European Financial Law in Times of Crisis of the European Union

EUROPEAN FINANCIAL LAW IN TIMES OF CRISIS OF THE EUROPEAN UNION

Edited by
Gábor Hulkó and Roman Vybíral

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Introduction

Before the 1990s, the cooperation of financial experts from Central and Eastern European countries had, among others, a formula of scientific symposia organised every 2 years by the particular countries of the region. The last of them took place in May 1991 in Opatija (Croatia). The socio-economic and political transformations of the 1990s interrupted this cooperation. However, the need for its establishment and institutionalisation continued in academic circles, which is why on 6 September 2002, the founding meeting of the Information and Organization Center for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe (in short Center) was held in Białystok (Poland).

The Center inspires and conducts joint conferences and research, assists in their implementation, collects and makes available information on the Members' scientific initiatives, cooperates with governmental and non-governmental organisations. An important aim of the Center is to promote European standards in the field of public finance and tax law in Poland and the other countries represented by the members of the Center as well as the exchange experience with other countries. The Center brings together ca. 300 members – the representatives of legal, economic and public management science as well as public sector practitioners – from 14 European and Asian countries (Poland, Russia, the Czech Republic, Slovakia, Lithuania, Belarus, Hungary, Ukraine, Kazakhstan, Croatia, Bulgaria, Moldova, Romania and France). The autonomous organisational unit of the Center is the All-Russian branch of the Center functioning since 2008 at the Voronezh State University.

The mission of the Center is fulfilled through the organisation of annual international scientific conferences, which have become a forum for the exchange of ideas, the findings of scientific research and the experience of scientists from several dozen academic centres of Europe and Asia. It seems that the differences in legal systems and regulations in the field of public finance in the 14 countries, which the board members come from, promotes creative discussion at the conferences and the elaboration of effective solutions to problems that exist in practice. The multiplicity of points of view and the variety of solutions analysed by scientists is a significant value that the Center has brought to the development of the science of financial law in this part of the world for 16 years. So far, 16 international scientific conferences of the Center have been held (Białystok 2002, Brno 2003, Vilnius 2004, Košice 2005, Grodno 2006, Voronezh 2007, Paris 2008, Lviv 2009, Prague 2010, Győr 2011, Białystok 2012, Omsk 2013, Mikulov 2014, Štrbské Pleso 2015, Białystok 2016, Vilnius 2017, Prague 2018). In consequence, so far, 16 monographs have been published that are the result of annual international conferences, as follows:

- Ruśkowski, E. ed. *The Budget Deficit and the Public Debt in the Selected European Countries.* Białystok: Publisher of WSFiZ in Białystok, 2003.
- Radvan, M. and Mrkývka, P. eds. *Financování* územní *samosprávy ve sjednocující se Evropě* [Financing Territorial Self-government in a Unifying Europe]. Brno: Publisher of the Faculty of Law of the Masaryk University in Brno, 2005.
- Miškinis, A. and Ruśkowski, E. eds. *Problems of Financial Law Evolution in Central and Eastern Europe within Integration Processes.* Wilno–Białystok: Temida 2, 2004.
- Štrkolec, M. ed. *Current Questions of Efficiency of Public Finance, Financial Law, and Tax Law in Countries of Central and Eastern Europe.* Koszyce: Publisher of the Faculty of Law at the University of J. P. Safarik in Košice, 2005.
- Guszczyn, I., Zhuk, M., Abramchik, L., Ruśkowski, E., Kosikowski, C., Etel, L. Głuchowski, J., Mrkývka, P. and Sentsova, M. eds. Финансовое правотворчество *и* правоприменение *в* государствах Центральной *и* Восточной Европы [Financial Lawmaking and Law Enforcement in the States of Central and Eastern Europe]. Grodno: Publisher of the Grodno State University, 2006.
- Sentsova, M. ed. *Modern Problems of Tax Law Theory* [Современ- ные проблемы теории налогового права]. Voronezh: Publisher of the Voronezh State University, 2007.
- Ruśkowski, E. and Tyniewicki, M. eds. Basic Problems of Public Finance Reforms in the 21st Century in Europe. *Białostockie Studia Prawnicze* [Białystok Legal Studies], (5) 2009.
- Ruśkowski, E. and Zawerucha, I. eds. *Public Finance and Financial Law in the Context of Financial Crisis in Central and Eastern Europe.* Białystok–Lviv: Temida 2, 2010.
- Boháč, R. ed. *Current Issues of Finance and Financial Law from the Viewpoint of Fiscal and Monetary Promotion of Economic Growth in the Countries of Central and Eastern Europe after 2010* [Актуальные проблемы финансов и финансо-вого права с точки зрениа фискального и монетарного поощрения хоэяйственного роста в странах Средней и Восточной Европы после 2010 года]. Prague: Wydawnictwo Leges, 2010.
- Hulkó, G. and Patyi, A. eds. *Public Finances – Administrative Autonomies.* Győr: Publisher of the University in Győr, 2012.
- Ruśkowski, E., Stankiewicz, J., Tyniewicki, M. and Zawadzka-Pąk, U. K. eds. *Annual and Long Term Public Finances in Central and Eastern European Countries* [Годовое и многолетнее планирование в публичных финансах стран Централь- ной и Восточной Европы]. Białystok: Temida 2, 2013.
- Kostukov, A. N. ed. *Problems of Application of Tax Law in Central and Eastern European Countries* [Проблемы налогового правопри- менения в странах

Центральной и Восточной Европы]. Omsk: Publisher of the Omsk State University, 2013.
- Mrkývka, P. ed. *System of Financial Law – General Part.* Brno: Publisher of the Faculty of Law of the Masaryk University in Brno, 2015.
- Radvan, M. ed. *System of Tax Law.* Brno: Publisher of the Faculty of Law of the Masaryk University in Brno, 2015.
- Blažek, J. ed. *Financial Markets.* Brno: Publisher of the Faculty of Law of the Masaryk University in Brno, 2015.
- Babčák, V., Románová, A. and Vojníková, I. eds. *Tax Law vs. Tax Frauds and Tax Evasion.* Košice: Publisher of the Faculty of Law at the University of J. P. Safarik in Košice, 2015.
- Etel, L. and Popławski, M. eds. *Tax Codes Concepts in the Countries of Central and Eastern Europe.* Białystok: Temida 2, 2016.
- Lotko, E., Zawadzka-Pąk, U. K. and Radvan, M. eds. *Optimization of Organization and Legal Solutions Concerning Public Revenues and Expenditures in Public Interest.* Conference Proceedings. Białystok: Temida 2, 2018.

Members of the Center take an active part in the *Days of Law* at the Masaryk University in Brno organised since 2007, as well as in international scientific conferences organised by the Michał Rőmer University in Vilnius, the Pavel Josef Šafárik University in Košice, the Yanka Kupala Grodno State University in Belarus and the Voronezh State University in Russia.

The results of the scientific research of the Center Members are presented in the form of comparative scientific monographs, especially on an international scale. So far, about twenty such monographs have been published, issued at the initiative or with the participation of the Center. Monographs analyse selected issues of financial and tax law in the countries of Central and Eastern Europe. The following publications can be mentioned as an example:
- Etel, L. ed. *Europejskie systemy opodatkowania nieruchomości* [European Real Estate Taxation Systems]. Warszawa: Wydawnictwo Sejmowe, 2003.
- Ruśkowski, E. and Dolnicki, B. eds. *Władza i finanse lokalne w Polsce i krajach ościennych* [Local Authorities and Finance in Poland and Neighbouring Countries]. Bydgoszcz–Białystok–Katowice: Branta, 2007.
- Popławski, M. and Šramková, D. eds. *Legal Sanctions: Theoretical and Practical Aspects in Poland and the Czech Republic.* Brno: Publisher of the Faculty of Law of the Masaryk University in Brno, 2008.
- Sentsova, M. ed. *Tax and Budget Law: Modern Problems of Property Relations.* Voronezh: Publisher of the State University in Voronezh, 2012.
- Ruśkowski, E., Stankiewicz, J., Tyniewicki, M. and Zawadzka-Pąk, U. K. eds. *Roczność i wieloletniość w finansach publicznych* [Annuality and Multiannuality in Public Finances]. Warszawa: Lex a Wolters Kluwer, 2014.

The Center publishes two own journals in the form of yearbooks presenting the papers in English or Russian. Since 2008, the *Annual Center Review* has been published by the Center together with the Law Faculty of the University of Białystok. In 2016, an additional issue of the *Annual Center Review* was published devoted to the principles and problems of evaluation and dissemination of the scientific achievements of the Center's members. In turn, since 2010 the *Public Finances and Tax Law* issued by the Center and the State University of Voronezh has been published. In addition, the Center supports the organisational structure of the international scientific journal *Public Governance, Administration and Finances Law Review* established in Budapest in 2016 and published by the National University of Public Service (Hungary).

Thinking about the scientific future, the Center pays a lot of attention to the scientific development of young scientists, the results of their research are published, among others in the *Annual Center Review.* With a view to them, the Seminar for PhD Students and Young Researchers was initiated as a part of the annual conference that was held in Vilnius in 2017. In addition, the Center undertakes the task of inspiring double doctorates. In 2015, two such defences took place as a result of the scientific cooperation of the University of Brno and the University of Białystok. Currently, the Center works on the next double doctorate.

More information about the Center and its activities can be found in the *Center Scientific Bulletin,* edited by E. Ruśkowski, P. Mrkývka, J. Stankiewicz, P. Woltanowski, E. Lotko, Białystok: Center, 2017, 272 pages, available at the website of the Center (www.ciob.pl).

In 2018, the international scientific conference of the Center entitled *Currency, Taxes and Other Institutes of Financial Law in the Year of the 100th Anniversary of the Founding of Czechoslovakia* was held in Prague within the framework of the international cooperation of the Faculty of Law of the Charles University (Prague) with the Centrum Informacji i Organizacji Badań Finansów Publicznych i Prawa Podatkowego Krajów Europy Środkowej i Wschodniej (Białystok) and the Institute for Research and Development on State and Governance of the National University of Public Service (Budapest) and under the auspices of the Governor of the Czech National Bank and the Minister of Finance of the Czech Republic. The conference was attended by more than 100 experts from the Czech Republic, Russia, Poland, Slovakia, Hungary, Italy and Spain.

The aim of the conference was to introduce and evaluate the issues and topics important for financial law not only in the Czech Republic, but also in the whole Europe. At present, there have been more than enough topics and problems in the area of financial law, including the question of international corporate taxation or legal regulation of the virtual currency. The main topic of the conference revolved around current issues of financial law, especially its sub-fields of tax law and currency law, as well as other related fields of law. The unifying theme consisted of a long-term development of a legal regulation in Europe and Czechoslovakia, later the Czech Republic.

Some of the papers presented at the conference referred to the origin of legal regulation in Central Europe, its development and several difficult periods that interrupted, or even disrupted this development. This was especially the Second World War and the Communist era when the traditional Roman law concept was replaced by the concept of Soviet law. Other contributions were related to the development of legal regulation in the Czech lands in the period from the Velvet Revolution to the present day. Foreign conference participants commented on these observations from their national perspectives and their legal cultures. They were then supplemented by contributions on related topics from their countries.

A summary of individual papers presented at the conference *Currency, Taxes and Other Institutes of Financial Law in the Year of the 100th Anniversary of the Founding of Czechoslovakia* is available to the readers in this publication. All the published articles have been subjected to a double-blind review.

The Editors

Tax-Free Allowance in Light of the Theory of Law and Case Law of the Constitutional Tribunal

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Abstract
The article is related to an attempt to evaluate changes in the Personal Income Tax Act in the scope of regulations regarding tax-free allowance, which are a consequence of the judgment of the Constitutional Tribunal of October 28, 2015. The Tribunal recognised that Art. 27/1 of this Act, to the extent that it does not provide for a mechanism to adjust the amount reducing tax, guaranteeing at least subsistence minimum, is inconsistent with Art. 2 and Art. 84 of the Constitution of the Republic of Poland.

