'member states shall further have the option to decide that the cap on market revenues shall not apply to revenues derived from the sale of electricity on the regulated energy market and from compensation for re-dispatching and counter-trading' (Origo, 2023).

To summarise, in Hungary the income of electricity producers was already subject to a special tax before the adoption of Regulation 2022/1854. After reviewing the available sources, we found no new legislation that would impose a cap on market revenues for electricity producers.

6. Polish national legislation concerning the cap on market revenues

The introduction of the levy on surplus revenue in Poland was implemented in November 2022, when the Act of 27 October 2022 on Extraordinary Measures to Reduce Electricity Prices and to Support Certain Customers in 2023 came into force. The Act was heavily criticised by the Renewable Energy Association (see Zagórski, 2022). It introduces a levy on surplus profits; the law determines the rules and procedures for introducing a temporary obligation to contribute to a fund for the reimbursement of price differences, and the new levy is paid to the fund by electricity producers and traders. The duties are to be fulfilled in the period from 1 December 2022 to 31 December 2023. This levy will be calculated depending on the electricity generation technology, and the following variables will enter the formula: the volume of electricity sales, the volume-weighted average market price of electricity sales and the volume-weighted average price cap of electricity sales, all three variables measured for a given entity on a given day. The last variable was conditional on the adoption of relevant regulation by the Council of Ministers. On 8 November 2022, the Council of Ministers adopted the Regulation on the method of calculating the price

cap, which defines the method of calculating the cap depending on the electricity generation technology. The Regulation became effective as of 10 November 2022.

The Fund for the Reimbursement of Price Differences is administered by the clearing house for renewable energy support (Zarządca Rozliczeń energii odnawialnej S.A.). The principle of calculating contributions to the Fund separately for each day raises fundamental doubts. It means that the loss incurred on a given day cannot be offset by the profit from subsequent days (periods), which will be transferred in full to the Fund (above the agreed price cap on electricity sales). Contributions to the Fund will be paid monthly and will constitute a tax-deductible expense.

Contributions to the Fund apply to producers who produce electricity in a generation unit with an installed capacity exceeding 1 MW, using energy from renewable energy sources (wind, solar, geothermal, hydro, biomass) or energy from waste, lignite, black coal or liquid and gaseous fuels. For example, producers using biogas and agricultural biogas for electricity generation do not have to pay a contribution to the fund. Energy produced in renewable energy installations covered by the surcharge-based support and not accounted for by the clearing agent shall be subject to a levy to the Fund to the extent that the proceeds exceed the price of the winning auction bid for that project (taking into account the relevant statutory indexation). This requires setting a cap on prices individually for each project benefiting from surcharge-based support. The cap on prices will be different for December 2022 and different for contributions to the Fund for the Reimbursement of Price Differences in 2023 (taking into account the aforementioned indexation).

For installations using renewable energy sources not covered by the surcharge-based support, a levy shall be paid to the fund to cover price differences to the extent that the revenues exceed the reference price for the technology in the auction system in force at the date of calculation of the levy. The reference prices resulting from the Regulation of the Minister for Climate and Environment dated 31 October 2022 are currently in force (e.g. PLN 295 per MWh for wind installations, PLN 355 per MWh for photovoltaic installations). In the case of hydropower installations, the price cap is 40% of the reference price for the sale price of electricity, above which the levy is collected to the fund (currently PLN 270 per MWh). In the case of energy generated in biomass, coal or liquid or gaseous fuel installations, the legislature set a more extensive mechanism for calculation of the price cap for the sale price of electricity, above which the levy to the fund is payable, including for example the cost of the fuel burnt, a 3% margin (calculated in relation to the reference market value of energy on a given day), the cost of CO2 emission allowances (for fossil fuels) and an investment allowance to cover fixed costs, of PLN 50 per MWh (uniformly for all technologies).

A summary of the national regulation adopted in Poland which introduced a cap on market revenues for electricity producers under Regulation 2022/1854 may bring the following conclusions:

- *De lege lata*, the legal instrument is of a temporary nature, but the levy on the surplus (the cap on market revenues) is to be applied beyond the period defined in Regulation 2022/1854, also for the second half of 2023;
- The surplus revenue levy applies to both electricity producers and electricity traders, i.e. every participant in the wholesale market.

7. Slovak national legislation concerning the cap on market revenues

In Slovakia, the cap on market revenues has been adopted by Act 433/2022 Coll. of Laws amending Act 251/2012 Coll. of Laws on Energy as Amended and Amending and Supplementing Certain Acts. Similarly to the Czech Republic, the cap in Slovakia was introduced by an amendment to existing energy legislation, namely Act 251/2012 Coll. of Laws on Energy on Amendment and Supplementation of Certain Laws as Amended and Amending Certain Laws (the New Energy Act). The legal institution that introduces the cap is the surplus revenue levy. The subject of the levy, which is denoted in the terminology as the payer, is defined by reference to the directly applicable EU regulation. It is worth noting that the Slovak national legislation does not consider an electricity trader as a payer of the surplus revenue, but as part of a vertically integrated entity (§ 25(a) of the New Energy Act). In the context of the subject of the levy, we further note that, in an extensive interpretation, it is possible to draw a partial conclusion that the legislature included certain hydropower plants with a reservoir, for example the Váh Cascade, among the payers of the levy in question, while Regulation 2022/1854 states that in the case of hydropower plants, the cap on market revenues shall be applied on hydropower without reservoirs (Article 7(1)(d)).

Surplus revenue itself is legally defined in § 25(b)(2) of the New Energy Act as 'the positive difference between the market revenues and the cap on market revenues'. It should be noted that the cap is not directly determined in this law, but is determined by the Decree of the Government 38/2023 Coll. of Laws, which establishes the method of determining the amount of extra income from the sale of produced electricity, the cap on market revenues, the costs of deviation, the scope of information necessary for monitoring and reporting to the European Commission, and the fixed electricity prices for determining the cap on market revenues of electricity produced from biogas, biomass, or highly efficient combined production (§ 2).

According to Article 25(f) of the New Energy Act, the cap on market revenues obtained from the sale of 1 MWh of electricity will be set between EUR 50 and EUR 250, depending on the type of source. The government may only increase the cap once it has been determined (Article 25(f)(5)). It is worth noting that the Slovak legislation also allows for a cap above the threshold set by Regulation 2022/1854, i.e. the government may even set a cap above EUR 180 per MWh in accordance with Article

8(1)(b) of Regulation 2022/1854. In our opinion, setting the cap by government decree, compared to it being set via primary legislation, creates the opportunity for its easier and faster modification, but on the other hand decreases the level of certainty for market participants.

The method of determining the surplus revenue is determined by Decree 38/2023 Coll. of Laws (§ 1). The surplus revenue levy is to be applied in the levy period from 1 December 2022 to 31 December 2024. It should be noted that the legislature in Slovakia also exceeded the period that was directly required by Regulation 2022/1854. We are of the opinion that if other Member States do not apply the cap on market revenues to their electricity producers after the date specified in Regulation 2022/1854 (30 June 2023), the application of the cap to electricity producers in Slovakia after that date may put them at a disadvantage vis-à-vis EU market competition.

The levy on surplus revenue in Slovakia is applied to 90% of it, i.e. the legislature did not use the possibility of charging the entire surplus revenue of obliged entities. Applying the 90% share is to maintain incentives for the market and to ensure the availability of electricity producers in situations of high demand (Explanatory memorandum, 2022).

The tax office competent for the administration of the income tax of the payer of the levy on excessive income, pursuant to Act 563/2009 Coll. of Laws on Tax Administration (the Tax Code) and on Amendments and Supplements to Certain Acts, administers the levy on surplus revenue. The designation of the competent tax authority is justified by the fact that it is the authority which is the most competent from a procedural point of view (Explanatory memorandum, 2022).

We consider it necessary to also point out that the levy on surplus revenue is not the first specific financial obligation for electricity producers in Slovakia. Since 2012, electricity producers in Slovakia have been obliged to pay a special levy on business in regulated sectors, which was introduced by Act 235/2012 Coll. of Laws on a Special Levy on Business in Regulated Sectors and on Amendments and Supplements to Certain Acts, as Amended. It is worth noting that this levy was also originally intended to be temporary in nature, yet it is still applied today. It is worth noting that the primary aim of the legislature in the case of this levy was also to share the burden of the effects of the global financial and economic crisis more fairly and economically.

A summary of the national regulation adopted in Slovakia which introduced a cap on market revenues for electricity producers under Regulation 2022/1854 may bring the following conclusions:

- *De lege lata*, the legal instrument is of a temporary nature, but the levy on the surplus revenues (the cap on market revenues) is to be applied until 2024, beyond the period defined in Regulation 2022/1854;
- The cap on market revenues is not regulated in primary legislation but by a government decree (Decree 38/2023 Coll. of Laws). At the same time, it

should be noted that the Slovak legislation also allows for a cap on market revenues above the level set by Regulation 2022/1854.

Conclusion

Electricity producers' market revenues are subject to specific financial obligations in all the countries examined. In the case of the Czech Republic, Poland and Slovakia, the relevant national legislation was approved at the end of 2022, establishing the legal framework for the cap, while the basic legal framework for this institute is regulated at EU level by Regulation 2022/1854. In these three countries, the cap was reflected in the introduction of a levy on surplus revenues, which was introduced in the case of the Czech Republic and Slovakia by an amendment to the legislative rules on energy, and in the case of Poland by the adoption of a separate law. The Czech Republic, Poland and Slovakia are planning to apply levies on surplus revenues for a longer period than required by Regulation 2022/1854.

In the case of Hungary, we have not identified any new obligation that would be introduced in the context of the cap on the market revenues of electricity producers under Regulation 2022/1854. At this point, it is important to note that according to Article 7(2) of the Regulation, the cap does not apply to producers whose revenues per MWh of generated electricity are already capped due to national or public-authority measures not taken pursuant to Article 8 of Regulation 2022/1854.

Despite the variety of measures, we consider that all of the examined Visegrad Group countries have agreed to some limitations on the available resources of electricity producers. Although the measures are described as temporary in nature, they are to be applied for a longer period than required by Regulation 2022/1854; in the case of Hungary, this period is not even defined. We believe that imposing financial obligations on electricity producers in the Visegrad Group for a longer period than in other EU countries will have a negative impact on the development of new investments in electricity generation. It is important to remember that electricity producers operate in the EU single market. Restricting their disposable incomes may have a significant negative impact on the development of generation capacities in the countries concerned, and this will also apply unconditionally to the generation of electricity from renewable energy sources. The regulatory risk for energy investments is also stated by Boute (2023, p. 205): 'Regulatory risks for clean energy investments are particularly high during energy crisis, as illustrated by the introduction of a cap on the revenues of clean energy investors in the EU to protect customers from high energy prices in 2022.' In our view, the negative aspect of the cap on market revenues is also the fact that under Regulation 2022/1854, it does not have to apply to every participant in the wholesale market but is targeted preferentially at electricity producers.

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State Special Funds in Poland and Uzbekistan: A Comparative Legal Analysis

Abstract: This paper presents a comparative analysis of state special funds in Poland and Uzbekistan, focusing on their legal dimensions within the framework of financial law. State special funds play a vital role in the allocation and management of public resources, serving as targeted financial mechanisms to address specific needs and promote socio-economic development. However, there is limited comparative research examining the legal frameworks and operational aspects of these funds in different jurisdictions. This study aims to fill this gap by conducting a comprehensive analysis of state special funds in Poland and Uzbekistan, providing valuable insights into their legal frameworks, objectives, structures, and operational mechanisms. The research objectives of this study include examining the legal frameworks governing state special funds in both countries, analysing their objectives and operational mechanisms, identifying similarities and differences, and assessing their effectiveness and challenges. By achieving these objectives, this study aims to contribute to the enhancement of financial-law practices in both jurisdictions and to provide knowledge for improving the legal frameworks and operational efficiency of state special funds.

Keywords: off-budgetary funds, public finance, public funds, state special funds

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Introduction

It should be noted at the beginning of this presentation of research issues that the term ‘state special fund’ translates into Polish as *fundusz celowy*. In principle, the name does not raise any doubts; it has already taken root in the legal literature on the subject, legal regulations, and jurisprudence. One could approach it in terms of linguistic analysis and insist that the word ‘fund’ (*fundusz*) would be sufficient, because by its very nature it means raising funds for a specific purpose.[1] It must be admitted that in English, there is some confusion due to the multitude of terms that relate to the institution we are examining in this article – for example earmarked funds, manual reserves, funds commitments, encumbrances, state funds, state special funds, public funds, off-budget funds, or extra-budgetary funds, and probably more. The ambiguity of terms in English and other languages is dictated by the fact that the general image of special-purpose funds is often presented in the context of all kinds of funds that have operated for many years, and which have nothing to do with the institution of state special-purpose funds (*fundusz celowy*) in terms of financial law and public finance. In this broad approach, the prototype is charitable funds, which in principle probably exist in every legal system. In such a broad approach to special-purpose funds, it should be recognized that they were established earlier than certain budgetary rules of states or cities. Here it is important to mention that in the Islamic world, *waqf* funds were formed, which in Arabic means “roperty withdrawn from civil circulation and transferred by the state for religious or charitable purposes” (Budiman, 2014, p. 22; Kuran, 2001, p. 15) Subsequently, these funds began to be endowed with various functions, among them social, economic, political, ideological, and other tasks.

Furthermore, the term ‘state special fund’ encompasses a range of financial mechanisms and institutions that go beyond the concept of a traditional fund. These funds are established by legislation and operate under specific legal frameworks, distinguishing them from other financial instruments or entities. They serve as dedicated channels for collecting, managing, and allocating public resources for specific purposes, such as infrastructure development, social welfare programmes, or economic stimulus initiatives. The inclusion of the term ‘special’ also highlights the distinctive nature of these funds. They are designed to address particular societal needs or strategic priorities, often requiring separate financial structures and mechanisms to ensure their effective implementation. The adjective ‘special’ underscores the targeted nature of the funds, indicating that they are not part of the regular budgetary

1 A fund is a pool of money that is allocated for a specific purpose. A fund can be established for many different purposes: a city government setting aside money to build a new civic centre, a college setting aside money to award a scholarship, or an insurance company that sets aside money to pay its customers’ claims (Kagan, 2023).

process but rather represent a specific subset of public financial resources. Moreover, by using the term 'state special fund', this study acknowledges the legal and regulatory context in which these funds operate. They are subject to specific rules and regulations, governing their establishment, operation, reporting, and accountability. Understanding and comparing the legal frameworks surrounding state special funds in different jurisdictions is crucial for identifying best practices, addressing challenges, and fostering effective governance of these financial mechanisms.

The literature on the subject states that allocation of funds outside state budgets was gradual and that their creation was necessary for the state to be able to use its financial resources more effectively. The main objective of public funds is the implementation of public tasks and their financing out of the state budget or regional and local authority budgets. The essence of a public fund lies in the fact that individual public tasks are performed through their financing from separate budgets. In the broad sense, the financial aspect of financing such tasks lies in the fact that the fund is supplied with specific sources of public revenue for expenses with a specific purpose.[2] A link appears here between certain revenues and expenditures with specific goals (Kraan, 2004).

As with budgets, public funds perform a redistributive and control function. The redistributive function manifests itself, on the one hand, in the collection of revenues and their redistribution to specific social groups or individual sectors of the economy. In turn, the control function should in general allow for constant monitoring of the specific processes occurring within certain social groups or sectors of the economy (Sedova, 2007, p. 34).

A second justification for the creation of state special funds (especially off-budgetary funds) is their exemption from general budget rules and restrictive budget regulations. Legislatures have intentionally provided for the establishment of these financial-law institutions to operate independently from the state budget or the budgets of local government units. By doing so, the objective was to grant them certain flexibilities and autonomy in managing financial resources. The exclusion of off-budget funds from the traditional budgetary process allows for more efficient and streamlined decision-making regarding the allocation and utilization of funds. It enables specific sectors or initiatives to receive dedicated funding without being subject to the same constraints as the regular budgetary framework. It is important to acknowledge that the motivations behind the creation of off-budgetary funds may extend beyond purely financial considerations. Political factors and bypassing certain budget constraints (Kiss, 2007, p. 19; Lotko, 2021, p. 215) can also play a role in their establishment, although they are beyond the scope of analysis of this article. It is worth emphasizing that these funds should not be confused with special legal per-

2 The Słownik PWN (n.d.) dictionary gives two definitions for 'fund': 'money collected for a specific purpose; also: an institution established to manage such money', 2. 'someone's financial resources'.

sons that act on behalf of the state and carry out its tasks, while in political terms, their main purpose is to remove them from the legal regulation of public finance.

1. The legal status of state special funds in Poland

The broad interpretation of the institution of a fund can be observed in the economic interpretation of the state budget, which should be regarded as a state fund tasked with the collection and spending of funds for public purposes. The process of financing public tasks is referred to as funding (*funduszowanie*), both in relation to budgets and separate public funds. It should be noted that, as a rule, legal specialists define a budget as a financial plan designed to control the collection and spending of public funds. In turn, the basic budgetary principle is the principle of non-funding (*niefunduszowanie*) (the principle of material unity or of universality) (Bitner, 2016; Kosikowski, 2008; Salachna, 2008). It is a demand that the budget be organized as one pool of public resources, which are allocated to the entire budget expenditure. This means that the creation of a public fund is an exception to the non-funding principle. In other words, non-compliance with this principle is the principle governing the functioning of public funds in Poland.

It should also be added that the creation of public funds is in violation of two fundamental budgetary principles – the principles of universality and of material unity. The principle of the universality of the state budget means the necessity of including all financial relations in the budget, whereas in the case of public funds, the flow of public funds occurs, in general, outside the state budget. In turn, the restrictive understanding of the principle of formal unity consists in the acceptance of one financial plan in order to implement the state's financial management, which is also contrary to the concept of public funds (Szołno-Koguc, 2007, p. 79).

Various forms of funding can be distinguished within the theory of public finance (e.g. net funding and gross funding), mostly as a result of the limited financial resources of the state. The variety of public funds and methods of funding are a manifestation of striving to achieve efficiency in the management of the state's public finances. Secondly, the creation and use of public funds result not only in the implementation of the principle of legality (the principle of legalism, of legal regulations, or of the rule of law) in the sphere of public finance, but also in the implementation of control over the function of finance. The downside of funding is the limitation, to a certain extent, of the implementation of tasks realized by funding (the inflexibility of budgetary management) or the positive discrimination of these tasks in relation to tasks implemented with funds from the state budget. The inefficiency of funding is also apparent when a public fund requires additional sources of financing for specific tasks (Masniak, 2014, p. 389). This, in turn, may result in the legislature issuing a ban on the creation of public funds or creating new public funds – something that has

taken place in Poland in the past (and also applies to other countries). Pursuant to the Act on Public Finance of 1998, activity-based funds were defined as statutory funds created prior to the date when the Act entered into force, the income of which comes from public revenues and the expenditure of which is intended for the implementation of specified tasks. It should be noted that new activity-based funds were created after this act entered into force. The prohibition on fund creation was ineffective, as activity-based funds are also created by statute. There may also be other reasons for the eradication of activity-based funds and the prohibitions on the creation of new such funds, apart from the broadly understood effectiveness of public finances.

Currently, the general issues concerning public funds in Polish financial law are regulated in the Act on Public Finance of 27 August 2009. It should be noted that Polish legislation refers to public funds as activity-based funds. The key to the interpretation of this legal institution is that its essence is the place where the funds for a specific purpose are collected and spent. Therefore, the use of the adjectival phrase 'activity-based', when referring to funds, becomes unnecessary. However, one should not dismiss the use of the term 'activity-based', if only for the reason that this term often occurs in the relevant literature and in practice. Regardless of differences of opinion on the terms 'activity-based fund' and 'state special fund', one must agree that the main focus should be placed on the concept of the fund. Every fund has a material aspect (as a rule, the allocation of funds) and an organizational aspect (i.e. clearly set rules regulating the collection and spending of funds for a specific purpose). In general, these two elements together allow us to develop a certain definition of a public fund which was omitted in the Act on Public Finance. The state special fund should be defined as a form of organization of public funds which is characterized by the intentional linking of statutory sources of income with the financing of the costs of a given state task (Niedzielska, 2022).

The public nature and subjective separateness of funds are expressed in Article 1 of the Act on Public Finance, which states that the Act defines the scope and principles of the operation of activity-based funds. It should be noted that the detailed regulations and financial management of public funds are defined in the acts under which the funds are created (Kosikowski, 2011). It is impossible to find clarification in the Act on Public Finance if a new activity-based fund is created under a new act which defines the specific principles of its operation contrary to the general provisions of the Act.

The general principles of financial management of public funds have been regulated in Article 29 of the Act on Public Finance. A particularly important limitation on the scope of the creation of funds is that the legislation only allows for funds to be created at the state level and only on the basis of a separate act. The creation of public funds on the basis of other legislative acts is prohibited. In practice, this means that for a new public fund to be created, a certain political compromise must be reached, in relation to both the idea of the new fund and the rules of its operation.

Another restriction on the operation of public funds is the definition of its income, which can only be sourced from public resources. On the other hand, the costs of funds are allocated to the implementation of specific state tasks. It should be noted here that the objectives of the legislation are for the financial management of public funds to be based on a plan of the income and costs of the implementation of specific state tasks. Referring to public resources as the fund's income also implies a prohibition on financing funds from other sources.

Pursuant to the provisions of the Act on Public Finance, state activity-based funds have no legal personality. The prohibition on funds having legal personality, which resulted from later changes in regulations in the sphere of public finance, meant that certain funds lost their legal personality on the day the Act on Public Finance came into force. Currently, in legal terms, according to the will of the legislature, a state activity-based fund is a separate bank account controlled by a minister appointed to the task or by another body specified in this Act. State activity-based funds do not include funds of which the only source of income, excluding interest from the bank account and donations, is a subsidy from the state budget.