Keywords
personal income tax; tax-free allowance; Constitutional Tribunal; case law

1 Introduction

Granted to the legislative authority on the basis of Art. 84 and 217 of the Constitution of the Republic of Poland (The Constitution of the Republic of Poland), the exclusivity of tax bills means freedom in shaping tax obligations, their substantive content, but does not mean that the content of tax legislation is left to the free recognition of the parliament. In the first place, tax legislation is subject to similar rules that apply to other acts. The difference, however, is that the establishment of tax law is based on certain

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principles that are only relevant to this law and have become constitutional standards. These include the abovementioned principle of parliamentary exclusivity in imposing public levies (Art. 84 of the Constitution), the exclusivity principle in determining the essential elements of the legal construction of a tax (Art. 217 of the Constitution) and the rule specifying the requirements to be met by a draft tax act (Art. 123/1 of the Constitution). In drawing up tax acts, the Parliament should also observe all constitutional norms expressing constitutionally protected principles and values (The Constitution of the Republic of Poland). This means that the legislator is bound by a set of directives regarding the creation of tax law. Their violation allows eligible entities to apply to the Constitutional Tribunal (CT) to examine the compliance of the tax act with the Constitution.

The subject of the article is an attempt to evaluate changes in the Personal Income Tax Act of July 26, 1991 (PIT Act) and the manner in which it sets the tax-free allowance. These changes are a consequence of the judgment of the CT of October 28, 2015 (Trybunał Konstytucyjny: K 21/14), which recognised that Art. 27/1 of the PIT Act, to the extent that it does not provide for a mechanism to adjust the amount reducing tax, guaranteeing at least a subsistence minimum, is inconsistent with Art. 2 and Art. 84 of the Constitution.

The main purpose of the article is to try to verify the hypothesis that the current regulation regarding the amount free from personal income tax does not fully implement the provisions of the CT judgment, which is contrary to the Constitution.

In order to verify such a hypothesis, the article presents an analysis of the constitutional principles of tax law creation, in the context of the tax justice principle and related principles of universality and tax equality. It follows from these principles that a properly constructed tax on personal income should take into account the personal ability of the taxpayer to pay taxes and leave at his disposal a part of the income necessary to satisfy his needs (the so-called subsistence minimum).

The research used the dogmatic-legal research method and the analysis of the CT case law.

2 Constitutional Principles of Creating Tax Law

The essential principles regarding the creation of tax law include the principles of Art. 1 and Art. 2 of the Constitution. In the context of tax, the provisions of Art. 1 of the Constitution indicate that by introducing the obligation to pay taxes, "all these values that constitute the Polish statehood, which develop and sustain it, which the Constitution associates with the principle of the common good and which have been expressed in its individual editorial units should be taken into account" (Kulicki, 2016). Art. 2 of the Constitution expresses the principles of a democratic state of law and social justice. An element of social justice is tax justice, which should be understood as the justice of fiscal burdens of citizens shaped according to the principle of equality (Art. 32 of the Constitution) and universality (Art. 84 of the Constitution) of taxation.

The universality of taxation is expressed in the fact that tax as a non-equivalent benefit should burden everyone so that common needs can be met. It means that the tax obligation rests with all obliged entities, and the tax covers all the factual and legal conditions with which the tax obligation relates. As emphasised by the CT, "paying taxes is one of the duties of individuals towards the state, resulting from the fact that everyone – using various forms of public tasks performed by the state (ensuring safety, maintaining roads) – should also participate in their financing. In other words, everyone is obliged to contribute to the common good according to their own abilities" (Trybunał Konstytucyjny: P 29/13).

However, the universality of taxation does not exclude the possibility for the legislator to grant exemptions or tax-free allowances, "however, any deviation from the principle of the universality of taxation should always be considered in terms of Art. 2 of the Constitution, that is, taking into account the standards of a democratic state ruled by law that implements the principles of social justice" (Trybunał Konstytucyjny: K 41/02). The principle of tax equality shows that all entities that are in the same economic situation (in terms of assets, types of income sources and their size) should be taxed equally (Trybunał Konstytucyjny: SK 2/10). The principle of equality, however, is not absolute, which means that in certain situations it allows to differentiate the legal situation of similar entities, but it has to be justified (Trybunał Konstytucyjny: K 10/96). Tax equality is expressed in the proper distribution of the tax burden, i.e. in proportion to the taxpayer's ability to pay (Krzywoń, 2011), in accordance with the individual level of his ability to pay. These possibilities are based both on personal and, above all, economic and financial elements (Mastalski, 2014).

An equality in taxation expresses the justice of taxation and it is based on the principle of the ability to pay tax so that all natural persons who receive income in the area of tax operation (personal universality) pay tax on all income obtained from all sources (material universality) (Mastalski, 2014). The doctrine notes that a correctly constructed income tax should respect the principle of taxation of the so-called pure income (Gomułowicz and Małecki, 2002). That principle, in terms of the subject matter, assumes that only the income remaining at the disposal of the taxpayer should be taxable, intended for satisfying his needs. In this approach, pure income is income generated after deducting the costs of obtaining it. In the personal sense, taxation of the pure income is connected with leaving the taxpayer a minimum tax-free income (at least the so-called subsistence minimum), necessary to meet the needs of the taxpayer and his family. In the literature on the subject, it is pointed out that the omission of this circumstance in the construction of the tax may lead to the necessity for the state to refund taxes in the form of various social benefits "even for those who would be able to live without those in a different tax structure" (Wójtowicz and Smoleń, 1999). For this reason, it is justified to introduce in the structure of personal income tax regulations that take into account the deviations from the principle of the universality of taxation (Wójtowicz, 1999).

3 Tax-free Allowance in the PIT Act in the Years 1992–2016

The tax-free allowance is part of the construction of progressive personal income taxation systems in most European Union Member States. Its essence consists in excluding an initial amount of income from taxation. In other words, the tax-free allowance is the maximum limit of the tax base (expressed in monetary amount), for which – taking into account the applicable tax rates and in many cases the applicable tax deductible amounts, the tax liability will be zero and will not charge the taxpayer with the payment obligation. The tax-free allowance is related to the tax capacity and as a result determines the tax efficiency.

The method of determining the tax-free allowance can be based on various methods, and their choice depends on the will of the legislator. The first method consists in taking into account the income ranges untaxed on a tax scale in the personal income tax. In this case, this amount usually takes the form of a zero tax rate in the first tax threshold within the limit of a taxable income limit. The essence of the second method of determining the tax-free allowance is the application of a basic (personal) deduction from income, which reduces the tax base by a part of the income of the taxpayer. Finally, this amount can be determined by applying a basic (personal) deduction which is deducted from the input tax (Korolewska, 2015).

Defining the tax-free allowance in the PIT Act of 26 July 1991 relied on the first of the methods presented above. The PIT Act did not directly specify the value of the tax-free allowance, but it indicated the amount that reduced the tax. As a result, the amount of the tax-free allowance is determined by complex calculations.

The PIT Act also provided for a mechanism for the valorisation of the taxable income and the amount by which the tax is reduced. Initially, these amounts were increased to the extent corresponding to the increase in average of the monthly salary in the national economy over the three quarters of the year proceeding the tax year, compared to the same period of the previous year.

A change in the method of valorisation of these amounts took place in 2002 (The Act of November 21, 2001). It was assumed that they should be increased in each year to the extent corresponding to the increase in the prices of consumer goods and services during the three quarters of the year proceeding the tax year in relation to the same period of the previous year. These indicators were announced by the President of the Central Statistical Office. On this basis, the MF, by 30 November of the year proceeding the tax year, determined, by a regulation, the scale of income tax for the following tax year and the tax reduction amount (Art. 27/4–7 of the PIT Act).

At the beginning of 2004 (The Act of November 12, 2003), the mechanism for the valorisation of taxable income bands and the tax-free allowance was abolished altogether. A fixed, statutory amount, by which the tax was reduced, was set in the amount of PLN 530.08. This amount was increased only once in 2007 (The Act of November 16, 2006), up to PLN 556.02. From that time until 2016, the tax-free allowance remained at a stable, unchanged level of PLN 3,091.

4 Request of the Ombudsman

On October 3, 2014, the Ombudsman filed a motion to the CT to declare the non-compliance of Art. 27/1 of the PIT Act (*Journal of Laws,* 2012, item 361, as amended) in terms of setting in the first range of the tax scale the amount reducing the tax in the amount of PLN 556.02 with Art. 2 and Art. 84 of the Constitution of the Republic of Poland. The Ombudsman related the allegation of unconstitutionality of the challenged regulation with the infringement of the legislator's freedoms in tax lawmaking.

In the justification of the Ombudsman's conclusion, it was stated that setting the amount reducing the tax at the level of PLN 556.02 is detrimental to taxpayers, because this amount was determined in isolation from the poverty criteria adopted in the applicable law. They are determined by the provisions on social assistance, according to which a person living in poverty is a person whose annual income does not exceed PLN 6,504 (in case of a single person), and PLN 5,472 (in case of a person in a family) (The Act of March 12, 2004). As noted by the Ombudsman, the applicable income thresholds entitling to apply for social assistance benefits determine the category of subsistence minimum, i.e. the lowest standard of living below which there is a biological threat to life and psychophysical development of a human being. Tax regulations, however, consider that the annual income above PLN 3,091 is sufficient to impose a personal income tax obligation. Referring to the principle of fairness and the principle of the universality of taxation resulting from it, the Ombudsman stated that the assumption taken by the legislator, that the tax-free allowance (PLN 3,091 during the tax year) by a taxpayer proves that they are able to meet their elementary needs in life to the limits of income set in such a way and at the same time have the real ability to bear public burdens in the form of tax payment. These burdens can be borne only by those who are able to meet these obligations, and therefore must have an income from which it could transfer funds to the resources of the Treasury. In this sense, Art. 84 of the Constitution also raises the obligation to establish such taxes, which take into account the individual payment capability of the person.

The Ombudsman also stated that the total consumer price index in March 2014 compared to March 2008 amounted to 117.9 (price increase of 17.9%) (www.rpo.gov.pl), hence he expressed doubts regarding the abandonment of the mechanism for valorisation of the tax free amount since 2003.

5 Judgment of the Constitutional Tribunal of October 28, 2015

The CT in its judgment of October 28, 2015 ruled that Art. 27/1 of the PIT Act is inconsistent with the Constitution in terms of not providing for a mechanism to adjust the amount reducing tax, guaranteeing at least a subsistence minimum. However, the judgment of the CT did not question the institution of tax-free allowance itself. On the contrary, the CT stated that the amount reducing the tax is an acceptable shaping instrument under Art. 84 of the Constitution's obligation to pay public levies. However, the mere recognition of the legality of the institution does not prejudge the fact that it is shaped in accordance with constitutional requirements. The form of the tax reduction amount must result from the principle of tax justice and implement social justice.

In the justification of the judgment, the CT stated that the absence of a mechanism correcting the amount reducing personal income tax and maintaining the tax-free allowance for many years and making it independent from the socio-economic situation of the state is a defect of the tax law inadmissible in a democratic state of law. It causes the taxpayer's ability to pay tax to be disregarded. The lack of linking tax ability with provisions relating to subsistence minimum or other specific socio-economic indicators is contrary to the principle of social justice and the principle of trust in the state and the laws it legislates. It is not justified, in the light of constitutional principles and values, to have a solution according to which, the tax-free allowance is twice lower than the amount defining living in poverty.

The CT stated that the lack of correction of the tax reduction amount, when it remains unchanged from a number of years, with the loss of the value of money, means its reduction and consequent reduction of its importance in the tax system, which makes it an apparent institution that does not comply with its target set by the legislator. It is unreasonable and unjust to separate the amount that reduces the tax from objective economic and social criteria. It is unreasonable to regulate the tax law, which presupposes a fixed tax reduction amount, thus also a fixed tax-free allowance of PLN 3,091, while social welfare regulations define that a person living in poverty is one whose annual income does not exceed PLN 7,608 in case of a single person and PLN 6,168 in case of a person in a family (The Regulation of the Council of Ministers of July 14, 2015). The amount reducing the tax not synchronised with the ability to pay means that even the poorest participate in the tribute to the state budget from which social transfers are later financed, such as social assistance for the poor. For this reason, tax regulations should take into account individual possibilities of bearing public burdens by taxpayers, so that the general obligation to pay taxes does not contribute to their poverty. This means that the tax-free income amount determined by law should be set at a level of income that will enable a taxpayer a dignified life. The opposite regulations are unconstitutional.