The basis of the financial management of state activity-based funds is the annual financial plan. The financial plans of these funds, in turn, are annexes to the budget bill; in practice, this means the period of the annual financial plan of a fund is equivalent to the state budget year. The Act does not specify the minimum content of such a financial plan. In practice, financial plans of state activity-based funds are defined individually for each fund, in which the following aspects are outlined: the initial and final state of financial resources; receivables and liabilities; its own revenues; subsidies from the state budget and other public finance-sector entities; task implementation costs (including wages and wage-derived premiums); and tasks financed from the fund's resources. The financial plans of budgetary management institutions and state-owned legal persons are defined individually for each body and include a description of the initial and final state of current assets and the total amount of financial resources, receivables and liabilities, its own revenues, subsidies from the state budget, and the task implementation costs (Lipiec-Warzecha, 2011).

Regional and local authorities may be granted loans from the resources of state activity-based funds if the act which creates a given fund provides for this. The costs of a state activity-based fund may be covered only by the available financial resources, including current revenues, subsidies from the state budget, and residual funds from previous periods.

Changes may be made to the financial plan of state activity-based funds, consisting in increasing projected revenues and costs accordingly; however, changes to the financial plans of state activity-based funds may not result in an increase of subsidies from the state budget. If a state activity-based budget has payable liabilities, including credits and loans, then an increase in revenue is primarily allocated to their repayment. Changes to the amounts of revenues and costs of state activity-based funds

included in the financial plan are made by the minister or the body administering the fund, after obtaining the consent of the Minister of Finance and the opinion of the parliamentary budget committee.

Depending on the level at which public funds are managed, they may be classified as state or regional (regional and local authority) funds. Federal funds also exist in federal states. It should be added that under the current provisions of the Act on Public Finance, only state public funds are permitted. On the one hand, other funds will not be regarded as public funds in terms of this Act, but on the other, while they are not excluded, they will be subject to its provisions.

Due to the sources of funding, funds may have mandatory payments, for example taxes and public fees; the opposite will be voluntary payments, constituting contributions from private legal entities and natural persons. Due to the type of activity, state special-purpose funds can be broadly divided into those related to social insurance; those related to the social functions of the state; privatization; those related to the security and defence of the country; and those related to science, culture, and physical culture (Niedzińska, 2022).

Polish literature on public finance applies a division based on rationality and complementarity. Taking into account budgetary resources, the most significant is the division of state special funds based on the criterion of their relationship with the state budget. Three types of funds can be distinguished based on this criterion: autonomous state funds, state funds associated with the budget, and in-budget state funds. In the case of autonomous state public funds, no financing from the state budget occurs. In principle, this means that the financial plan of such a fund should be balanced or should have a surplus of collected revenues in relation to the expenses of the implementation of specific tasks. In turn, state funds are associated with the state budget by receiving subsidies, because, for various reasons, the financial resources allocated by the legislature do not cover all expenses, which prevents the funds from implementing their designated tasks. In-budget funds are not state activity-based funds within the definition of the Act on Public Finance. They do not exist as a separate fund, and they resemble a state activity-based fund in their construction only; the amount of expenditure for a specific task is dependent on the amount of income from a specific source (Masniak, 2014, p. 390).

2. The legal status of state public funds in Uzbekistan

In general terms, Uzbekistan follows a similar approach to Poland in recognizing the significance of special-purpose funds as fundamental institutions within financial law and public finance. Both legal doctrine and regulatory frameworks in Uzbekistan acknowledge the importance of special-purpose funds in ensuring the targeted allocation of financial resources and promoting efficient utilization for spe-

cific statutory objectives. In Uzbekistan, special-purpose funds are established in 18 state special funds to address diverse areas of public interest, such as social welfare, healthcare, education, infrastructure development, and environmental protection. These funds serve as dedicated mechanisms to secure funding for priority sectors and initiatives beyond the scope of the general state budget. By designating specific sources of revenue and outlining clear expenditure objectives, earmarked funds enhance financial stability, planning, and execution in Uzbekistan's public finance system (Farkhadovich, 2016, p. 91; Samandarova & Eshov, 2023).

The legal framework surrounding special-purpose funds in Uzbekistan is characterized by various laws, regulations, and decrees that govern their establishment, operation, and financial management. The legislation provides guidelines for revenue collection, allocation mechanisms, budgeting procedures, and reporting requirements specific to each earmarked fund. This ensures transparency, accountability, and proper governance of the financial resources allocated to these funds (Rakhmonov & Umarovich, 2020). Furthermore, the doctrine in Uzbekistan recognizes the significance of earmarked funds as essential tools for economic development, social welfare, and public-service delivery. Legal scholars and experts emphasize the need for a robust legal framework that supports the efficient management and utilization of funds, enabling the effective realization of the designated objectives (Farkhadovich, 2016, p. 91).

The main legal regulation of the state budget economy and special funds in Uzbekistan is the Budget Code of the Republic of Uzbekistan, which was adopted by the Legislative Chamber on 28 November 2013 and approved by the Senate on 12 December 2013 (Budget Code of the Republic of Uzbekistan 2013). The Budget Code distinguishes between special-purpose funds and off-budgetary funds. At this point, it should be admitted that such a regulation is an expression of the transparency of public finances, because we know immediately what funds will not flow through the state budget or other budgets. According to the Code, state purpose funds are created for the implementation of state functions, the funds of which are formed from tax deductions, mandatory payments and fines, sponsorship funds, and other income established by decisions of the President and the Cabinet of Ministers of the Republic of Uzbekistan, as well as budget transfers and subsidies. State purpose funds can be created in the form of a legal entity or without such a formation, including under ministries, state committees, and departments. With regard to off-budgetary funds, the legislation does not introduce detailed legal provisions but only lists those that have been granted the status of extra-budgetary funds. Off-budgetary funds of budgetary organizations are the development fund of a budgetary organization; the Fund for Material Incentives and Development of Medical Organizations; off-budget funds of ministries, state committees, and departments; and extra-budgetary funds of budgetary organizations, formed at the expense of fees charged. It is worth noting that the extra-budgetary nature has only a symbolic meaning, because the legislation states in

further provisions of the Code that extra-budgetary funds are included in the consolidated state budget.

The Code pays special attention to selected funds and indicates in detail the sources of their income (revenues). The income of the development fund of a budgetary organization is derived from various sources, including saved funds (the funds that remain unused according to the cost estimate at the end of the last working day of the reporting quarter, with the exception of funds allocated for financing capital investments); income from the sale of goods, works, and services (revenue from the sale of products or services related to the organization's specific activities or areas of operation, calculated as the positive difference between the proceeds obtained from sales and the costs incurred in producing those goods, works, or services); lease of property (a portion of the income is obtained from the leasing of assets owned by the budgetary organization); reserved funds (funds that have been set aside and authorized for use by the budgetary organization); and charitable contributions (funds from charitable sources, which further contribute to its financial resources).

Similarly, the income of the Fund for Material Incentives and Development of Medical Organizations comprises the following sources: budget allocations (a portion of the overall budget allocated to a medical organization, up to a maximum of 5%); income from the sale of goods, works, and services (revenue generated from the sale of products or services offered by the medical organization, corresponding to its specific profile of activities, determined as the positive difference between the proceeds obtained from sales and the costs incurred in producing the goods, works, or services); saved funds (funds that remain unused according to the cost estimate at the end of the reporting quarter, excluding those designated for capital investments); lease of property (similar to the development funds, the Fund for Material Incentives and Development of Medical Organizations also receives income from leasing properties owned by the medical organization); reserved funds (budgetary organizations may allocate funds for specific purposes, and these reserved funds contribute to the income of the fund); and charitable contributions (received from charitable sources to further enhance the financial resources of the fund).

The formation of revenues for other off-budgetary funds of ministries, state committees, and departments in accordance with the prescribed procedure is governed by the relevant provisions of the Code. These funds are primarily financed through deductions from state duties, fees, non-tax payments, administrative fines, and financial sanctions. This ensures a stable source of income for these funds, enabling them to fulfil their designated purposes effectively. Budget organizations, on the other hand, establish their own extra-budgetary funds by collecting fees for various services and activities; these serve specific purposes, such as supporting the maintenance of pupils in state preschool educational organizations, extended-day groups in state schools, boarding schools, colleges of the Olympic reserve, and other educational institutions. Additionally, fees are collected for teaching in children's schools

for music and art, institutions of out-of-school education, as well as for education in secondary and higher special professional educational institutions. Fees are also collected for meals provided to individuals undergoing treatment in inpatient institutions, among other types of services as stipulated by law.

The amount of fees and the procedures for their collection and utilization, as well as any benefits or exemptions, are established by the relevant legislation. These provisions ensure transparency, fairness, and accountability in the collection and management of fees, and they aim to optimize the utilization of these resources for the intended purposes. It is important to note that the establishment and operation of off-budgetary funds and the collection of fees by budget organizations are governed by specific legal frameworks in line with the principles of financial law and public-finance management. These frameworks provide a clear set of rules and guidelines to ensure the proper administration of these funds and the fair implementation of fee collection procedures.

The legal framework surrounding special-purpose funds in Uzbekistan is comprehensive, consisting of laws, regulations, and decrees that govern their establishment, operation, and financial management. This framework provides guidelines for revenue collection, allocation mechanisms, budgeting procedures, and reporting requirements specific to each fund, ensuring transparency, accountability, and proper governance of allocated financial resources.

Conclusions

This comparative analysis of state special funds in Poland and Uzbekistan sheds general light on their legal dimensions within the framework of financial law. The findings highlight the significance of these funds as targeted financial mechanisms for the allocation and management of public finances, aiming to address specific needs and promote socio-economic development. The study reveals that both Poland and Uzbekistan recognize the importance of state special funds in their legal frameworks. These funds are governed by specific legislation and regulations, outlining their objectives, structures, and operational mechanisms. They serve as dedicated financial instruments to support various sectors, such as social welfare, healthcare, education, infrastructure development, and environmental protection. Despite some differences in the legal frameworks and operational aspects of state special funds in Poland and Uzbekistan, both countries share common goals of public finances ensuring transparency, accountability, and the effective utilization of financial resources. The legal frameworks provide guidelines for revenue collection, allocation mechanisms, budgeting procedures, and reporting requirements, promoting sound financial management and governance.

To enhance the practices surrounding state special funds, several policy recommendations emerge from the research. Establishing clear and comprehensive legal frameworks with transparent governance mechanisms can foster effective management and utilization of financial resources. Strengthening coordination mechanisms among different funds and government entities is crucial to avoid duplication of efforts and to optimize resource allocation. Regular evaluations and impact assessments are essential to ensure the efficiency and effectiveness of state special funds in achieving their objectives.

Further research and collaboration in this area are encouraged to continue advancing the understanding and practices surrounding state special funds, fostering an exchange of knowledge and experiences between different jurisdictions. By learning from each other's successes and challenges, policymakers and practitioners can work towards optimizing the functioning of state special funds and ensuring their positive impact on public-finance management.

In conclusion, this comparative analysis provides valuable insights into the legal frameworks and operational aspects of state special funds in Poland and Uzbekistan. It contributes to existing knowledge on financial-law practices in both jurisdictions and offers recommendations for enhancing the effectiveness and efficiency of state special funds. Further research and collaboration in this area are encouraged, to continue advancing financial law and public-finance management in the context of state special funds.

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Constitutional and Legal Regulations on Financial Security and the Security of the Financial Interest of the State in Regard to the Challenges of the 21st Century

Abstract: This study demonstrates the interdependence of constitutional regulations and two types of state financial security: general financial security and the security of the financial interest of the state. An indication of these two types is possible due to existing legal regulations resulting primarily from constitutional regulations, but also from ordinary laws that allow for the analysis of the activities of public authorities in the field of collecting and spending public funds, in the budgetary, tax and banking contexts. The considerations discussed here are of particular importance due to the unstable political, economic, social and, above all, financial situation. In such difficult circumstances, it seems obvious that constitutional regulations should be the basis for ensuring the financial security of the state, while indicating to what extent the applicable provisions meet the challenges of the modern, unstable world. The considerations have been based primarily on the regulations resulting from the Constitution of the Republic of Poland, with an indication of which are the most important from the point of view of the adopted topic, the regulation of separate acts. In order to discuss the selected issues, it has also been necessary to refer to selected bibliographic items and court decisions. The study is selective and not comprehensive, constituting a stimulus for further research in this area.
Keywords: banking regulations, budget regulations, Constitution of the Republic of Poland, financial power of the state, financial security of the state, security of the financial interest of the State Treasury, tax regulations

Introduction

Pursuant to the Constitution of the Republic of Poland (1997), the functioning of public authorities should be fully coupled with the performance of public tasks for

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the benefit of citizens (Judgment of the Constitutional Tribunal 2000). Their proper performance is determined by the efficient and effective operation of public authorities, especially in crisis situations (Kuca, 2022a, pp. 151–152). While the basis for their efficient operation should be derived from constitutional regulations and from ordinary laws providing for the need to perform specific public tasks, their effectiveness should be associated with proper and adequate, i.e. safe, financing of their activities. The issue of the state's financial security, understood in this way, is particularly important now, during the pandemic, the war in Ukraine and ever-increasing inflation. At such a time, it is extremely important to ensure a state of social awareness, in which the existing level of threat should be minimized as much as possible without arousing fears for the future. For this purpose, it is necessary to refer to the constitutional provisions that regulate various aspects of the state's activity, in particular those that guard the financial security of the state. Due to the importance and the multifaceted nature of this issue, it will be discussed only in relation to selected constitutional and financial aspects that, in my opinion, are the most important, constituting an incentive for further considerations in this regard (Etel & Strzelec, 2021, pp. 21–23).

1. Financial security and the security of the state's financial interest

To start with, it is worth highlighting the fact that the Basic Law should be considered as the source of issues related to the financial security of the state (Raczkowski, 2014), which doctrine considers to be 'the starting point of the entire legal order in the country', protecting the 'common good of all citizens' (Bartosiewicz, 2006, p. 7; Liżewski, 2021, pp. 8 & 11), therefore also in the field of financial matters.[1] Against the background of these regulations, financial security should be considered, according to jurisprudence, as tantamount to the need to protect the financial interest of the state (Judgment of the Constitutional Tribunal 1993; Judgment of the Constitutional Tribunal 1994; Judgment of the Constitutional Tribunal 2002), which is also indicated by doctrine (Potrzeszcz, 2006, p. 18). The sources of the use of such a concept should be sought directly in the provisions of the Basic Law, in particular as indicated in the Constitution,[2] the public interest, important private interests, an important economic interest of the state, an interest of the state, an interest of the State Treasury, and the public interest in radio and television broadcasting (Woźniak, 2017).

Against the background of these scopes of constitutional protection, which are diverse and usually referred to, it must be recognized that all of them boil down to the safe operation of public authorities, acting to ensure public security (Zawisza, 2015,

1 Financial security is currently the most important component of economic security and the main foundation of national security as broadly understood.

2 Mentioned in Article 17, Sections 1, 22, 63 and 213 of the Constitution of the Republic of Poland.

pp. 71–73). Public security is the basis but also the common denominator for the finance-oriented, qualified financial security of the state as referred to in the title, and sometimes also the financial security of the State Treasury, which will be discussed later. At the same time, it is worth noting that both concepts should be understood as aiming at an ideal state of lack of financial threat, which does not exist, although public authorities should strive to achieve it.

In order to distinguish between the above-mentioned terms related to financial security, it is necessary to indicate obvious differences that are important for conducting financial and legal security considerations. The concept of the financial security of the state, despite the frequent use of the term, is a colloquialism and is not legally defined. Comparing it with the financial protection of the state, it should be considered that it concerns people permanently settled in a certain territory, having their own government, political system and law (Świat Książki, 2006, p. 632), i.e. an organized social group – the population of the state, the people, a social group operating through a specific state apparatus in a given area. Thus, financial security understood in this way has a wide subjective scope, referring both to the state understood as public authorities acting for and on behalf of the state and as its individual citizens or their groups residing in a given area.

Financial security of the State Treasury, on the other hand, is a concept used much less often in practice, and more in legal regulations. It means the obligation to protect the financial interests of a clearly specified and defined entity, the State Treasury. The State Treasury is a legal person that, acting in civil law relations, is the subject of rights and obligations that relate to state property that does not belong to other state legal persons (Article 34, Civil Code 1964). The need to ensure the security of the financial interest of the State Treasury (Krawczyk, 2021) is indicated by the Fiscal Penal Code (F. P. C. 1999), whose regulations recognize as a fiscal offence those types of crime that threaten the State Treasury with financial loss to the amount of at least ten times its substantial value (Article 53(11), F. P. C. 1999). In particular, these prohibited acts are related to budgetary and tax activities.

Against this background, it is also worth referring to the justification of the need to ensure the protection of the financial security of the state and the security of the financial interest of the State Treasury. In this regard, it is indispensable to refer to the financial power reserved primarily for the state (Feret, 2019).[3] The financial power of the state as broadly understood should be reduced to the exertion of a real influence on the environment by laying down absolutely *erga omnes* binding norms, the observance of which is secured by the possibility of applying legal coercion (Mańczyk, 2018, p. 208). It consists *de facto* but also *de jure* in the conduct of independent fi-

3 Although, due to the decentralization of public authorities, one cannot forget about the financial power of local government units, which I consider to be derivative, secondary to the financial power of the state.

nancial management by authorized public authorities in the scope of obtaining (enforcing) financial resources within the framework of their executive powers (Kirchof, 1982, 1–28), but also spending them under public law in the name of the common good, i.e. public interest (Dębowska-Romanowska, 2010, pp. 31–32), in accordance with the adopted monetary policy.

A properly functioning state, i.e. a state that performs public tasks on behalf of its citizens, must be equipped with appropriate financial resources. For this purpose, it is necessary to introduce legal regulations, primarily in the Basic Law, which indicate the legal basis for their permanent, systematic acquisition and effective enforcement on the basis of regulations resulting from lower-order acts. These legal regulations should be treated as a guarantee of ensuring the financial security of the state and the security of the financial interest of the State Treasury.

2. Constitutional budget regulations, the financial security of the state and the security of the financial interest of the State Treasury

To demonstrate the constitutionally defined financial security of the state through the prism of budgetary issues, it should be noted that the current Constitution of the Republic of Poland devotes its Chapter 10 to regulations regarding public finances (Public Finance Act 1998).[4] The legislation defines this concept by recognizing that public finances are funds for public purposes, collected and spent in the manner specified in the Act (Article 216(1) of the Constitution). On this basis, the Public Finance Act (Article 3) clarifies the concept of public finances, recognizing that these are processes related to the collection of public funds and their distribution.

Against this background, it is important to add that these statutory processes are principles, rules and methods of obtaining funds for public purposes (called public funds by the Public Finance Act) and their distribution, which are based on the annually adopted state budget and budgets of local government units. At the same time, it is important that the Constitution of the Republic of Poland explicitly states that 'the Sejm shall adopt the state budget for the financial year (Judgment of the Supreme Administrative Court 2022) in the form of a Budget Act' (Article 219(1)).

The Constitution also clearly indicates the deadline for taking actions aimed at passing the Budget Act. Pursuant to its regulations (Articles 222–224), it should be considered a rule that the Council of Ministers submits a draft Budget Act for the following year to the Sejm no later than three months before the start of the budget year. The Senate may adopt amendments to the Budget Act within 20 days from the date of its submission to the Senate, and the president signs the Budget Act within

4 The first Public Finance Act of 26 November 1998 was introduced under the Constitution of the Republic of Poland.

seven days. Therefore the Budget Act, adopted annually before the start of the financial year equivalent to the calendar year, is the basis for the conduct of the state's financial management, guaranteeing the proper collection and spending of public funds in accordance with the law, based on the principles set out in the provisions of the Public Finance Act (Article 109(4)). This is because the Public Finance Act (Article 1(4–5)), striving to ensure the financial security of the state in the budgetary sense, indicates, by specifying the subject matter covered by its regulations, that it concerns the principles and control modes of processes related to the collection and distribution of public funds, property management, the principles of state public-debt management, and prudential and remedial procedures (see Kuca, 2022b). The legislation refers directly to the financial security of the state in connection with defining the principles of financing the borrowing needs of the state budget (Article 78(3)(1)), the State Treasury debt-management rules (Article 78(g)(2)), implementation of investments under public–private partnership agreements that may not threaten the security of public finances (Article 133(c)(3)) and the implementation of long-term programmes to ensure the security of the state, in particular those related to its defence (Article 136(2)).

On the basis of the regulations resulting from the Public Finance Act concerning the financial security of the state, expressed generally or explicitly, the legislation also indicates the need to ensure safe operation of the State Treasury. Pursuant to the Act, the State Treasury was empowered to issue bonds, to grant guarantees and sureties (Adrian & Fine, 2009, pp. 412–414), to purchase property for purposes justifying its expropriation or to expropriate it, to take out loans and credits (also from the European Community and Member States) and to make other operations directly related to the management of the state public debt (Public Finance Act, Articles 49, 60(2), 62(1)(3), 80 and 84). The basis for granting such powers to the State Treasury are derived from the Constitution of the Republic of Poland. The regulations adopted by the legislation clearly indicate the possibility of borrowing and granting financial guarantees and sureties by the state (implicitly, by the State Treasury), as well as of the purchase, sale and encumbrance of property, shares or stocks, and the issuing of securities by the State Treasury (Article 216(2) and (4) of the Constitution). At the same time, it should be emphasized that, with reference to these regulations, the Basic Law introduces a cardinal principle to protect the financially secure operation of the State Treasury by limiting its operation in taking out such loans or granting financial guarantees and sureties as a result of which the state public debt would exceed three-fifths of the value of the annual gross domestic product (Article 216(5) of the Constitution).