6 Implementation of the Constitutional Tribunal Judgment

Art. 21/1 of the PIT Act, considered by the CT as partly unconstitutional, was to expire on 30 November 2016. On November 15, 2016, the Sejm of the Republic of Poland adopted a bill amending the PIT Act, which provided for the maintenance of the tax scale of 2015 in 2016 and 2017. It aroused concern for the Ombudsman, who, referring to the verdicts of the Supreme Court and administrative courts, pointed out that introducing a legal provision previously recognised as unconstitutional could create the result that "courts while recognizing a specific case or passing a resolution may refuse to apply a legal norm that, despite being declared unconstitutional and eliminating it from the legal order, has been reintroduced into the legal system by the legislator. [...] Therefore, disregarding the Constitutional Tribunal's judgment and reintroducing the tax-free allowance into the legal system in its existing shape, without taking into account the CT's guidelines in this regard, may lead to a situation in which the courts, will recognize an amount equivalent to the subsistence minimum as a tax-free allowance" (www.rpo.gov.pl, 2018).

Since passing the amending Act by the Sejm of the Republic of Poland did not end parliamentary work, the Senate of the Republic of Poland amended the bill. Finally, Art. 27 of the PIT Act (The Act of November 29, 2016) defined that the tax is deducted from the basis of its calculation, according to the principle that if it is less than or equal to PLN 85,528, the tax equals 18% minus the amount reducing the tax. If it exceeds PLN 85,528, the tax equals PLN 15,395.04 plus 32% of the surplus over PLN 85,528 minus the amount reducing the tax. The fundamental changes concerned the rules for determining the amount reducing the tax, which was related to the subsistence minimum for a single-person household set by the Institute of Labour and Social Affairs (ILSA). The legislator assumed that the amount reducing the tax should be a support for people with low incomes, while people with high incomes should not use it at all. As a result, the amount reducing the tax is degressive. Its value decreases as the taxpayer's income in the relevant tax year increases. Added to Art. 27/1b stated that it is:

1. PLN 1,188 – for the tax base not exceeding the amount of PLN 6,600 (people with an annual income of PLN 6,600 or less are exempt form personal income tax);
2. PLN 1,188 reduced by the amount calculated according to the formula: PLN 631.98 x (the basis for calculating tax – PLN 6,600) – PLN 4,400 – for the tax base higher than PLN 6,600 and not exceeding PLN 11,000 (taxpayer who will receive annual income higher than PLN 6,600, but not exceeding PLN 11,000, will pay a lower tax than previously);
3. PLN 556.02 – for the basis for calculating a tax higher than PLN 11,000 and not exceeding PLN 85,528 (people earning over PLN 11,000 a year, but no more than PLN 85,528 will be taxed, as on the existing rules, the tax-free allowance will amount to PLN 3,091);

4. PLN 556.02 – lessen by the amount calculated according to the formula: PLN 556.02 r x (the basis for calculating tax – PLN 85,528) ÷ PLN 41,472, for the tax base higher than PLN 85,528 and not exceeding PLN 127,000 (persons obtaining an income over PLN 85,528 annually will pay a higher tax than hitherto, because the tax-free allowance will be gradually reduced in their case; people earning more than PLN 127,000 a year will not benefit from the tax-free allowance).

The new provisions entered into force on January 1, 2017 and were applied to incomes received from that date. The existing rules were applied to the earnings obtained in 2016. The Amending Act also introduced a mechanism for adjusting the tax reduction amount. This amount is verified annually by the Ministry of Finance, which by 15 September of the year in which the verification was carried out, submits to the Council of Ministers information on the results of the verification and the proposal to change the amount reducing the tax for the following year, in case of a significant increase in the minimum subsistence for a single-person household, set by the ILSA. This indicates the unambiguous linking of the amount reducing the tax to the provisions of the Social Assistance Act (SA Act). Art. 9/1 of this Act states that the income criteria defining the threshold for the state social intervention are subject to verification (every 3 years), and the study of the threshold of this intervention is carried out by the ILSA.

On that basis, since 2018 (tax settlement in 2019) the tax reduction amount has been updated, but it is still available only to taxpayers whose annual income did not exceed PLN 85,528. Currently, the tax reduction amount is:

1. PLN 1,440 – for the tax base not exceeding PLN 8,000;
2. PLN 1,440 – reduced by the amount calculated according to the formula: PLN 883.98 (tax basis – PLN 8,000), up to PLN 5,000, for the tax base higher than PLN 8,000 and not exceeding PLN 13,000;
3. PLN 556.02 – for the basis for calculating a tax higher than PLN 13,000 and not exceeding PLN 85,528 (The Act of October 27, 2017).

7 Conclusion

The research that has been carried out and the resulting conclusions did not confirm the research hypothesis set in the introduction.

The personal income tax-free allowance has been an integral element of the Polish tax system since 1992. However, the way it is shaped depends on the will of the legislator. The Polish legislator does not provide for one value of the tax reduction amount and, and as a consequence, one tax-free allowance. This amount is degressive in its nature, and may take different values, depending on the amount of the taxpayer's annual income, including the value of '0'. This solution does not raise any doubt. The legislator has considerable freedom in shaping the tax law and can introduce provisions corresponding to the assumed political and economic objectives, expressing the values protected by the Constitution. This goal is, as emphasised by the judgement of the CT of October 28, 2015, providing the poorest people with a subsistence minimum that guarantees a decent life. It should therefore be considered that the new form of the tax-free allowance in the PIT Act does not violate the said judgement of the CT, thus is not contrary to the Constitution of the RP.

However, one can have doubts whether the act amending the PIT Act of November 29, 2016 setting the tax-free allowance for persons with the lowest income at the level of PLN 6,600 guaranteed at least the minimum subsistence level referred to in the judgment of the CT. The provisions on social assistance, which have been in force since 2015 till now, provide that a person living in poverty is the one whose annual income does not exceed PLN 7,608 in case of a single person and PLN 6,168 in case of a person in a family. This means that the legislator, when determining this amount, referred to the minimum subsistence for a person who remains in the family, and not as it was presented by the CT – for a single-person household. On the other hand, the legislator, specifying the mechanism for valorisation of the tax reduction amount, unequivocally refers it to the subsistence minimum for a single-person household, determined by the ILSA.

It seems that setting the tax-free allowance at the level guaranteeing, in accordance with the SA Act, the subsistence minimum, took place only on the basis of the Act of October 27, 2017, which set the tax-free allowance for people with the lowest annual income of PLN 8,000.

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The System of Financial Regulation

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Abstract
The article is devoted to the analysis of the legal nature of cryptocurrency as an object of financial and legal regulation from the point of view of the Russian legislation. The analysis of the qualification of cryptocurrency is described as money, electronic money, foreign currency, other property, as well as the possibility of assigning crypto-loans to obligations rights. The conclusion is made about the possibility of treating cryptocurrency as private money on a par with national currencies.

Keywords
cryptocurrency (crypto currency); money; virtual currency; blockchain; financial law; taxes; electronic money

1 Introduction

With the introduction of new digital technologies, the emergence and development of new objects, which are based on the public blockchain of such cryptocurrency as Bitcoin, Lightcoin, Ethereum, etc. (hereinafter: cryptocurrency), there is a need for legal regulation of both the very instruments and relations arising in connection with their use in general.

Currently, legal discussions are quite brisk about the legal nature of cryptocurrency. The qualification of cryptocurrency is one of the most important aspects as an object of civil rights, which creates the conditions for the legal regulation of transactions with the subject of cryptocurrency, which will simultaneously allow for the legal regulation and settle other equally important issues of relations arising in connection with the use of cryptocurrencies.

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Nowadays, most of the countries are trying to analyse the status of cryptocurrency and introduce legal regulation meeting the interests of the State and business.

2 Characteristics of Cryptocurrency

2.1 Cryptocurrency is money

As you know, the notion "money" is an economic substance, due to the works of F. A. Hayek, K. R. McConnell, S. L. Bru, M. Friedman, J. M. Keynes, L. Harris, and other well-known economists, whose works were devoted to the study of economic relations. Money is a special commodity, which is the universal equivalent of the value of other goods and services. Modern economic science distinguishes five functions of money.

1. Measure of value. Money allows you to evaluate the value of goods by setting prices.
2. Means of circulation. Money plays the role of an intermediary in the process of exchange.
3. Means of payment. The function of money that allows for the time of purchase not to coincide with the time of payment, that is, when goods are sold on credit.
4. Means of accumulation and saving. The ability of money to participate in the process of formation, distribution, redistribution of national income, formation of savings of the population.
5. The function of world money. It manifests itself in the relations between economic entities: States, legal entities and individuals, located in different countries.

It is believed that money fulfils its task only under the condition of the participation of people who use the opportunities of money. Only people can determine the prices of goods, apply money in the realisation and payment processes, and also use them as a means of accumulation. Thus, theoretically, any object that performs these functions can be considered money.

Another important aspect of the notion of "money" is connected with the notion of a "legal tender" and a State monopoly on money issue. In accordance with Art. 75 of the Constitution of the Russian Federation, the ruble is the monetary unit in the Russian Federation. Monetary emission is carried out exclusively by the Central Bank of the Russian Federation. The introduction and emission of other money in the Russian Federation is not allowed.

According to Art. 140 of the Civil Code of the Russian Federation, the ruble is a legal tender, mandatory for acceptance at face value throughout the territory of the Russian Federation.

Payments in the territory of the Russian Federation are made by cash and non-cash payments.

Cases, procedure and conditions for the use of foreign currency in the territory of the Russian Federation are determined by law or in accordance with the procedure established by it.

As L. A. Lunts noted, the legal significance of the legal payment force assigned to a monetary sign, is that the creditor under the obligation, which can be repaid by way of a monetary payment, having refused to accept the legal tender, falls into delay (Lunts, 2004: 50–52). The status of legal means of payment allows to repay by proper execution of any monetary obligation on the territory of the Russian Federation by law without the need to express the will of the creditor. All other forms of payment (counter-payments) do not have the status of legal tender. At the same time, a legal means of payment is used to fulfil public-legal obligations of a monetary nature, for example, for paying taxes (Savelyev, 1975).

Art. 128 of the Civil Code of the Russian Federation attributes to the objects of civil rights things, including cash and certificated securities, other property, including non-cash funds, uncertificated securities, property rights; results of works and services; protected results of intellectual activity and equated to them means of individualisation (intellectual property); intangible goods.

In the current Russian legislation, nothing prevents the cryptocurrency from being attributed to civil rights objects, since Art. 128 of the Civil Code of the Russian Federation does not contain an exhaustive list, but taking into account that the cryptocurrency performs different functions when it is applied (goods, investments, financial assets ensuring payment of a commission for the implementation of transactions on blockchain technologies, as an essential element of the system, if we consider by analogy as electric power for any production), respectively be different legal regulation of the cryptocurrency, depending on what function such a cryptocurrency will perform.

2.2 Cryptocurrency is the equivalent of cash

On the example of the most famous cryptocurrency, Bitcoin, we can argue that this is an electronic, digital equivalent of cash or that institution that will eventually be able to displace cash. If the authenticity of cash is verified through viewing watermarks, security threads, microprinting and with the help of special technical means, etc., while in case of cash there is no any register containing operations records (in this connection there are certain restrictions of cash settlements, and there is a centuries-old problem with their counterfeits of both coins and banknotes), in case of cryptocurrency – Bitcoin, the transaction register guarantees their authenticity. For example, Germany's legislation allows the attribution of cryptocurrencies to financial instruments, which are a form of "private money" that can be taxed.

In 1975, F. A. Hayek, in his work *Private Money* offered a radically new way of the achievement of the monetary stability – a system based on the competition of parallel private currencies (Hayek, 1975). His idea is simple, such currency should be recognised as an ordinary commodity and accordingly produced in a market way. In his opinion, “only those currencies will remain that will fulfil the functions of money best of all: to serve as a means of payment and preserve their value over time” (Frolov, 2011). It seems that we are on the verge of this reality because of the following:

The society had a need to create an entity similar to cash only in the conditions of a new space. For example, if the simple transfer of a note by one person to another person when calculating cash is indicative of the transfer of the value determined by its value, and such transfer does not require any assurance by the third party, since these are only two persons' relations and nobody prevents them from doing this transfer, then when translating electronic funds in order to carry out the transfer of value expressed in electronic money from one person to another, there is a necessity to seek help from a third party (bank, non-bank credit institution) which on legal grounds acting as an intermediary in relation to these two persons, carrying out transfers of electronic money, has the right under certain conditions to question the legality of such transfer and to refuse to carry out the transfer of funds.

This example demonstrates that cash can be transferred without any consent of the third party. This factor indicates the unshakable control of such a transfer. And this factor is fundamental for the development of the cryptocurrency, because it is also based on the mechanism of inadmissibility of interference by the third party – control on the one hand, anonymity and reality (genuineness) of the very essence of the cryptocurrency on the other.

Another factor of the popularity of cryptocurrency is its decentralisation, the unsettled activities of persons issuing the cryptocurrency. In fact, everyone can issue their own cryptocurrency. There is only a question of its market competitiveness, the ability of the circulation and trust of the community, the issue of an agreement on the one hand, but of course the danger, insecurity on the other, which needs legal regulation, and relations of such kind in defence on the legislative level.

Thus, if the cryptocurrency is recognised as money, in the sense of the legislation of the Russian Federation, and treated as an alternative monetary unit, then explicit prohibition is clearly seen in relation to such an approach. Accordingly, payment of goods and services with the help of Bitcoins and other cryptocurrencies on the territory of the Russian Federation is contrary to the current legislation.

2.3 Cryptocurrency is a foreign currency

The opinion that it is possible to equal cryptocurrency to foreign currency, have been repeatedly expressed by the media.

According to subparagraph 2) of Art. 1 of the Federal Law No. 173-FZ of December 10, 2003 (as amended on July 18, 2017) *On Currency Regulation and Currency Control* (hereinafter: Law on Currency Regulation), where the foreign currency is:

a) token money in the form of banknotes, treasury notes, coins in circulation and being a legal means of cash payment on the territory of the relevant foreign State (group of foreign States), as well as have been withdrawn or are withdrawn from circulation, but subject to exchange the indicated banknotes;
b) funds in bank accounts and in bank deposits in monetary units of foreign States and international monetary or settlement units.

From the above definition, it follows that the nature of cryptocurrency is not covered by the term "foreign currency" because of the following:

Cryptocurrency is not materialised in form and does not exist in cash. It is also not covered by the second qualifying attribute, constituting "the recognition of the cash payment as the legal means". For the same simple reason, the absence of a cash form, if one abstracts from the concept of "cash" and considers from the standpoint of "means of payment", it is also seen that cryptocurrency cannot be attributed to the concept of "foreign currency", because the territory of the Russian Federation is OK (MK (ISO 4217) 003-97) 014-2000.

All-Russian Classifier of Currencies (app. by the Resolution of the State Standard of Russia No. 405-st of 25.12.2000) (ed. from 02.06.2016), according to which the name of the country and territories correspond to the currency of circulation, and, respectively, there is no data in the indicated classifier, the provisions on cryptocurrency and the correlation of the latter to any country.

If viewed through the prism of non-cash foreign currency, according to the regime of existence, cryptocurrency is not accumulated in different bank accounts and deposits and is not covered by the notion (concept) of international monetary and settlement units, since full decentralisation is established in respect of cryptocurrency – the absence of an external or internal administrator in the network, guaranteeing (conforming) the correctness of system operations, including the lack of ability to influence the transactions of system participants. The reliability of transactions is ensured in the network by the blockchain technology (replicated distributed database – distributed registry technology), respectively, the equalisation of the cryptocurrency to foreign currency from the point of view of the legal regime established by the legislation with respect to foreign currency (by regulations on currency regulation and currency control) is legally incorrect.

2.4 Cryptocurrency is electronic money

In accordance with subparagraph 18) of Art. 3 of the Federal Law *Federal Law No. 161-FZ of June 27, 2011 (as add. on July 18, 2017)* on the National Payment System (hereinafter: Payment System Act), electronic funds are cash which were previously provided by one person (the person who provided money) to another person who takes into account information on the amount of money provided without opening a bank account (to an obligated person), for the fulfilment of the monetary obligations of the person who had provided money, to the third party and in respect of which the persons and for which the person who provided the money, has the right to transfer the orders exclusively with the use of electronic means of payment.

Electronic means of payment is a means and (or) a method that allows the client of the operator on money transfer to draw up, certify and transfer orders for the purpose of transferring funds within the framework of the applied forms of non-cash payments using information and communication technologies, electronic media, including payment cards, as well as other technical devices – item 19 of Art. 3 of the Federal Law *On the National Payment System*.

Electronic funds are the right of the owner of electronic money to the operator of electronic funds about their repayment (exchange for cash or non-cash money). Electronic funds are accounted for in a special virtual account ("electronic purse"), while funds are reflected in the bank account of the operator of electronic money due to which (funds) all electronic funds, accounted by the operator of the electronic funds, will be paid off. One more detail – before the transfer of electronic funds, it is supposed to be prepaid in cash or non-cash money. After that, it becomes possible to make a payment – the operator of electronic money transfers it to the recipient.

The transfer can be carried out both on the basis of the order of the payer, and on the basis of the demand of the recipient of funds. Electronic money is written off from the virtual account of the payer and included into the recipient's virtual account. After the calculations, electronic money can be transferred back to cash or non-cash form. Electronic money is a means for settlements, the availability of which is possible if there is money in the sense of Art. 140 of the Civil Code of the Russian Federation.

Cryptocurrency is not subject to the notion of electronic funds, since it has a different mechanism of the origin. The emission of cryptocurrency is carried out through a decentralised emission. The intermediaries (any special subject, banks, clearing centres, etc.) do not need to transfer it from one entity to another; there are no territorial borders for translation; it is not possible to cancel a transaction and there is the possibility of converting a fiat currency.

I suppose that the disclosure of the concept of "cryptocurrency" through the notion of "digital financial asset" is not entirely good, because there is some misunderstanding in the difference between such concepts as cryptocurrency and digital assets. Although you can certainly argue that each cryptocurrency is a digital asset in its essence. But they differ in the way they are managed. There are many differences between financial instruments. A digital asset exists in binary format, i.e. binary files are opposed to text files, while text files are a special case of binary files, so in the broadest sense of the word, any file is suitable for the definition of a "binary file".

A digital asset can be placed anywhere – from movies to documents and any other types of data. Any digital data can be called "digital assets", for example, a folder on the computer desktop, since the data composing this asset are stored on electronic media, on digital devices, including computers, mobile devices, media players, etc.

And each cryptocurrency can be marked as a digital asset. However, not every digital asset is a cryptocurrency. An excellent example of this is XRP, which many specialists classify erroneously as cryptocurrency. This is a digital resource stored in a distributed register, and it does not work like a cryptocurrency.

XRP in its case can only be used in the Ripple Consensus Ledger. Even in this case, the use of transactions in this register is not obligatory. The value of a digital resource often depends on the organisation with which they are connected. The higher demand for such an asset often increases its value. However, the control of access and portability of these assets is supported by individual companies.

The most part of cryptocurrencies is known for their decentralised aspect, the security, contained in the very essence of the underlying mathematical algorithm in it. At the same time, cryptocurrency is characterised by the management of the exchange discreteness (manipulation), which may not be typical for any other digital asset. Moreover, most of cryptocurrencies have an offer limit, while digital assets can in theory be created indefinitely, if necessary. Obviously, these two types of values are very different from each other, which should always be taken into account.

2.5 Cryptocurrency is a law of obligations

The position that such a cryptocurrency as Bitcoin is a mandatory claim right arising on the basis of an agreement between the participants of the corresponding settlement system was expressed by Doctor of Law, Professor L. Novoselova. In support of her position, Professor L. Novoselova classifies Bitcoin as non-cash money, insofar as Bitcoin fulfils the function of money, its transfer for the purpose of paying for goods, works and services should be regarded as a final payment terminating the monetary obligation by execution (Novoselova, 2017: 15).

According to the legal construction of the law of obligations, a relative legal relationship is that, in which there are specific participants bound to a certain conduct pursuing a property interest (as opposed to an absolute legal relationship in which an indefinite number of persons are opposed to the authorised person, for example, in property relations, operational management) i.e. in obligatory legal relations, the obliged person always resists the authorised person.

The fact is that when you acquire a cryptocurrency, you, in fact, buy the right to use it, since cryptocurrency does not have a real form – it does not physically exist, and all operations for buying and selling cryptocurrency are records of transactions that are stored in multiple block chains (blockchain). That is, managing a cryptocurrency account, you manage as a matter of fact records and keys, which are stored in this purse. In itself, joining in the platform and opening a digital wallet does not create the obligations of participants in such a system to acquire a cryptocurrency, i.e. the wallet can remain empty. After acquiring cryptocurrency by the participants, the participant does not have the obligations and the rights of claims to other participants of the system.

At the same time, the participant treats as his own the cryptocurrency accountable in the crypto purse, and the publicity and the transparency of the data contained in the distributed registry. Blockchain ensures the relevance (fixity) of the given property to the given participant in such a format that does not allow violation by all other participants.

Such a construction of relations reminds something of the principle of publicity of law of property existing in the German law, which is realised either in the form of a record in the land register (Grundbuch) (since only land plots are related to real estate here), or in the form provided for in § 929 BGB for the alienation of movable things "property contract" (Einigung). This latter is based on the "principle of abstraction" (Abstraktionsprinzip), or on the "principle of division" (Trennungsgrundsatz) of two transactions – the obligatory (Verpflichtungsgeschaft), which generates the rights and obligations of its parties, and real, which is essentially the fulfilment of the obligation transaction (i.e. a kind of managerial transaction – Verfugungsgeschafte). By virtue of the "principle of abstractness", the person who obtained the movable thing by the "property contract" becomes its owner regardless of the validity of the obligation transaction, and the actual possession of the movable item is presumed as the owner's possession (compare paragraph 2 of § 854 BGB) (Bando, 2016: 15).

I believe that the cryptocurrency cannot be attributed to either obligatory (mandatory) or to proprietary rights, since it is not fully covered by those legal regimes that exist in property and obligatory law. The special regime with respect to certain objects of civil rights, in fact, is established not for the objects themselves, but for persons who commit legally significant actions with them. But different objects of civil rights in this capacity differ from each other precisely by their legal regime, as well as by their physical or economic properties, the peculiarities of such a regime being formed in the form of certain types of property (civil) rights. An example here is the allocation of non-cash funds and uncertified securities among other objects of civil rights and the establishment of special legal regulation.

Thus, in the absence of a special legal regime established by law in respect to cryptocurrency, there will be attempts to attribute it or to equate it with existing ones.

3 Cryptocurrency as an Object of Legal Regulation

After the analysis of the various sources, it is possible to define the notion (concept) of cryptocurrency in the following way – it is a digital (virtual) currency, the creation and control of which are based on cryptographic methods (mathematical algorithms), in respect of which full decentralisation (absence of external or internal administrators in the network, guaranteeing [confirming] of the correctness of the operations of the system, including the lack of ability to influence the transaction participants in the system). The reliability of the transactions is provided in the network by the blockchain technology (replicated distributed database – technology of the distributed registry), algorithms of which allow to combine the transactions in "blocks" and add them into the "chain" of the existing units to ensure the stability of the base of the chain of the blocks of transactions with the use of cryptography elements and consistent hashing. The continuity is ensured by the inclusion hash sum of the previous block into the current block, which does not alter the unit without changing the hashes in all subsequent blocks. As a guarantee, mathematical calculations are a certain value of the physical world.

Thus, the cryptocurrency is a completely new object of legal regulation, based on the fundamentally different approaches, which require different legal regulation at the national level and at the level of international legislation. Therefore, it will be necessary to define the conceptual apparatus, to provide for various legal regulation in respect of the function, performed by the cryptocurrency (for example, the instability of the course of the cryptocurrency has negative consequences on the purposes of its use in the investment asset, i.e. for accumulation purposes), as a unit of measurement and income generation, as there are certain difficulties in the current cryptocurrencies in the form of obtaining interest income, as far as at the present time the yield of the cryptocurrency has come to a speculative growth or the drop in value. The creation of conditions for the competition of cryptocurrencies, legal grounds and conditions, and the organisation of activities by mining cryptocurrency is also very important, that is, the creation of rules, protecting both private legal interests and public legal interests that ensure national security. In this connection, it will be necessary to identify a subject and provide for liability in the event of a possible failure of the system, authorised or unauthorised modification of the program code, as well as the resulting consequences in the system and the procedure for eliminating them and restoration of the legal balance.