3. Constitutional tax regulations, the financial security of the state and the security of the financial interest of the State Treasury

When examining constitutional regulations in relation to the issue of financial security from the perspective of tax, one should first refer to those constitutional regulations that introduce cardinal principles related to tax assessment. In this regard, it is necessary to refer to the general but very important provision resulting from Article 84 of the Constitution, according to which 'everyone is obliged to bear public burdens and benefits, including taxes, as specified in the Act'. This regulation, considered as a doctrine (Bernat, 2018, p. 38), as the basis for imposing taxes on citizens in Poland, should be treated as a guarantee of the financial security of the state. The state, i.e. the public authorities actually acting on its behalf, gains the certainty of collecting the funds necessary for the annual implementation of public tasks, as each citizen will make payments in the form of various cash benefits. Importantly, from the point of view of the state's financial security from the perspective of tax, the legislation considers taxes to be the most important group of such benefits, which should be associated with the name of this type of cash benefit, as is also confirmed by doctrine, which recognizes that 'one of the elements of the state's system are public levies – including taxes' (Dębowska-Romanowska, 2009, p. 110).

Recognition of the special rank and importance of taxes is also evidenced by those constitutional regulations that clearly refer to the provisions of separate acts related to their imposition, determination of entities, objects of taxation and tax rates, as well as the rules for granting reliefs and redemptions, and categories of entities exempt from taxes (Article 217 of the Constitution). It is worth noting that these issues, rightly raised by constitutional regulations, give rise in practice to a number of problems of interpretation, starting from the indication of the subjective scope affecting the actual possibility of applying tax preferences through the objective scope (Popławski et al., 2022, pp. 771–787).

While conducting further considerations of the aspect of constitutional and legal tax solutions protecting the financial security of the state, one should also refer to the regulations resulting from Article 167, in conjunction with Article 168, of the Basic Law (March, Judgment of the Constitutional Tribunal 1998; November,Judgment of the Constitutional Tribunal 1999; Judgment of the Constitutional Tribunal 2005). In the context of decentralization of public authorities (Kallas, 2002), the legislation does not forget to indicate the sources of obtaining funds for local government units that perform public tasks not reserved for other public authorities. Local government units obliged to perform statutory public tasks are financially secured, having the right to make their own income, among which the most important is tax.

In the case of local government, the most important monetary benefits are local taxes and fees, i.e. property tax, taxes on means of transport, market fees, local fees and administrative fees (Local Tax and Fee Act 1991). In relation to these, the constitutive

body of a local government unit was constitutionally equipped with the right to determine their amounts within the limits specified in the Act (Article 168 of the Constitution). At the same time, it is worth noting that although this is very important, it is not the only tax revenue indicated by the Basic Law in the case of local government units. The Constitution also provides that local government units are guaranteed a share in public revenues in accordance with the tasks assigned to them, while at the same time indicating that their sources of income are specified in the Act. Its regulations show that the revenues of local government units are also shares in income taxes from natural and legal persons (Article 3(2), Local Government Unit Income Act 2003).

Directing these considerations to determining the importance of constitutional regulations from the point of view of the financial security of the State Treasury's interest in tax terms, it must be unequivocally stated that the legislation does not directly express the need for financial security in relation to this entity. There can be no doubt, however, that such protection was provided for, which results from the provisions of the Tax Ordinance (Tax Ordinance Act 1997). The provisions of this Act, indicating the subject matter covered by its regulations, directly state that it applies primarily to taxes, but also to fees and non-tax receivables of the state budget and budgets of local government units, and tax authorities are authorized to determine or specify them (Article 2(1)(1), Tax Ordinance Act 1997). Later, defining tax in Article 6 of the Act, the legislation states that 'tax is a public law, a gratuitous, compulsory and non-returnable cash benefit to the State Treasury, province (*województwo*), district (*powiat*) or commune (*gmina*), resulting from the Tax Law'. The adoption of such a prima facie definition confirms the security of the financial interest of the State Treasury, which acts as a tax creditor. It is the Treasury, not the state, that receives funds from taxes, because it is the Treasury, not the state, that was endowed with legal personality. For this reason, it is also the Treasury that was designated as the entity authorized, inter alia, to acquire an inheritance in its entirety as a way of extinguishing a tax liability towards a tax remitter or collector, and to purchase property for purposes justifying its expropriation or to expropriate property as part of a deduction (Articles 59(2)(7) and 64(1)(3), Tax Ordinance Act 1997).

4. Constitutional banking regulations and the financial security of the state

Finally, referring to the issue of constitutional banking regulations in relation to the financial security of the state, reference should be made to the provisions of Article 227 of the Constitution. Under this provision, the legislation addresses the issue of financial security from the perspective of banking regulations in the most complete manner, stating that 'the central bank of the state is the National Bank of Poland' and has the exclusive right to issue money (Ruśkowski, 2021, p. 11), determine and imple-

ment monetary policy and be responsible for the value of the Polish currency (Ofiarski, 2020, p. 117).

The constitutionally provided powers of the National Bank of Poland (NBP) are manifested in the statutory objectives of its activities related primarily to maintaining a stable price level while supporting the economic policy of the government (Zubik, 2021,31–51). In this area of activity, the NBP was authorized to organize monetary settlements in the field of foreign-exchange reserves management, conduct foreign-exchange activities within the limits specified by statutes, conduct banking services for the state budget, and regulate the liquidity of banks and their refinancing (Articles 3(1) and (2)(1–5) of the National Bank of Poland Act 1997). Due to these objectives, the NBP has been recognized by doctrine as the basic element of the financial safety net (Kraś, 2013, p. 189).

The fact that the Constitution of the Republic of Poland also defines the structure of the Bank, indicating its president, Monetary Policy Council and management board, can be considered as confirmation of the significance and role of the NBP. In order to ensure the financial security of the state, the activities of these bodies should be coupled with the activities of the state authorities responsible for running the state's financial management. The necessity of such linkage of actions results directly from the constitutional provisions, where the legislation stipulates that the Monetary Policy Council establishes the assumptions of the monetary policy annually and submits them to the Sejm for information simultaneously with the submission of the draft Budget Act by the Council of Ministers. Also, after the end of the financial year, the Monetary Policy Council submits a report on the implementation of the monetary policy assumptions to the Sejm within five months of the end of the financial year (Article 227(6) of the Constitution).

Conclusion

The considerations here prove that the Basic Law should be treated as the basis for regulations which guard the financial security of the state. Although the legislation does not use this term, there can be no doubt that the adopted constitutional regulations are to safeguard security, as broadly understood, in its various aspects, including financial security. This financial security should be equated, based on the applicable legal regulations, with both the financial security of the state and the concept of the security of the financial interest of the State Treasury. Such types of security can be distinguished in the financial context analysed, with the former being of a colloquial nature and the latter of a qualified one. The constitutional regulations serve to highlight them, which should be considered from three financial perspectives: budgetary, tax and banking. In relation to these, the Constitution of the Republic of Poland introduces cardinal regulations, which are the basis for the regulation of ordinary laws. It is based on these that

ordinary statutes specify constitutional regulations. Such a role for the Constitution is particularly important from the point of view of public authorities that perform public tasks and their need to take action. Without constitutionally defined financial rules for their operation, the financial security of the state, which is necessary to preserve its identity and financial independence, cannot be guaranteed.

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Suspendium ad Kalendas Graecas? The Problem of the Constitutionality of Suspending the Statute of Limitations for Fiscal Offences during the State of the Epidemic or the State of the Epidemic Threat as the Example of Broadly Understood 'Fiscal Repression' of the State against the Individual[1]*

Abstract: One of the basic principles defining the relationship between individuals (including entrepreneurs) and the state is the principle of protecting the citizen's trust in the state and the law enacted by it. This principle is based on legal certainty, understood in the jurisprudence of the Constitutional Tribunal of the Republic of Poland as a certain set of features inherent in the law which ensure legal security for the individual; the individual then has the possibility of full knowledge of the reasons for the operation of state authorities and the legal consequences that his or her actions may entail. An individual should be able both to determine the consequences of behaviours and events on the basis of

1 * This article presents only the personal views of the authors.

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the legal status in force at a given moment, and to expect that the legislator will not change it arbitrarily. On 22 June 2021, Article 15zzr[1] was added to the Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them; the article stipulates that during the state of epidemic threat or state of the epidemic, as announced due to COVID-19, and in the period of six months after their cancellation, there is no statute of limitations for the criminality of the act and no statute of limitations for the execution of a penalty in cases of crimes and fiscal crimes (paragraph 1); the periods referred to above are counted from 14 March 2020 – in the event of an epidemic threat, and from 20 March 2020 – in the event of an epidemic (paragraph 2). The subject of this paper is an attempt to answer the question of whether the indicated provision – interfering with the current model of the relationship between penal fiscal law and tax law – meets constitutional standards.
Keywords: penal fiscal law, statute of limitations, the Constitutional Tribunal, the Constitution

Introduction

With effect since 22 June 2021, under Article 4(2) of the Act of 20 April 2021 amending the Act – Penal Code and Certain Other Acts (hereinafter: the April Amendment), Article 15zzr1 was added to the Act of 2 March 2020 on Special Solutions Related to the Prevention, Counteraction and Combating of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (hereinafter: the March Act). According to this provision:

– during the period in which the state of epidemic threat or state of epidemic declared due to COVID-19 is in force and for a period of six months after their revocation, the statute of limitations for the punishment of the act and the statute of limitations for the execution of the sentence in criminal and fiscal offence cases is not effective (paragraph 1);
– the periods referred to above shall be counted from 14 March 2020 – in the case of the epidemic threat, and from 20 March 2020 – in the case of the state of the epidemic (paragraph 2).

In our opinion, the consequences of Article 15zzr1 of the March Act are part of a ‘broader’ trend of instrumental application of the law in state–citizen relations by tax authorities. It suffices to mention that, pursuant to Article 70 § 6(1) of the Act of 29 August 1997 – Tax Ordinance (hereinafter: the Tax Ordinance),[2] the period of limitation for a tax liability does not commence, and the one commenced is suspended, with the date of commencement of proceedings for a fiscal offence or fiscal misdemeanour, of which the taxpayer has been notified, if the suspicion of an offence or misdemeanour is connected with failure to fulfil this liability, and the institution of initiating proceedings for a fiscal offence is used by tax authorities to circumvent the general provisions on the statute of limitations of a tax liability, as illustrated by the

2 With regard to the interpretation of Article 70 of the Tax Ordinance, see Dzwonkowski & Kurzac (2020, pp. 556 ff.).

judicial practice of the Constitutional Tribunal,[3] the pleadings initiating subsequent proceedings before that authority,[4] as well as the judicial decisions of the Supreme Administrative Court.[5]

One of the basic principles defining the relations between an individual (including an entrepreneur) and the state is the principle of protection of the citizen's confidence in the state and the law made by it.[6] This principle is based on the certainty of the law, understood in the jurisprudence of the Constitutional Tribunal as a certain set of features vested in the law which ensure legal security for the individual; the individual is then guaranteed the possibility of full knowledge of the premises of state bodies' actions and the legal consequences that their actions may entail. The individual should be able both to determine the consequences of particular behaviours and events on the basis of the legal state in force at a given moment, as well as to expect that the legislator will not change them in an arbitrary manner.