3.1 Cryptocurrency as an object of financial and legal regulation

Cryptocurrency as an object of financial and legal regulation requires the definition of the nature of cryptocurrency in the financial and legal sense, for the purpose of tax transactions, in connection with the use of cryptocurrency. It is necessary to take into account that the approaches to the tax-legal regulation of any economic activity in different countries are not the same. The Internal Revenue Service (IRS) considers Bitcoin a property for the purposes of tax regulation, and not a currency. Any transaction using Bitcoins are taxed in accordance with the principles applied to property taxation. Thus, the owners of Bitcoins must inform the IRS about all their transactions. US tax residents who sell goods and services in exchange for cryptocurrency are obliged to include the cost of the obtained Bitcoins in the annual tax return. It is calculated on the basis of a fair market price in the US dollars at the date of receipt (i.e. the exchange rate on that day). Cryptocurrency is considered a capital asset in the hands of a taxpayer (similar to shares, bonds and other investment instruments), so this obliges to take into account profits and losses when calculating the taxable base. The profit arises in the case when the sale price in the US dollars exceeds the adjusted purchase price. A loss arises when the sale price is lower than the adjusted purchase price. The miners who obtain Bitcoins on their own equipment are also subject to taxation. The miner is obliged to include the fair market value of the extracted cryptocurrency in its annual gross income

In 2015, the European Court of Justice (the highest court of the EU) ruled that operations in Bitcoins are exempt from value-added tax (VAT) in accordance with the regulations governing the circulation of currencies, banknotes and coins used as a legal tender. Thus, according to the Court, Bitcoin is a currency, not a property. Although no VAT is withheld when buying and selling Bitcoins, other transactions may be taxed, for example, income tax or capital gains tax.

I believe that at present, it is difficult to determine which tax policy in relation to cryptocurrency will be chosen by the legislator. Everything depends on the way cryptocurrency will be determined from the point of view of fiscal interest in the legislation: if as “goods”, then VAT will be taken, if as “income”, then personal income tax and income tax. Further, it will be difficult to decide the question of how it is supposed to pay – a certain tax only by ruble or by cryptocurrency, too. If we imagine such an opportunity, it will be necessary to create conditions for the creation and formation of a cryptobudget, following the example of the gold and foreign exchange reserve, which is formed from other assets other than the national currency, both in form and in economic status and regime. Simultaneously with the definition of the order of the taxation of cryptocurrency, the questions related to tax administration arise. Who and how will collect information, how will the accumulation and security of information be ensured, which will be considered a violation of the legislation on taxes and fees.

4 Conclusion

The above analysis confirms that, in short time, much work is coming to be done. The world does not stand still and at present there are polar situations where, on the one hand, rapidly developing information technologies are introduced into all spheres of society and human life, on the other hand, the lack of timely prepared legal mechanisms, the delayed implementation of which can have the opposite effect, when it is not the State that will manage the system, but the system will manage the State, the creation of a substance competing with public order, through the existence of parallel systems, which can lead to strong competition and effective development, or vice versa to its suspension. Mankind constantly tried to understand and to review the form and role of money. We believe that the task of today’s generation is to explain need and necessity to transform money into a cryptovirtual form. Accordingly, this cannot but affect the functioning of public finances. As a consequence, this causes the modernisation of the legal regulation of the sphere of public finance. A special place in the modernisation of legal regulation belongs to the rules of public financial law. It appears that a large group of rules is being formed in the system of public financial law, which is forming a complex of legal institutions that is transformed into the sub-sector of the public finance law – the issue law.

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How Much Tax Harmonisation Is Needed?

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Abstract
The paper concentrates on tax harmonisation in the European Union. The author shows its development and results, and brings some case law examples. The paper deals with a problem whether taxes should be harmonised further – and how. It briefly looks back to the Austro–Hungarian Monarchy, and tries to find some parallels. In this context, some topical tax issues are discussed (e.g. ATAD, CCCTB).

Keywords
tax; tax harmonisation; EU

1 Introduction

In the year of the 100th anniversary of the founding of Czechoslovakia (and the fall of the Austro–Hungarian Monarchy), I wanted to evaluate the current state of tax harmonisation and its perspectives. First, there is a short description of the level of integration of economic policies in the Austro–Hungarian Monarchy. Then I analysed the development and achievements in areas of the harmonisation of both indirect and direct taxes. Some examples of case law in the tax area are shown. The hypothesis is that economic and tax harmonisation would work better with a smaller group of more coherent countries. Some statistics of countries that were parts of the Monarchy were compared.

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I used the data from the EU database, selected articles in journals, and selected the EU case law. I also used materials developed during my teaching.[2]

2 Looking Back to the Austro–Hungarian Monarchy

The tax system in the Austro–Hungarian Monarchy developed gradually. For several centuries, each "land" also had its tax system. Starting with Maria Theresa and Joseph II, tax reforms started within the monarchy. After the defeat from Prussia in 1866, Austria "compromised" with Hungary in 1867 and formed the Austro–Hungarian Monarchy. There was a common market, common army, common trade and foreign policy, common monetary policy, but full fiscal autonomy. In fact, tax competition (instead of tax harmonisation) existed. Both parts could have had their debts, could have borrowed on capital markets. Both parts invested a lot and subsidised their industry extensively. Especially after 1908, (the annexation of Bosnia and Herzegovina) military expenses grew. After 1909, taxes and government spending dramatically increased (53% during the first decade of the 20th century) to cover the budget deficit. Personal income taxes and inheritance taxes increased, new taxes for alcohol, soda-water and mineral water (spent usually in cities) were planned. Corporate profit taxes were considerably high. There were high taxes on urban buildings, while in the countryside they were lower. The expenses of government increased due to inefficiencies of nationalised industries, the most costly and unproductive of which was the national railroad system. Both industry and agriculture were less intensive than in other countries (Ebeling, 2009). The monarchy was multi-national, people of different nations freely intermingled in major cities of the monarchy. With problems of the monarchy, national tensions grew.[3]

People enjoyed three freedoms after 1850:[4] the free movement of goods, the free movement of money, and the free movement of people.[5]

Before the First World War, the monarchy was a mixture of monarchical absolutism and political and economic liberalism. Emperor Francis Joseph held the monarchy together by quite heavy centralisation. In spite of that, one of the most liberal economic schools, the Austrian School, was created and flourished in Vienna at that time. Its representatives should have advised the emperor that liberalism and the free

2 Since 1997, I have been teaching courses that include the European harmonisation of taxes. As a part of the course requirements, students present in English a CJ EU judgement of a case they select. This gives me also additional material to research.

3 Czech representatives strived for autonomy within the Austrian Empire for a long time; the Austro–Hungarian "compromise" put an end to it. But it is necessary to say that while Czechs were at least represented as a land in Austrian institutions, the situation of Slovaks in Hungarian parts was even worse.

4 This era was also significant for introducing income tax in the empire, new administrative organisations of the empire, establishing the ministry of finance for the whole empire.

5 They did not explicitly speak about free movement of services, but we can assume that. So we can speak about a common market in a way. More in Ebeling, 2009.

competition of tax systems would have worked better. They often criticised the Austro–Hungarian Monarchy. "The essence of fiscal forces", Mises stated, "was a deep dislike for modern capitalist society". Böhm-Bawerk accused the Austrian Government that "a very large number of our public authorities have been living beyond their means" (Flandreau, 2001). Carl Menger chaired a commission to reform an Austrian Monetary System in the late 1880s, Wieser supported the adoption of the gold standard. By 1900, Austria–Hungary had a "gold standard without gold in circulation", as Mises put it (Huerta de Soto, 2010).

Monetary union existed in the Austro–Hungarian Monarchy for almost fifty years without serious problems. We can even find certain similarities to the Euro area today. There was a complete monetary union with a common central bank (based on gold standard), but almost full fiscal autonomy of the two parts. The Austro–Hungarian Government could not run a deficit, but both the Austrian and Hungarian governments could (and did). There was nothing like a Strategic and Growth Pact then. It was assumed that both governments would guard their reputation not to be charged high interests on government bonds. The investors really distinguished between both parts and invested to the economy they considered stable. So, according to Roberts, the stability of the Austro–Hungarian monetary union stood on two pillars: the credibility of the central bank and the market mechanism (Roberts, 2011).

Czech lands also contributed to the development of economic thought. Karel Engliš was the most original Czech economist. His "teleological" economic theory stressed that everything in life (and specifically in economy) should have its purpose. These purposes should have their hierarchy. Karel Engliš also developed his tax theory. Taxes should have their purpose as well, but, first of all, they have to be bearable[6] (Engliš, 1946: 138). Karel Engliš, as a Minister of Finance, developed a really modern tax system for the new republic that concentrated mainly on direct taxes.

It would be interesting to see how Austrian School economists and Karel Engliš would perceive the European Union of today.

3 EU Market and Tax Harmonisation

3.1 EU market integration

After World War II, everybody felt it was necessary to ensure peace in Europe. Technology was also well developed to enable production in large quantities and trade with goods and services. A project of market integration, which was difficult to imagine before, started in Europe. First, it concentrated on goods and services[7] (factors of production leaving rather immobile), later it developed also for labour and capital.

6 In Czech "únosnost".
7 First, coal and steel in the ECSC, later all goods and services in the EEC.

For market integration, completing of the customs union in Europe 50 years ago was a big step forward. The main trade barriers – tariffs and quotas – were removed. It enabled trade development, but deprived Member States from the possibilities of protecting their national market. The Member States had to give up part of their sovereignty. At times of crises, the problem of integration re-appears, and protectionist tendencies arise.

Market integration deepened and stepped into the next level – a common market, including also free movement of factors of production. The Single European Act came with the idea of the single market without trade barriers, and with mutual recognition of standards and harmonisation of law.[8] In the 1990s, the idea was re-formulated, and the European internal market was created with free movement of goods, services, capital (and payments),[9] and people.[10] In 1993, the common/internal market was mostly completed. This year, we can celebrate its 25th anniversary.[11] The Maastricht Treaty then codified all basic European freedoms and marked the introduction of the next integration stage – Economic and Monetary Union.

3.2 Indirect taxes as trade barriers

Indirect taxes are already harmonised in the EU. If goods should move freely among countries, its price should not be artificially altered by any surcharges, including taxes. Indirect taxes were an important area of EU harmonisation since its foundation.

The Treaty on the Functioning of the European Union (TFEU) includes several articles on tax harmonisation. In Arts. 34–36, the condition for customs union are given. There are provisions against tariffs, quotas, and other measures having an equivalent effect to them (including taxes). Arts. 110–113 deal more specifically with discriminatory (indirect[12]) tax provisions that may hamper the internal market.

As to Arts. 34–36 of the TFEU, ECJ/CJ EU interprets the term “equivalent effect” rather expansively.[13] Excise taxes often have this effect.[14] There are many cases that can document that. Cases that are solved based on these articles are often “spirit cases” (when Member States try to restrict the import of alcoholic beverages that are not typical for the country in question). Examples of these cases would be:

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8 For more details, see Craig and de Búrca, 2015.

9 Including real property which is considered to be an investment. Thus, the production factor “land” is also included (of course, land cannot move, but its ownership can).

10 From the point of view of the market, people are important as “labour”, but their movement to work in another county is a very complex issue.

11 We can argue that not all the aspects of it really worked 100% then (and even now), but the most crucial things did.

12 The Treaty speaks about “turnover taxes” meaning generally used indirect taxes (currently VAT).

13 See more in Craig and de Búrca, 2015.

14 For excise taxes, minimum rates are agreed. Each Member State can apply these rates or higher ones.

- C-170/78: The United Kingdom applied for still wine excise tax that was considerably higher than that for beer. The Court ruled that "by levying excise duty on still light wines made from fresh grapes at a higher rate, in relative terms, than on beer, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the second paragraph of Art. 95 of the EEC Treaty". There was a question of substitutability of both products. The UK defended itself by pointing to different consumer habits and different perception of beer and wine by most of the customers.
- C-243/84 was of a similar nature – Scotch Whiskey and Danish fruit wine were taxed differently in a discriminatory way in Denmark (which was disapproved by the Court).

3.3 Precise definitions in indirect taxes

If indirect taxes – VAT and excise duties – should be used in a harmonised way in the EU, the tax base should be precisely defined. ECJ/CJ EU solved and solves many cases of preliminary ruling, where some terms have to be explained more precisely, such as:

- C-220/11, where Nejvyšší správní soud needed to confirm the meaning of the term "travel agent" (to resolve the case of the Czech transport company Star Coaches s.r. o., that did not consider itself to be a travel agent, as they provided merely transport services for other agencies.) CJ EU ruled that this particular company is not a travel agent and cannot use special VAT scheme for travel agents.
- C-581/08 deals with a definition of a "sample" and a "gift of a small value" in relation to VAT directive. The issue was raised by EMI that regularly sends thousands (up to 7,000) samples of non-resalable copies of its recordings. VAT was charged on those till 2003, and EMI wanted it to be reimbursed.
- In C-638/15, the term "smoking tobacco" was specified. The preliminary question was posed by the Czech Supreme Administrative Court. Smoking tobacco is defined as "tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing".
- Case C-495/04 dealt with a problem whether a product sold as "Medicinal herbal cigarettes" as an aid in giving up smoking, could be exempted from excise tax [Art. 7(2) of Council Directive 95/59/EC1]. The court did not support this idea as they were not used exclusively for medical purposes.
- Both in the UK and in Sweden, excise tax rate for still wine is relatively high.[15] Therefore, a special product, cooking wine, appeared. In case C-458/06,

[15] As the minimum rate for still wine is 0, many countries – including the Czech Republic – do not impose excise tax on still wine at all, and this problem would not appear there.

exemption from excise tax for this product was solved. The result was that exemption laid down in Art. 27(1)(f) of Directive 92/83 could be applied for cooking wine, as well. The exemption also applies when the alcohol is used for medicines, and, as the case C-306/14 confirms, also for disinfection and cleaning [Art. 27(1)(d) of Council Directive 92/83/EEC].

- For excise taxes on beer, lower rates are used for small, independent breweries. But when is a brewery independent? If more breweries cooperate, how far can they go not to lose the possibility of using lower rates? Case C-285/14 may give an answer.
- Sometimes alcohol could be used, for example, a part of chocolate filling. Case C-63/06 shows the consequence of different language versions of the directives, when the Lithuanian version of Art. 27(1)(f) of the Council Directive 92/83/EEC did not include the exception of the excise for "5 litres of pure alcohol per 100 kg of the product for other products" (which causes confusion for the treatment of UAB Profisa, a Lithuanian importer of chocolates).
- Common market rules must ensure fair competition among suppliers. This was breached, for example, by France when it set minimum prices for retail sale of cigarettes, as was ruled by the Court in C-197/08.[16]
- Technology brings new issues with its development. It could be shown on a problem of electronic books. In C-479/13, the question was whether electronic books should be subject to reduced VAT rate as printed books are.[17] The delivery of electronic books is an "electronically supplied service" within the meaning of Art. 98 of the VAT Directive and this provision precludes any possibility of applying a reduced rate of VAT to such services. The problem is still discussed. It is expected that the problem will be solved by 2019.[18]

The CJ EU has already solved many "tax cases", and indirect taxes should not serve as a fiscal barrier any longer. The Court contributed to establishing a proper balance between the Treaty freedoms and the need for Member States to safeguard their taxing rights to protect their fiscal income.[19]

3.4 Direct tax harmonisation

While indirect taxes are harmonised on EU level, direct taxes are not even mentioned in the TFEU. There was one "hint" in Art. 293, second indent, of the TEC (repealed by

16 It was regarded as a breach of Art. 9(1) of Council Directive 95/59/EC.

17 Books on a tangible medium are subject to a reduced rate of VAT, whereas books provided only digitally do not apply with reduced VAT.

18 Unfortunately, it was our representative Mr. Pilný, who was against this idea when it was negotiated in June 2017. The negative approach of the Czech Republic was voiced again by Prime Minister Andrej Babiš in April 2018.

19 More on this issue in Farmer, 2015.

the Treaty of Lisbon) that was requiring Member States to enter into negotiations with each other with a view to the abolition of double taxation within the Community.[20]

Direct taxes can present a serious obstacle to exercising European freedoms. In spite of that, the Court recognises the freedom of Member States to define their direct taxes, if they do not discriminate on the basis of nationality. There may be differences based on tax residence, as Member States have tax sovereignty. The Member States are also free to set conditions for double taxation avoidance treaties with other countries.[21] With an absence of harmonisation, double taxation can be a real barrier to exercising single market freedoms (Farmer, 2015).

The problem can appear in a wide range of areas. The largest area where direct tax harmonisation is discussed is company taxation. Different taxes in Member States create fiscal obstacles for multinational groups operating in multiple jurisdictions. After many years of negotiation, a directive on Common Consolidated Corporate Tax Base (CCCTB) was proposed in 2016 (with a formula for apportionment agreed). Dividends, interests and royalties paid within corporate groups are already harmonised. Different tax rates create incentives to aggressive tax planning through shifting profits and losses. In 2016, an Anti-tax Avoidance Directive was accepted [Council Directive (EU) 2016/1164].

International corporations operate on the territory of different Member States. The corporation generates incomes from all its parts. If it generates profit, it is taxed according to double-tax treaties (based on the tax residence of individual parts of the group). A case C-446/03 is quite famous – it deals with the permissibility of Marks & Spencer to use group tax relief in respect of losses incurred by its subsidiaries in Belgium, Germany and France in 1998–2001. There is a conflict between equal treatment of subsidiaries in different Member States (to support the freedom of establishment, not to discourage undertakings from setting up subsidiaries in other Member States) and the right of a Member State (given the autonomy of imposing direct taxes) to collect taxes from subjects on its territory, from incomes generated on this territory. The Court finally held that "it is contrary to freedom of establishment to preclude the possibility to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary".

In C-196/04, corporate income tax of Cadbury Schweppes Plc, a UK resident company with two subsidiaries established in Ireland, was the issue. According to the Controlled Foreign Companies (CFC) rule, it is necessary to prevent tax avoidance and to discourage companies from shifting income to countries where tax rate is really low. In this particular case, the Court ruled to allow the tax authorities to apply the British rate of corporation tax to overseas subsidiaries. There was a strong aspect

[20] Many authors criticise the derogation of this article.
[21] The CJ EU typically does not force Member States to avoid double taxation.

of freedom of establishment in the judgement, referring to Art. 49,[22] especially to its second paragraph.[23]

4 What Should Be the Right Tax Harmonisation?

Apparently, the current situation in the European Union is not ideal. The question is whether the current EU is not too big and too diverse for real harmonisation.

4.1 Would the former monarchy be a better fiscal area?

There are eight countries in the EU that were (partly or fully[24]) in the former Austro–Hungarian Monarchy. They all are relatively new members. Austria, as the heart of the former monarchy, joined the EU in 1995. All the other countries were part of the EU Eastern enlargement, and joined the EU mostly in 2004 (with the exception of Romania, that became an EU member only in 2007, and Croatia, that became a member in 2013).

The following two tables show some statistics for these selected Member States. In Table 1, selected tax rates are compared. These are:

- Standard VAT rate in 2018. "VAT Directive" (Council Directive 2006/112/EC) says that this rate should be at least 15% of the tax base (and the recommendation is that it should not exceed 25%). Selected countries show a rather standard situation, with an average[25] that is slightly higher than the EU average. Hungary represents an extreme with its 27% rate.
- Top personal income tax rates (PIT) in 2018. They are considerably lower than the EU average (with the exception of Austria, Slovenia and Croatia). But still, this group of countries does not seem a coherent area.
- Top corporate income tax rates (CIT) in 2018. The rates are much closer together than in the previous case (with the exception of Hungary) and closer to the EU average.

[22] The mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty.

[23] Arts. 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a controlled foreign company in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the normally payable national tax.

[24] Out of the current EU members, the former empire comprised today's Austria, the Czech Republic, Croatia, Hungary, Slovakia and Slovenia. Territories of today's Poland and Romania were partly in the empire.

[25] Simple arithmetic average was calculated, although in this case, a weighted mean would be more precise (there would be a problem which weights to use).

- Implicit tax rates on consumption in 2016 (latest available). This indicator represents a rate of consumption taxes (especially VAT, tax on energy, tobacco and alcohol) to the final consumption expenditure of households.[26] Values of this indicator show quite a wide spread, the average is slightly above the EU average.
- The indicator "implicit tax rates on labour" (values from 2016) includes in its numerator all taxes and social contribution payments that have to be paid from the employed labour income. The values are much closer together than PIT rates do, which also shows different policies of countries in question as to social security systems.

Table 1. Tax rates in the Member States of the former Austro–Hungarian Monarchy

Country/Tax	Standard VAT	PIT	CIT	Implicit tax on consumption	Implicit tax on labour
Austria	20	50	25	22.1	41.2
Croatia	25	42.5	18	n/a	31
The Czech Republic	21	15	19	24.7	39.8
Hungary	27	15	10.8	31.1	41.6
Poland	23	32	19	20	32.6
Romania	19	10	16	17.8	28.8
Slovakia	20	25	21	18.8	365
Slovenia	22	50	19	25.1	35.6
"AH–EU average"[27]	22.13	29.94	18.48	22.80	35.89
EU average	21.5	39	21.9	20.6	36.1

Source: https://ec.europa.eu/taxation_customs/sites/taxation/files/implicit-tax-rates.xlsx

The comparison of all the indicators does not show a clear and strong cohesion among the countries in question. This statement will hold even if we exclude Romania (and Poland) that were not part of the former monarchy in their entirety.

[26] More in Annex B, p. 271 of *Taxation trends in the European Union*.
[27] "Austro–Hungarian" EU average.

Table 2. Convergence Criteria Indicators

Country/Indicator	Unemploy-ment	Inflation	Deficit	Debt	Interest rate
Austria	4.9	2.1	–0.7	78.4	0.76
Croatia	9.1	1.8	0.8	78	2.16
The Czech Republic	2.2	2	1.6	34.6	1.89
Hungary	3.7	2.9	–2	73.6	2.92
Poland	3.8	1.2	–1.7	50.6	3.23
Romania	4.6	4.6	–2.9	35	4.69
Slovakia	7.4	2.7	–1	50.9	0.75
Slovenia	5.2	2.2	0	73.6	0.96
"AH–EU average"	5.11	2.44	–0.74	59.34	2.17
EU average	7.1	2	–1	81.6	1.35

Source: https://ec.europa.eu/commission/sites/beta-political/files/convergence-criteria-for-joining-euro_en.pdf

Table 2 shows the latest available values of the Maastricht convergence criteria. Despite of the fact that three of the countries already use Euro, convergence criteria can serve to evaluate the coherence of the economies in questions.[28] Eurostat data were used, so comparability of the data should be granted. Out of the five Maastricht convergence criteria, only four were used.[29] The indicator of unemployment was added to provide a more complex picture of the area.

It could be stated that most countries will comply with convergence criteria now. With the exception of Romania, most criteria (inflation, interest rate, public deficit) would be met.[30] As to the public debt, four countries do not meet the 60% criterion, but the area as a whole does. From the point of view of this criterion, Austria, that otherwise is the most advanced economy of the seven, is the worst performing country.

It is true that a smaller and more coherent area would make a better fiscal area. Monetary union, already existing in some countries, needs "a second leg" – a common fiscal policy. At present, there is no political will for it.

4.2 How should taxes be harmonised?

The concept of European integration has to be based on a strong agreement of all the participating member states. Market integration in the EU is based mainly on

28 At least, they were meant like that when they were set.

29 The criterion of ERM would not make sense, as three of the countries already use Euro, and the remaining four are not a part of the ERMII.

30 The reference values for the four criteria would be: inflation 3.5%, deficit 3%, debt 60%, and interest rate 3.35%. Romania would exceed inflation and interest rate criteria.

a principle of mutual recognition rather than that of harmonisation of rules since the Maastricht Treaty. From the point of view of the common market, it seems logical that the condition should be the same for all the participants. This also includes taxes.