There is no doubt that the action of a taxpayer (including an entrepreneur), the purpose of which is to unlawfully evade his tax obligation, should be subject to an appropriate response from the state, not excluding a criminal sanction. At the same time, it should be noted that the issue of the statute of limitations for fiscal penal offences is essentially regulated in Article 44 of the Act of 10 September 1999 – Fiscal Penal Code (hereinafter: the Fiscal Penal Code). Pursuant to § 1 of this provision, the punishability of a fiscal offence ceases if five years have passed since it was committed – when the act constitutes a fiscal offence which is punishable by a fine, restriction of liberty or imprisonment for a term not exceeding three years (point 1), and if ten years have passed, when the act constitutes a fiscal offence which is punishable by imprisonment for a term exceeding three years (point 2). The punishability of a fiscal offence consisting in the reduction or exposure to the reduction of public-law liabilities also ceases when the statute of limitations for that liability has expired (Article 44 § 2 of the Fiscal Penal Code). Pursuant to the first sentence of Article 44 § 3 of the Fiscal Penal Code, the commencement of the period of limitation for a fiscal offence involving the reduction or exposure to reduction of a public-law liability shall commence at the end of the year in which the deadline for payment of that liability has expired.

3 See *inter alia* the judgment of the Constitutional Tribunal 2012 (P 30/11).

4 See e.g. the application of the Ombudsman of the Republic of Poland 2014 and the letter of the Ombudsman for Small and Medium-Sized Entrepreneurs 2021.

5 Cf. Resolution of the Supreme Administrative Court 2021 (I FPS 1/21).

6 On the subject – derived from Article 2 of the Constitution – of the principle of protection of the citizen's confidence in the state and the law made by it, see more in particular: the judgments of the Constitutional Tribunal: 1999 (SK 19/99), 2000 (SK 21/99), 2001 (SK 11/00), 2003 (SK 12/03), 2012 (P 30/11), 2014 (SK 22/11) and 2020 (SK 26/16). See also Banaszak (2004, pp. 214 ff.); Banaszak (2010, pp. 300 ff.); Banaszak (2012, pp. 17 ff.); Dowgier (2010, pp. 101 ff.); Florczak-Wątor (2019, pp. 27 ff.); Krasuski (2020, pp. 267 ff.); Morawska (2004); Sokolewicz & Zubik (2016, pp. 94 ff.); Tuleja (2016, pp. 216 ff.); Wróblewska (2010, pp. 82 ff.); Wyrzykowski (2006, pp. 233 ff.).

In turn, the extension of the limitation period depends on the initiation of proceedings, which is regulated by Article 44 § 5 of the Fiscal Penal Code, according to which if, during the period provided for in Article 44 § 1 or 2 of the Fiscal Penal Code, proceedings have been instituted against the offender, the punishability of the fiscal offence committed by the offender referred to in Article 44 § 1(1) shall cease with the efflux of five years, and of the fiscal offence referred to in Article 44 § 1(2) of the Fiscal Penal Code with the efflux of ten years from the end of that period.

The subject of this study is an attempt to answer the question of whether the regulation of Article 15zzr[1] of the March Act – especially as it interferes with the current model of the relationship between the penal fiscal law and the tax law – corresponds to constitutional standards.

1. The position of the Constitutional Tribunal on the statute of limitations in criminal law and tax law

1.1. The statute of limitations in criminal law (including penal fiscal law)

The statute of limitations in criminal law (including penal fiscal law) is a common and long-standing institution in criminal legislation (excluding in countries of the Anglo-Saxon world). It means the exclusion or limitation of criminal reaction due to the passing of time (Cieślak, 1994, pp. 482 ff.; Gardocki, 2005, pp. 202 ff.; Marek, 2005, pp. 377 ff.; Warylewski, 2004, pp. 431 ff.; Wilk, 2006, pp. 372 ff.). Despite the universality of this institution, it still arouses serious controversy in the science of law, which searches for a proper justification for its existence. In the literature (e.g. Marszał, 1972, pp. 50–60), the institution of the criminal statute of limitations is justified on the basis of:

- extra-legal theories, most often finding justification for the statute of limitations in the mitigating power of time;
- theories based on elements of procedural criminal law, *inter alia*, theories pointing to evidentiary difficulties occurring after a considerable period of time has elapsed or based on the assumption that the statute of limitations is a reaction to the tardiness of the prosecution and a means of mobilising it to act efficiently;
- theories based on the premises of substantive criminal law, such as the theory based on blurred memory and on general prevention or the theory of enhancement;
- substantive-process theories, combining elements of views based on considerations of procedural law and substantive criminal law.

It has been acknowledged in the jurisprudence of the Constitutional Tribunal that the statute of limitations of a criminal offence – although this may be a structural

element of the substantive criminal law norm referred to in Article 42(1) of the Constitution – always means a peculiar severance of the link between the offence and the punishment. Assuming that in Article 42(1) of the Constitution the legislator of the constitutional system formulated the principles that criminal liability is imposed only on the one who has committed an act prohibited under penalty by the law in force at the time of it being committed, and – a consequence of the norm thus defined – that the one who has committed such a defined act bears the consequences (liability) stipulated by the law, it should be concluded that the legislator of the constitutional system could not assume that the liability for committing a crime and the prescription of such liability are equivalent values. For the reason that under criminal law, the institution of the statute of limitations is an element of the criminal law order – albeit by its universality – it is treated as an element of a certain penal policy and not as a constitutionally protected right of a citizen (Judgment of the Constitutional Tribunal 2004, SK 44/03).

At the same time, in the opinion of the Tribunal, the individual has the right to expect to be subject to criminal liability under the principles set out in Article 42(1) of the Constitution. On the other hand, he or she cannot expect the benefits that could result for him or her from violating the law due to this and not that penal policy, since this policy – depending on the nature of the risks associated with specific offences – may be subject to modifications and changes. In this sense, an individual cannot assume, prior to sentencing or even prior to the initiation of criminal proceedings, that those elements of the legal norm (legal order) related to the punishability of acts that do not constitute a constitutionally protected right will not change. Therefore, when they commit a criminal offence (if, of course, the act was considered a criminal offence at the time it was committed), the statute of limitations cannot be prejudged. A different approach to the institution of the statute of limitations would lead to a kind of bonus for those criminals who persevere in their efforts to avoid responsibility. Hence, with regard to a statute of limitations that has not expired prior to a final judgment, the argument cannot be made that its extension aggravates the situation of the offender because, when committing the offence, he or she could not have foreseen that the statute of limitations would change (judgment of the Constitutional Tribunal 2004, SK 44/03).

The Tribunal also held that a change of the statute of limitations related to criminal liability should be linked first and foremost to penal policy, which is an element of criminal law, and not to axiological grounds derived from Article 42(1) of the Constitution. Indeed, a different understanding of the institution of the statute of limitations would oppose the axiological meaning of punishment and responsibility for acts that violate criminal law (crimes). Moreover, it would lead to the violation of a number of fundamental values, including the sense of justice, which is important from the point of view of the rule of law. This sense of justice encroaches on the dimensions of both

the common good and the individual good (combined with the due protection of citizens' rights) (Judgment of the Constitutional Tribunal 2004, SK 44/03).

At the same time, in the assessment of the Constitutional Tribunal, retroactive extension of the limitation periods is subject to assessment from the perspective of the rule of law; nevertheless, this is not related to the infringement of acquired rights or the protection of trust in the scope of regulations determining the punishability of a criminal act. For these reasons, they do not fall within the scope of application of the guarantee principle *lex severior poenali retro non agit*. On the other hand, a law introducing re-punishment of a prohibited act, despite the expiry of the limitation period, is inadmissible and violates the principle of the protection of trust and the resulting prohibition of retroactivity; it is a situation of retroactivity concerning 'closed facts', similar to the retroactive introduction of the punishability of certain conduct (Judgement of the Constitutional Tribunal 2008, P 32/06; Wróbel, 2003, p. 538).

1.2. The statute of limitations in tax law

With regard to the statute of limitations in tax law, the Tribunal found that the Constitution does not directly contain regulations relating to the issue of the statute of limitations of a tax liability, nor can a constitutional right to a statute of limitations, or even the expectancy of such a right, be derived from its content. The statute of limitations is not a subjective constitutional right, and even if the legislator had not provided for this institution, it could not be claimed that any constitutional rights or freedoms were thus violated (Judgment of the Constitutional Tribunal 2012, P 30/11).

In the absence of a constitutional regulation of the problem of the statute of limitations for tax liabilities, it should be considered that the introduction of this institution into the legal system, as well as giving it a specific shape (including the determination of the statute of limitations), is left to the discretion of the legislator, although – at the same time – the freedom of the legislator in this respect is not unlimited. This applies in particular to provisions constituting guarantees for the taxpayer. Provisions of this kind are those concerning the period of statute of limitation, the possibility of interrupting or suspending it and the length of the limitation period itself. Limitation periods that are too short would run counter to the principles of universality and tax justice. On the other hand, time limits that are too long would make the statute of limitations on a tax liability an apparent institution (Judgment of the Constitutional Tribunal 2012, P 30/11). Circumstances that should be taken into account by the legislator when setting the statute of limitations for tax liabilities include: the real possibility of enforcement of unpaid receivables by the tax authorities, periods of suspension when the statute of limitations does not run, and other circumstances, such as those related to the conduct of various types of tax audits, which do not suspend or interrupt the course of the statute of limitations. The legislator should also take into account the factual circumstances accompanying the enforcement of

tax dues, such as the behaviour of taxpayers evading tax or concealing assets from enforcement. Finally, the actual efficiency of the tax administration authorities is not without significance for the determination of the length of the limitation period, although the institutional weakness of the state cannot constitute a premise justifying the excessive extension of the limitation period *per se* (Judgment of the Constitutional Tribunal 2011, P 26/10).

At the same time, the Tribunal emphasised that the institution of the statute of limitations on tax liabilities serves to realise two important constitutional values:

– the need to maintain budgetary balance (as the statute of limitations on tax liabilities has a disciplining effect on the public creditor, requiring it to enforce tax debts within a strict timeframe);
– the stabilisation of social relations by extinguishing overdue tax liabilities (there is therefore no doubt that the statute of limitations on tax liabilities, although not *expressis verbis* regulated in the Constitution, finds support in constitutionally protected values) (Judgment of the Constitutional Tribunal 2012).