With the financial crisis, the EU-scepticism grew. Member States would perceive any further deepening of the tax integration as threatening their sovereignty. Research results show that especially low-tax countries are likely to oppose further tax harmonisation. The support for wider tax harmonisation considerably dropped after the Eastern enlargement.[31] Thus, there is a complete monetary union in nineteen Member States, but no real progress in fiscal cohesion.[32]

Furthermore, there is a question what legal forms to use for tax harmonisation. In a present (rather negative) environment, regulations would not be feasible, and directives would be too slow to implement.

There might be a possibility of liberal approach and free tax competition. The question is how this would work in the EU, where the model of integration is rather dirigistic.

The creation of the single market has led to intense tax competition. It rather has the form of a harmful tax competition, leading to artificial tax arrangements and tax avoidance. While free tax competition advocated by liberal economists[33] would be beneficial to all, and would lead to the best tax systems to be implemented, harmful tax competition has to be avoided.

5 Conclusion

From the point of view of the single market, common (or strongly harmonised) tax system would be an advantage. But it seems unfeasible for a large and diverse group of countries, such as today's EU. Even the smaller group of Central European countries did not show to be coherent enough, and the hypothesis was not confirmed. A fully centralised model might work for a group that would be even smaller and more coherent.

At present, tax avoidance by profit shifting seems to be the most important problem to be solved. As big corporations operate really multinationally, it is necessary to solve their tax issues in the same way. The Member State should reach an agreement on it. But, I am afraid, there is a long way to go.

31 See Wasserfallen, 2014: 420–435.

32 The European Commission proposed, especially under Commissioner Pierre Moscovici, many important steps, but a lot of them remained to be proposals.

33 The idea that every subject would be free to choose any of the existing tax systems, and, as a result of free competition, the best system will survive.

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Selected Issues of Public Finance in the Protectorate of Bohemia and Moravia

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JEL Classification: K34, N14, N44

Abstract

The paper looks into selected issues of public finance during World War II, i.e. the period of the Protectorate of Bohemia and Moravia. It focuses on the fiscal, tax and monetary policies and, subsequently, the fiscal, tax and monetary sovereignty of the Protectorate. The aim of the paper is to confirm or disprove the hypothesis of the non-existence of fiscal, tax and monetary sovereignty of the Protectorate of Bohemia and Moravia.

Keywords

public finance; financial sovereignty; the Protectorate of Bohemia and Moravia

1 Introduction

Even though the paper covers one of the darkest periods in the history of our country, it is free of any emotional prejudice to the historical context and is of a purely apolitical nature. The paper can be described as partially financial-legal and partially historical.

The scientific purpose is to clarify selected issues of public finance in the Protectorate of Bohemia and Moravia, specifically the fiscal, tax and monetary policies. In connection with this scientific purpose, the following three hypotheses have been defined:

Hypothesis 1 – The Protectorate of Bohemia and Moravia did not meet the conditions of fiscal sovereignty.

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Hypothesis 2 – The Protectorate of Bohemia and Moravia did not meet the conditions of tax sovereignty.

Hypothesis 3 – The Protectorate of Bohemia and Moravia did not meet the conditions of monetary sovereignty.

For this purpose, the paper applies the method of analysis and synthesis, description and historical description. As for the current literature, the work of Jiří Novotný is of some interest (Novotný, 2006) where he describes in a comprehensive way both the public (or rather state) finance in the Protectorate of Bohemia and Moravia and the state finance in Czechoslovakia during the so-called Second Republic and in the post-war period. The publication *Public Finance in the Protectorate* (Bartes, 2016) is believed to be the most coherent publication dedicated to public finance in the period of World War II. This publication describes the condition and development of public finance (including local government finance) both in the period before the Protectorate of Bohemia and Moravia (i.e. the so-called Second Republic) and the subsequent post-war development, reflecting all Beneš Decrees that had an impact on the later development and, thus, the continuity or discontinuity of public finance after the war. This publication became the basic point of reference for this paper.

2 Fiscal Policy in the Protectorate

In terms of the theory of financial law, the fiscal part represents an incorporated set of financial and legal norms defining the social relations that arise, are implemented and vanish in the process of creating, distributing and using public funds (Mrkývka, 2014: 111).

State budget is the most important public fund. In the Protectorate, the state budget was necessarily affected by the introduction of the war economy, and therefore, it was hardly feasible to maintain the principle that the economy should be based on the relative benefits of money, time, space, etc. (Engliš, 1929: 56). During the occupation, the state budget deficit was high all the way, mainly due to the need to pay the so-called matricular contribution to the Reich. The amount of these contributions exceeded all scales existing thus far. It was the maximum amount that, according to the Germans, could be transferred from the Protectorate budget in this manner. However, the elevated taxes were not enough for the contribution and therefore it could never be made in cash. That is why it had to be covered by a loan which meant further indebtedness of the Protectorate. This was the reason why banks were forced to issue more money and this raised inflation in the Protectorate.

Since the state budget of the Protectorate was permanently in red numbers all through these years, the state debt naturally deepened. The budget for 1939 was initially governed by the budget provision adopted during the Second Republic. The "fully-fledged" budget for 1939 was subsequently adopted by a government regulation. In 1940, the budget was once again provisional because the Germans did not allow the preparation of a proper budget. The main reason was the fact that the Germans anticipated the proclamation of a customs union between the Protectorate and the Reich which eventually happened on 1 October 1940. The budget process was different from the usual usage. At first, the budget was proposed as usual but its approval was being postponed while it was still being adjusted and the final approval took place only at the close of the budget period. For this reason, the economy was based on the so-called interim financial management which was adopted in the form of a government regulation. The first official Protectorate budget could not be prepared until 1941. In the last year of the war, the economy was managed without an official budget and a provisional budget was applied instead.[2] Due to the non-existence of Parliament or another similar institution, the approval of the state budget was in the remit of the Protectorate President even though the Reich Protector had the final word.

2.1 Fiscal sovereignty

Fiscal sovereignty *"is a situation where a community organised in a state is able to regulate public finance, manage its own resources autonomously and independently, to create its own fiscal policy, to decide on its public revenues and expenditures, and to organise its own centralised and decentralised funds"* (Mrkývka, 2014: 110).

Following such a definition of fiscal sovereignty, it can be stated that the fiscal policy of the Protectorate did not fulfil a single feature of this definition. The Protectorate cannot be "suspected" of being able to regulate its own public finance. Everything had to be adjusted to suit the war economy or rather the military needs of the Reich. As such, the Protectorate could not manage its finance autonomously, not to mention independently. After all, this fact is clear from the way in which the Protectorate budget was drafted. During the budget year, the financial management was absolutely "informal" according to the needs and instructions of the Reich. Then, the budget itself was prepared and adopted at the very end of the budget period without any influence by the Protectorate Government. For this reason, the Protectorate budget can be described as a mere formality.

All this is further illustrated by the fact that basically all resources of the Protectorate were transferred to the Reich in the form of a matricular contribution.

This confirms the validity of Hypothesis 1.

3 Tax Policy in the Protectorate

Many legislative changes and amendments of existing taxes took place over the period of the Protectorate but the tax collection system also changed. Some taxes were

[2] Budgets in the First Republic and Protectorate were made for a calendar year.

completely abolished and replaced by others; some were modified according to the Reich model. All changes took place in a gradual and sophisticated manner, always with the aim of strengthening the Reich budget at the expense of the Protectorate. The immediate administrative transition to the Reich–German tax system would have been too radical a measure. At first glance, the German tax collection system looked simpler but in fact when it was applied in the Protectorate, it proved to be less efficient than the Czechoslovak system. One reason was that our officials were familiar with the original system and there were not as many changes as there were in the later stages of the war.

As far as customs duties and indirect taxes (including state financial monopolies) are concerned, from the year 1940 on, they were paid straight to the Reich Fund and were no longer a part of the Protectorate budget revenues. The more important were the direct taxes for the Protectorate as they remained the revenue of the Protectorate budget.

Direct taxes have undergone a major reform during the occupation, resulting in not only a transition to the Reich system but also in an increase in individual taxes. For this reason, direct taxes became an important revenue of the Protectorate budget and their importance further increased. It was the only group of taxes that was increasing throughout the war. This was ensured mainly by the revenue tax which prevailed among taxes with a 62.5% share. As mentioned above, the employment was (namely in industry) almost full. By 1944, it had increased by 1/3 compared with the pre-war period (however, this was due to Germany's need to maximise the usage of production capacities). The second most important direct tax was the corporation tax which replaced the special income tax coupled with corporation income tax. These two taxes not only replaced the former special income tax but their collection managed to outperform it significantly. It should be made clear that although direct taxes were the income of the Protectorate budget, they were ultimately transferred through a matricular contribution to the Reich budget.

The public revenue of the Protectorate budget consisted of 95% sensu largo taxes which was the function of the Protectorate financial administration that followed up on the First Republic financial administration and it can be said that there were no revolutionary changes in the financial administration at the beginning of the occupation. Certain changes occurred only after 1 October 1940, i.e. after the customs union was introduced between the Protectorate and the Reich. The Financial Guard (the executive financial authority representing an armed and uniformed component of the financial administration carrying out the border guard service where it mainly prevented the evasion of customs duties) was abolished and the administration of duties, excise taxes and state monopolies was distributed between the Protectorate authorities and the Reich authorities. While the Reich authorities managed the administration of customs duties, excise taxes and state monopolies in contact with foreign countries, i.e. on the borders of the Protectorate and the Slovak State, the Protectorate authorities operated within the Protectorate. The Protectorate tax authorities were subordinated to the Chief Financial Officer as regards the administration of taxes, excise taxes and monopolies; at the personal level, they were subordinated to the Protectorate Minister of Finance. The authority of the Ministry was largely curtailed though.

3.2 Tax sovereignty

Tax sovereignty is defined as *"the ability of the State to impose, collect, recover, and exact taxes and allocate them in funds designated by the State"* (Mrkývka, 2014: 110).

Although the Protectorate was able to impose, collect and exact taxes, by analysing the flows of individual tax revenues in the Protectorate tax system, it is impossible to describe the subsequent Reich-imposed allocation and management of these revenues as liberal. Everything was subordinated to the war economy and the necessity to satisfy Germany's needs. The Protectorate of Bohemia and Moravia could only stand by and see how its tax money was being decided about and distributed.

This chapter confirms the validity of Hypothesis 2.

4 Monetary Policy in the Protectorate

In the past, there have been cases where the occupation administration used the method of issuing so-called military money, which was intended exclusively for the occupied territory.[3] However, due to the previous, not positive, experience with this method, the German administration decided not to apply it, and instead, from 22 March 1939, the Czech Korunas were exchanged for Reichsmarks brought in by the occupying army. The reason for the exchange was to prevent double currency circulation on the territory of the Protectorate. Less well-known is the fact that Austrian coins and Groschen were also a legal currency in the Protectorate until 1942.

In the Protectorate, the Reichsmark became the basic currency and the Koruna was used in parallel or rather as the second in order until its withdrawal. Germany reckoned on introducing the Reichsmark from the beginning of the Protectorate because it was mentioned in Hitler's declaration on the establishment of the Protectorate (in Art. 10 of Hitler's order no. 75/1939 Sb. z. a n., on the Protectorate of Bohemia and Moravia) that the legal currency in Bohemia and Moravia would be the Czech Koruna but only as a subsidiary currency of the Reichsmark. At the same time, the Reichsmark was put into circulation at the rate 1 RM = 10 K. However, this internal rate did not apply to the Koruna's rate with respect to other foreign currencies, so in the international currency markets the Koruna was recorded separately until the customs border was abolished. However, this rate favoured the Reichsmark by more than a third because the actual rate should have been six Korunas for one Reichsmark. This underscored

3 For example, during World War I the Austrian adminstration in the occupied Italian territory issued military currency which the local citizens used only if forced to do so.

rate of 1:10 became realistic as late as in 1941, i.e. after three years of the Protectorate's existence. The position of the Koruna toward foreign currencies changed on 1 October 1940 with the introduction of a customs union when the same exchange rate of the Koruna was established for foreign currencies. Thus, the Koruna was deprived of its status as a separate currency in foreign exchanges. It was the ultimate move of the Reich to deprive the Protectorate of autonomy in its dealings with foreign countries. From that moment on, the Koruna became only a domestic currency. At the same time, however, its value was increased and its gold content grew by 14.8%, from 31.21 mg to 35.84 mg (Olšovský, 1963: 552). This appreciation resulted from the fact that the exchange rate of the Reichsmark to the Koruna was relatively high 1 RM = 11.84 K. By that time, the Koruna's exchange rate against foreign currencies was more real than that of the Reichsmark's that was deliberately overvalued (Novotný, 2006: 19). Until 1 October 1940, the Protectorate had the opportunity to monitor the quantity of goods exported and imported from and to the Reich and thus, knowing the difference between the actual and dictated purchasing power of our Koruna against the Reichsmark, it was able to calculate the difference of which it was deprived by the dictate (Chmela, 1946: 29). With the loss of the Koruna's autonomy vis-à-vis foreign countries, the trade treaties of the Protectorate with other states became invalid.