In view of the above, it should be stated that, although there is no constitutional right to a statute of limitations on a tax liability, or even an expectancy of this right, in the opinion of the Constitutional Tribunal, the legislator should shape the mechanisms of tax law in such a way that the expiry of a tax liability occurs within a reasonable period of time. Indeed, the enforcement of a tax debt and the accompanying uncertainty of the taxpayer as to the status of his or her tax liabilities cannot last indefinitely. Although the institution of the statute of limitations on tax liability may at times sanction a taxpayer's breach of the constitutional obligation to pay taxes, since it was introduced into the legal system, it must fulfil the tasks assigned to it. One of these is to stabilise social relations by extinguishing overdue tax liabilities (Judgment of the Constitutional Tribunal 2012).[7]

To sum up, there is no constitutional right to a statute of limitations *in toto*; however, by creating regulations on this subject, the legislative (irrespective of the area regulated) may not create the legal situation of individuals in contravention of the prohibition of retroactivity and in a manner that excludes the coherence and predictability of legal status.

7 In addition, with regard to the suspension of the limitation period for a tax liability in connection with the use of the tax institution of a compulsory mortgage, also see the judgment of the Constitutional Tribunal 2013 (SK 40/12); Białogłowski & Matarewicz (2013, pp. 44 ff.); Etel (2013, p. 532); Krawczyk (2009, pp. 13–17).

2. An attempt to evaluate Article 15zzr[1] of the March Act

Article 15zzr1 of the March Act, which came into force – what needs to be highlighted – on 22 June 2021, contains in paragraph 1 a regulation on the suspension of the statute of limitations for, *inter alia*, acts in penal fiscal matters during the period of the state of the epidemic threat or the state of the epidemic declared due to COVID-19, and for a period of six months after their revocation; paragraph 2 of this article specifies that these periods are counted from 14 March 2020 – in the case of the epidemic threat, and from 20 March 2020 – in the case of state of the epidemic. In addition, the April Amendment provides in Article 7 that the statute of limitations, as amended by the April Amendment, is to apply to acts committed before the date of entry into force of this law and to penalties imposed before the date of entry into force of this law, unless the statute of limitations has already expired. Putting it figuratively: if the statute of limitations on the criminality of the relevant act was up to and including 21 June 2021, Article 15zzr[1] of the March Act does not apply; however, if the statute of limitations was 'scheduled' to run on 22 June 2021 or after that date, then its running shall be suspended *ex lege*.

As a reminder: the state of the epidemic threat due to SARS-CoV–2 virus infections was declared on 14 March 2020; the state was revoked on 20 March 2020 due to the declaration of the state of epidemic on the same day; that state was revoked on 16 May 2022. Since 16 May 2022, the state of the epidemic threat was in force till 1 July 2023, when it was revoked (§ 1 of the Regulation on the announcement of the state of the epidemic threat 2020; § 1 of the Regulation on cancelling the state of the epidemic threat 2020; § 1 of the Regulation on the announcement of the state of the epidemic 2020; § 1 of the Regulation on cancelling the state of the epidemic 2022; § 1 of the Regulation on the announcement of the state of the epidemic threat 2022; § 1 of the Regulation on the cancelling the state of the epidemic threat 2023). The legislative power has not indicated the date until which the suspension of the statute of limitations for, *inter alia*, penal fiscal offences will apply, nor has it specified a maximum time limit. Despite the fact that the state of the epidemic threat was first declared on 14 March 2020, that the state of epidemic was subsequently declared on 20 March 2020, and that the state of epidemic threat is again in force since 16 May 2022, it is still not possible to determine the time limits up to which the extension of the limitation periods will last. Thus, Article 15zzr1 of the March Act in fact creates the institution of a suspension of the statute of limitations for an indefinite period of time, thereby undermining the principle of protection of confidence in the state and the law it enacts. This principle, as mentioned at the outset, is based on the assumption that the activities of public authorities should be characterised by loyalty and honesty towards each individual, stimulating in them a sense of legal security and stability. However, the statutory provision in question does not meet this requirement for the reasons set out below.

Firstly, this regulation was not introduced in March 2020, i.e. during the initial period of the pandemic (which disorganised public life in an unprecedented way), but only 15 months after the outbreak had occurred in Poland.[8]

Secondly, it introduces (probably unintentionally?) a dissonance with the regulation of Article 44 § 2 of the Fiscal Penal Code, which means that – despite the statute of limitations for a public debt – it still maintains the punishability of the related offence; thus, a situation arises which the legislator did not plan for when creating the Fiscal Penal Code.[9]

Thirdly, the suspension of the statute of limitations for punishment of an act *ad Kalendas Graecas* (despite even the expiry of the limitation period for a public liability) has the effect of exposing those concerned to legal consequences that could not have been foreseen previously, while at the same time calming down the epidemic situation (which is a notoriousness); new laws enacted by the legislator cannot surprise their addressees as to the further conduct of the public authorities.

It should also be noted that Article 15zzr[1] of the March Act imposes additional obligations on businesses to store documentation showing the dimensions of their tax liabilities and mutual settlements with business counterparties. This implies further financial and organisational costs for businesses and is of an indefinite and perpetual nature, which makes rational decisions on data archiving difficult. This burden not only applies to situations where criminal proceedings have already been initiated and criminal charges have been brought against certain entities; in principle, it affects all participants in economic transactions, as the suspension of the statute of limitations in the light of Article 15zzr[1] of the March Act also occurs in situations where no proceedings are pending and there is only a hypothetical possibility that they may be initiated in the unspecified future (*sic!*).

The legislative power – in principle – is free to shape the institution of the statute of limitations. Nevertheless, the lack of specification of a maximum duration for the suspension due to the state of epidemic threat or the state of epidemic results in the fact that the suspension of the statute of limitations may last for an indefinite period of time (several months or even several years); this is regardless of the actual impact of sanitary strictures on the ability of the procedural authorities to undertake actions efficiently. Importantly, the legal status created by Article 15zzr[1] of the March Act, which interferes with the rights of the individual, depends on the decision of the executive authority, i.e. the minister responsible for health, who decides on the subject of the state of the epidemic threat and the state of the epidemic on the basis of Article 46(2) of the Act on preventing and combating infectious diseases in humans 2008.

8 Cf. Order of the Constitutional Tribunal 2021 (Ts 111/20).

9 On the interpretation of Article 44 of the Fiscal Penal Code, see especially Konarska-Wrzosek (2021, pp. 289 ff.); Kotowski & Kurzępa (2007, pp. 213); Skowronek (2020, pp. 109 ff.); Wilk (2016, pp. 194 ff.).

Leaving aside the problems which occurred in March and April 2020 with the effective functioning of the procedural authorities responsible for detecting, prosecuting and judging crimes, despite the COVID-19 pandemic, criminal proceedings have generally continued throughout its entire duration to date. There is no public record that the delays occurring as a result of the quarantine or isolation of judges, prosecutors, police officers, witnesses or defendants have significantly affected the course of criminal or penal fiscal prosecution proceedings. Hence, the introduction of such a far-reaching legal norm – 15 months after the declaration of an epidemic threat and then a state of epidemic – which directly suspends the institution of the statute of limitations in penal fiscal law must be considered disproportionate and contrary to the standard of Article 2 of the Constitution; it should be noted that the suspension of the course of procedural and judicial deadlines (Article 15zzs of the March Act) was in force only from 31 March 2020 until 23 May 2020.[10]

Conclusions

It is a constitutional principle that one must pay the public and legal liabilities prescribed by law, not to avoid payment in anticipation of the statute of limitations (Białogłowski & Matarewicz, 2013, p. 52) and consequently to also evade the penal fiscal liability related thereto. At the same time, it follows from the jurisprudence of the Constitutional Tribunal that the principle of a democratic state of law encompasses the prohibition on granting state bodies the possibility to abuse their position towards citizens (Judgment of the Constitutional Tribunal 2008). The regulation of Article 15zzr[1] of the March Act may deprive procedural bodies of the motivation to conduct criminal fiscal proceedings (and, as a consequence, also tax proceedings) in a fast and effective manner, which may become a reason for tardiness in conducting the relevant proceedings. In our opinion, the regulation in question, which lacks any rational justification, fosters the institutional weakness of the state and, moreover, undermines trust in it, as essentially repressive regulations (suspension of the statute of limitations) have been introduced to a certain extent (through Article 7 of the April Amendment), with retroactive effect and with a nullifying effect in relation to the relevant legal situations regulated by the Fiscal Penal Code. Article 15zzr[1] of the March Act violates Article 2 of the Constitution in regard to the principle of protection of confidence in the state and the law created by it.

10 See: Article 1(14) in connection with Article 101 *in principio* of the March Act and Article 46(20) in connection with Article 76 *in principio* and Article 68(7) of the Act amending certain acts in the field of protective measures in connection with the spread of the SARS-Cov-2 Virus 2020.

Post Scriptum

After accepting this paper for publication, on 13 December 2023 the Constitutional Tribunal in case P 12/22 ruled that Article 15zzr[1] of the March Act is inconsistent with Article 2 of the Constitution.

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COMMENTARY

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Burden of Proof or the Principle of Cooperation in Granting Tax Relief? Commentary on the Judgment of the Supreme Administrative Court of the Republic of Poland of 14 September 2022, III FSK 538/22

Abstract: The purpose of this commentary on the judgment of the Supreme Administrative Court (SAC) mentioned in the title is to present the relationship between the tax authority and the taxpayer seeking relief from a tax liability. The literature and court rulings, the most recent example of which is the SAC ruling under review, indicate that it is the taxpayer who bears the burden of proving that the prerequisites for granting tax relief are present, namely an important interest of the taxpayer or the public interest. The institution of the burden of proof, characteristic of civil proceedings, should not be transferred to tax proceedings, where it is the statutory duty of the tax authority to clarify all the circumstances of the case. This does not mean that the taxpayer should not point out to the tax authority all the circumstances supporting the granting of relief. However, this does not follow from the fact that the taxpayer, as the applicant, bears the burden (obligation) of proving the existence of the prerequisites. There are and should be no provisions in the Tax Code imposing such an obligation. The taxpayer should submit any evidence justifying the relief in compliance with the principle of cooperation between the taxpayer and the tax authority. This is one of the general principles of tax law found in the literature and court decisions and boils down to the fact that the taxpayer is obliged to cooperate with the authority in charge of the procedure for granting the tax relief requested by the taxpayer. This principle, like many other general principles of tax law, should be inscribed in the current Tax Code, as has long been advocated in the literature.
Keywords: burden of proof, principle of cooperation, tax relief

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Thesis

In cases involving discretionary relief and exemptions granted under Article 67(a) of the Tax Code (TC), the burden of proving the circumstances relied upon by the applicant in his/her application rests with the applicant him/herself. This is because it is the applicant, pointing at obstacles to the ability to pay the tax, who most often has the relevant evidence that can confirm certain facts. Also, for fiscal reasons (the costs incurred by the administration), there is no reason why the burden of proof, i.e. confirming or disputing the situation described by the applicant, must be placed solely on the tax authorities.

1. Important taxpayer's interest and public interest v. the taxpayer's request for relief

In the judgment under review, the court addressed the process of determining the prerequisites for granting relief from tax liabilities that are set forth in Article 67(a) of the TC, namely 'important public interest' and 'public interest'. According to Article 67(a)(1), the tax authority, at the request of the taxpayer, subject to Article 67(b), in cases justified by an important interest of the taxpayer or by public interest, may: 1) defer the date of payment of a tax or divide the tax payments into instalments; 2) postpone the payment of tax arrears or divide it into instalments, with interest for delays or on tax advances not paid on time; 3) write off tax arrears, interest on the arrears, or a prolongation fee in whole or in part.

As a rule, a taxpayer requesting relief presents all the circumstances known to him/her that justify the granting of the relief. However, the tax authority cannot limit its actions to merely analysing the arguments raised by the taxpayer in the application, especially when the case is not self-evident. It is incumbent on the authority to establish all the relevant facts, including the prerequisites for granting the tax relief. This follows directly from Article 122 of the TC, which provides that the tax authority is obliged to establish all relevant facts determining whether the taxpayer's important interest or the public interest supports the granting of relief. In contrast, there is nothing in the aforementioned Article 67(a) of the TC and other provisions thereof about any related obligations incumbent on the taxpayer. So can the taxpayer's activity in the proceedings be limited to writing an application for relief? This is the issue that the judgment in question addresses. It can be argued that, strictly adhering to the literal wording of Article 67(a) of the TC in conjunction with its Article 122, it is the tax authority, and not the taxpayer, that is obliged to determine the existence of the prerequisites for granting (or refusing) a tax relief. Therefore, according to this understanding of the analysed provision, the taxpayer's activity may be limited to filing an application that meets the formal requirements set forth in Article 168 of the TC, with virtually no justification provided. In such a case, the authority has no

grounds to refuse to initiate proceedings (Article 165(a) of the TC) nor to call upon the taxpayer under Article 169 of the TC to remedy any deficiencies of the application within seven days with the instruction that failure to fulfil this condition will result in the application being left unprocessed. This is because the provision of an adequate justification for the application is not a formal requirement under Article 168. Nor is the tax authority allowed to discontinue proceedings initiated at the taxpayer's request on the basis that they are groundless (Article 208). Importantly, it may not refuse to grant relief by pointing out that the taxpayer has not presented circumstances justifying the grounds for the relief; this is not a premise for denying relief.

2. The basis for granting relief by the tax authority

What action should the authority take when the taxpayer has not sufficiently substantiated his/her application for relief? The proceeding is initiated at the request of the taxpayer, and within the framework of the proceeding, the tax authority should demand, pursuant to Article 155 of the TC, that the taxpayer present arguments and evidence in support of granting the relief. The taxpayer should, in his/her own interest, comply with the demand to provide the missing evidence. The demand may not indicate the possibility of a disciplinary penalty, since Article 262 of the Civil Code does not provide for this, which undoubtedly weakens the taxpayer's interest in complying with the tax authority's demand.

The tax authority may also require the taxpayer to complete a statement about property that may be subject to a mortgage or a tax lien (Article 39 of the TC). If the tax authority finds in the course of the proceedings that there is a reasonable fear of a failure to fulfil the tax obligation, it must demand that the taxpayer submit such a statement (on the ORD-HZ form). This provision is structured in such a way that it obliges the tax authority to make such a demand in the case of an application for tax payment relief where it is the taxpayer who indicates that he/she cannot meet the obligation to pay the tax. However, its wording also implies that the taxpayer may refuse to submit such a statement. This also does not encourage the taxpayer to provide arguments in support of the tax relief.

A demand that the taxpayer indicate the facts justifying the application for relief does not relieve the tax authority from the requirement to establish the relevant facts using other means of evidence and information known to it *ex officio*. Pursuant to Article 187(1) of the TC, it is the responsibility of the tax authority to gather and exhaustively consider all the evidence. However, the tax authority's options are severely limited in this regard, as it is the taxpayer who knows best what the reasons for applying for the relief are. In most cases, without the taxpayer's cooperation with the tax authority, the latter is really unable to determine the facts that support the granting of tax relief.

If a taxpayer complies with the tax authority's demand and presents arguments justifying, in his/her opinion, the granting of relief, or if the tax authority makes the relevant determinations on its own, all that remains is to issue a decision ending the proceedings. But what if the taxpayer does not respond to the tax authority's demand? This is another issue that was the subject of the judgment under review. The SAC rightly noted that 'the burden of proving the circumstances relied upon by the applicant in his application rests with the applicant himself'. For a long time, the literature has pointed out the need to implement the principle that the burden of proving the existence of the prerequisites of an important interest of the taxpayer or the public interest rests with the entity that requests relief (Brolik, 2012, p. 8). This trend is also evident in court rulings. One can already speak of an established jurisprudence, which is manifested, among others, in the judgment under review. The court rightly pointed out that in cases involving discretionary reliefs and exemptions granted under Article 67(a) of the TC, the burden of proving the circumstances relied upon by the applicant in his/her application rests with the applicant him/herself. This is because it is the taxpayer who knows what reasons have caused the difficulty in paying the tax and can provide relevant evidence that can confirm certain facts. The Supreme Administrative Court gave similar rulings in its judgment of 21 April 2022, III FSK 471/21, LEX 3349194, and a judgment of 21 June 2022, III FSK 5054/21, LEX 3371089.

This is definitely a rational approach to the problem in question. If a taxpayer applies for a relief, he/she should present the supporting circumstances. However, a taxpayer called upon to present these circumstances may ask about the legal basis for such a demand. Unfortunately, no such basis is explicitly stated in the TC, which also says nothing about the distribution of the 'burden of proof' when granting relief in the payment of tax (Nita, 2016, p. 273). This concept is 'borrowed' from civil law, where it is regulated in Article 6 of the Civil Code and the corresponding Article 232 of the Code of Civil Procedure. These institutions cannot be applied in tax proceedings, because they are not provided for in the TC (Brzeziński & Masternak, 2004, p. 57). Nor does it seem that it would be a good solution to include them in the TC, because they are characteristic of adversarial proceedings, such as civil proceedings (Etel & Strzelec, 2021, p. 19). According to the principle of adversariality, the parties to a process are in dispute and it is incumbent on them to prove their case, with the court playing the role of an arbiter (Jamroży & Szmura, 2011, pp. 32–38). Tax proceedings are inquisitorial, where the authority that conducts it (and at the same time which represents the revenue service) has the duty to clarify all the facts. In inquisitorial proceedings, it is the tax authority conducting them that has the duty to collect evidence and clarify all the circumstances of the case, which does not exclude the use of evidence presented by the taxpayer. The principle of active participation of a party in tax proceedings arising from Article 123 of the TC allows the taxpayer to present evidence, but does not obligate him/her to do so (Strzelec, 2014, p. 551). In our view,

therefore, there is no justification for introducing rules on the distribution of the burden of proof into these proceedings.

3. The principle of cooperation or the burden of proof?

So is the court's opinion expressed in the judgment under review unfounded? As has already been stated, the presented position of the court deserves to be accepted, but with a slightly different rationale. The aforementioned rulings actually indicated the need to apply the principle, present in literature and jurisprudence, of cooperation between the taxpayer and the tax authority in granting relief in the payment of tax obligations (Etel et al., 2017, p. 81). This requires the taxpayer to cooperate with the tax authority in determining the facts relevant to the subject matter of the proceedings. This principle is formulated in various ways, but its meaning boils down to imposing an obligation on the taxpayer to cooperate with the authority conducting the proceedings because of his/her interest, but also because of the need to protect the public interest. In the draft of the new Tax Code prepared by the General Tax Law Codification Committee, this principle is enshrined in Article 17 '[t]o the extent arising from the provisions of the tax law, obliged person (taxpayer, payer, collector, third party, legal successor) has to cooperate with the tax authorities' (Etel et al., 2017, p. 81). It is clear that the implementation of that principle brings certain benefits to the taxpayer applying for relief, but also, which is not so obvious, to the tax authority conducting the proceedings. As the court rightly pointed out in the judgment under review, the taxpayer's cooperation with the tax authority brings tangible benefits to the tax administration by reducing the costs of the proceedings. In the court's opinion, 'also, for fiscal reasons (the costs incurred by the administration), there is no reason why the burden of proving, i.e. confirming or disputing, the situation described by the applicant must be placed solely on the tax authorities'.

The court's reasoning reasonably and rationally justifies the taxpayer's duties in proceedings concerning relief in the payment of tax obligations pursuant to the general principle of cooperation. However, it is important to consider whether the application of this principle has legal grounds. The SAC does not address this issue in the reasons for its judgment. In our opinion, it is difficult to point to provisions in the current TC that could be the basis for the formulation of this principle. Practice shows that this is an undeniable shortcoming of the current legislation. Therefore, courts try to compensate for the shortcomings of the TC by deciding individual taxpayer cases. This sometimes leads to the formulation of 'jurisprudential' principles of tax law, which are respected not only by courts, but also by tax authorities applying tax law. Over time, or rather, incidentally, these principles become normative principles provided for in the TC. A good example is the principle of the resolution of legal doubts in favour of the taxpayer (Article 2(a) of the TC), which took shape in

jurisprudence long before its rather accidental and unfortunate articulation in the TC (Gomułowicz, 2015, p. 5). In our view, the principle of cooperation between the taxpayer and the tax authority is one of the many general principles of tax law that have been applied in judicial decisions, and should be included into the TC. Making it normative would help to popularize the rightful claim that a taxpayer seeking tax relief is obliged to provide the authority with all information indicating the existence of grounds for the relief. And if he/she fails to do so – as in the cases reviewed by courts – the authority may not have any grounds for granting the relief requested.

In our opinion, it makes no sense to propound that only the principle of cooperation should be inscribed in the TC (e.g. in Article 2(b)). One of the main shortcomings of the current TC is the lack of a catalogue of general principles of tax law. This shortcoming can only be eliminated by comprehensively codifying these principles in a new TC. Proposals in this regard have been prepared by the General Tax Law Codification Committee (Etel et al., 2017, p. 72). Until it is implemented, discussion will continue as to the need for and effect of the application of the general principles of tax law by courts. It will also still be difficult for taxpayers to identify the legal basis for the demands placed upon them by tax authorities.

Conclusions

In conclusion, it should be noted that in the judgment under review, the court rightly stated that the taxpayer was obliged to indicate the factual circumstances justifying his application for relief in the payment of tax liabilities. This is one of the judgments that make up an established jurisprudence. The basis for this obligation, in our opinion, is the principle of cooperation between the taxpayer and the tax authorities that has been applied in court rulings, although under a different name. Indeed, courts point out that the burden of proving the existence of grounds for applying for relief in the payment of tax liabilities rests with the taxpayer. The use in the TC of the concept of 'burden of proof' (which is present in civil law) is not acceptable, due to the completely different nature of tax proceedings. In the latter, there are no equal parties, and the rules governing the distribution of the burden of proof must be indicated. The principle of cooperation involves the taxpayer's obligation to cooperate with the authority conducting the proceedings, the purpose of which is to establish the existence of important interests of the taxpayer and of the public interest. The taxpayer's inactivity in this regard (e.g. failure to respond to the authority's demands) may result in a refusal to grant the relief. This principle, which is widely accepted in jurisprudence, should be explicitly provided for in the Tax Code, together with other general principles of tax law present in jurisprudence and doctrine.

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