A gradual devaluation of a state's currency is a frequent way in which the occupation administration uses the occupied state to finance its war needs. In case of the Protectorate, the occupation administration did so right from the start in such a significant way that further devaluations would not have been feasible. Notwithstanding the fact that the Czech people were already quite outraged at German interventions, not only in economic affairs of our country.

The introduction of the Reichsmark as an official currency had another, albeit transitory, aspect at the beginning of the Protectorate. For all German citizens, our territory was very cheap at that time. It is not surprising that after 15 March, German civilians and members of the Wehrmacht swarmed to Prague and other Czech towns buying everything that they could put their hands on (Olšovský, 1963: 571). Everything was extremely cheap for the Germans in the Protectorate. From March 1939 until the war began, there was enough merchandise in shops and the Germans or German soldiers bought almost anything they could. They had to be served preferentially and were able to sit in sweetshops and cafes almost all day long. This did not last long, though, because a few months later they had to go to the front and fight in Poland. This behaviour of the Germans during this short interim period brought great prosperity to many establishments, especially restaurants, sweetshops and pubs.

This was accompanied by another thought-out move by the Germans, who managed to freeze the purchasing power of the Czech population. This was related to the introduction of the controlled war economy, the rationing system and the wage or price caps. As the population had money (though almost worthless) with which there was nothing to be bought during the war, in fact it became another source for the financing of the war. This value of deferred purchasing power at the end of the war was estimated at 120 billion K.

As far as inflation was concerned, its level was best observed in some consumer goods. While in the rationing system, the official price of raw pork lard, for example, was 19 K for the whole six years, in the black market in 1945 it was as much as 1,800 K (Novotný, 2006: 20–22). It was in the last two years of the war that black market elements interfered with the strictly regulated prices and rationing economy. Money had lost its function and was replaced by barter exchange (mainly cigarettes were traded that were rationed to each adult citizen) (Vencovský, 2003: 100).

The National Bank for Bohemia and Moravia was the central bank of the Protectorate. The Bank was given a specific task for which the Germans allowed its existence as a Czech financial and monetary institution. The task was to be an efficient tool for draining any resources from the Protectorate for the needs of the Reich's war economy. Already on 15 March 1939, a representative of the German Reichsbank, Friedrich Müller, accompanied by a large group of SS members arrived at the building of the Bank for Bohemia and Moravia. He announced that they would take over the institution and under the threat of death, forced the representatives of the bank František Peroutka and Josef Malík to sign the transfer of gold deposited in London to the Reichsbank.

4.1 Monetary sovereignty

Monetary sovereignty is the power of the state to exercise exclusive legal control over its currency (Mrkývka, 2014: 94).

In view of the above, it can be stated that the Protectorate was unable to fulfil this necessary condition of monetary sovereignty. The Protectorate was not only unable to control its own currency but it was forced to accept a foreign currency.

For these reasons Hypothesis 3 can be confirmed.

5 Conclusion

The scientific purpose of this paper was to clarify selected issues of public finance in the Protectorate of Bohemia and Moravia, taking into account the fiscal, tax and monetary policies of the Protectorate. This was achieved mainly by the overall analysis and synthesis, and historical description of fiscal, tax and monetary policies during the Protectorate period. As a result, all three hypotheses set out in the introduction of the paper could be confirmed.

Within the framework of the fiscal policy of the Protectorate, we clarified the issue of budgeting during the war period which was based on the "informal principle" and was fully subordinated to the German war needs. In addition, the role of the matricular contribution as a forced payment was mentioned which was the Alpha and Omega of the Protectorate economy. The Protectorate tax policy then served to drain funds from the Protectorate into the Reich budget, either in the form of direct transfers (in case of indirect taxes and customs) or indirect transfers (in case of direct taxes which were the revenue of the Protectorate budget but ultimately transferred to Germany through the matricular contribution). Also subject to the war needs or rather the war economy was the monetary policy of the Protectorate in which the Reichsmark was introduced as the basic currency with an artificially undervalued exchange rate of 1:10 in favour of the Reichsmark against the Koruna. The central bank was practically in the hands of the Germans.

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Tax Law Rulings as an Example of Support for Taxpayers

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Abstract
Tax law rulings are not an institution typical only for the Polish tax system, because they occur, in various forms, almost everywhere in Europe. Undoubtedly this reflects the fact that the legislator is able to see the specifics of the tax law – the area not only extremely complex and extensive, but first of all affecting the ownership right. Rulings give the taxpayers not only the chance to clarify doubts related to the text of regulations, but also create a sense of security and certainty – if taxpayers follow recommendations of the authority included in the ruling, they will not suffer any negative consequences of their own actions.

Keywords
tax; tax law rulings; taxpayer

1 Introduction

The canon of certainty is one of the canons of taxation formulated by Adam Smith (Gomułowicz, 2002: 35–36). As a weaker party in the relationship resulting from an obligation, taxpayers need to understand their duties and rights. They should also know when their act or omission would result in a tax liability, and consequently – a tax obligation. Moreover, the taxpayer should know when, where and in what amount the tax due should be paid. In the Polish legal system, in accordance with Act of 2 April 1997 (The Constitution of the Republic of Poland), taxes are imposed, tax subjects, tax objects and tax rates are identified, rules for tax credits and relieves, as well as categories of entities exempt from tax are set out in an act (Art. 217 of the Constitution).

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From a theoretical point of view, the canon of certainty is applied in Poland.[1] Taxes are imposed based on the act and taxpayers have an unlimited possibility to review their content. However, in practice, tax acts are subject to frequent amendments; sometimes, the same act is amended more than once in the same year. The lack of clarity and precision of tax law provisions is another issue. This is because tax law provisions that very seriously affect the personal financial position of the taxpayer should be clear and very specific (Burzec, 2012).

Tax law rulings, both individual and public, have already become a permanent and crucial element of the Polish tax law. They are treated as a material extension of the scope of protection of rights and economic freedoms of the taxpayer. Consequently, rulings are supposed to be an important, and thus stabilising element of the process of resolving disputes between taxpayers and tax authorities. Although the institutional solution pertaining to rulings is not free from defects, taxpayers recognise rulings as one of the most important safeguards for the protection of the legal rights of taxpayers.

The increasing degree of complexity might be indicated as a key reason for the growth of importance of tax law rulings.[2] The above is a consequence of both the growing complexity of economic relationships and phenomena, as well as fears of taxpayers seeking to circumvent tax law and avoid taxation (Andersson, 1965: 7).

2 International Background

Tax law rulings are not an institution typical only for the Polish tax system, because they occur, in various forms, almost everywhere in Europe (Morawski, 2012: 344 et seq.). There is no single model of binding tax information in Europe.[3] This is because no uniform EU rules in this respect have been introduced. Such rules have been introduced only in case of the EU customs law that provides the opportunity to obtain binding information on the tariff classification of goods and their origin. In Denmark, no rulings are issued with respect to VAT, customs duties and inheritance. In the Netherlands, rulings are issued only for matters pertaining to international business structures. International taxation matters are also subject to rulings in France. In the Czech Republic and Slovakia, the scope of binding information issued is limited to transfer pricing issues. In all countries, the ruling system is undergoing continuous evolution. Optimal ways of balancing the fiscal interest of the state on the one hand, and, on the other hand, the interest of citizens related to the protection of their legitimate expectations related to acting based on trustworthy tax law rulings are being searched for (Morawski, 2012: 344 et seq.). Procedures for issuing rulings are highly differentiated. Rulings are usually the responsibility of tax authorities, but not always – for instance, in Sweden, an independent body has been established – the Council for Advanced Tax

1 See Burzec, 2012.
2 See Brzeziński, 1998.
3 See Rochowicz, 2012.

Ruling. Possibilities to appeal against rulings issued also differ. Taxpayers rarely have an in-court option to persuade the authorities to their views, since, apart from Poland and Sweden, such options are very limited. It is worthwhile to note that although tax law rulings can be considered a universal phenomenon in Europe, there are also countries where such an institution does not function. This refers, for instance, to the United Kingdom, Ireland and Luxembourg. While legal systems of these countries do not include a separate institution related to rulings, taxpayers are able to obtain clarifications from tax authorities. Consequently, in these cases, the legislator prefers direct communication between the taxpayer and the tax authority.

A limited duty to monitor binding tax law rulings issued by Member States has been imposed on the European Commission as of 1 January 2017 [Council Directive (EU) 2015/2376]. The Directive is one of the ideas to fight tax avoidance by enterprises. It requires Member States to automatically exchange information on advance cross-border tax law rulings and advance pricing arrangements. The duty to automatically exchange information on tax rulings has been introduced by Art. 76 of Act of 9 March 2017 on the exchange of tax information with other countries (*Journal of Laws,* 2017, item 648).

3 Public Rulings

Pursuant to Art. 14 § 1 of the Tax Ordinance, the minister competent for public finance shall attain at ensuring uniform application of tax law provisions by tax authorities, in particular by issuing, *ex officio* or upon application, their interpretation (public rulings), having regard to the judicial pronouncements of the courts, the Constitutional Tribunal or the Court of Justice of the European Union.[4]

It should be emphasised that public rulings cannot be considered norm-setting acts, since they do not contain norm-setting content, although they are abstract in nature. They are not administrative acts either, since they do to authoritatively decide about rights or duties of the addressee. It is also impossible to recognise them as a source of law or an internal act of administration of law (Etel, 2018). This is because an official interpretation cannot provide a basis for tax decisions towards citizens and other subjects of rights (Dębowska-Romanowska, 1998: 28). These rulings are not recognised as binding by tax authorities (Osada, 2017). Such a legal status results from the judgement of the Constitutional Tribunal of 11 May 2004 (Judgement of the Constitution Tribunal K 4/03, OTK-A 2004, no. 5, item 41.), which – in the previous legal context – repealed Art. 14 § 2 of the Tax Ordinance in part stipulating that rulings issued by the Minister of Finance are binding on tax authorities and fiscal control authorities, as inconsistent with Art. 78 and Art. 93 section 2 of the Constitution of the Republic of Poland. On the other hand, it is difficult to assume that tax authorities

[4] See Filipczyk, 2012.

would not feel bound by the ruling issued by the Minister of Finance when applying tax law provisions in individual cases when the purpose of the ruling is ensuring uniform application of tax law by these authorities and they are the addressees of these rulings.[5]

In the Ordinance, the Polish legislator has introduced a principle of the primacy of public rulings over individual rulings. The aforementioned principle results in a refusal to issue the individual ruling where there is a public ruling applying to the factual state of affairs or future events described in the application. The director of the Bureau of the Domestic Fiscal Information may also, *ex officio,* confirm the expiry of the individual ruling, if such ruling is non-compliant with the public ruling issued in the same legal circumstances. The key purpose of introducing the principle of the primacy of public rulings was to control the number of applications for individual rulings.[6]

4 Individual Rulings

An individual ruling is an act issued to a specific recipient. The director of the Bureau of the Domestic Fiscal Information shall, upon application by the party concerned, issue in the party's individual case an interpretation of tax law provisions (individual ruling) (Art. 12b of the Ordinance). Individual rulings with respect to local taxes shall be issued by the *voit,* mayor (president of a city), *staroste* or marshal of a *voivodeship* (Art. 14j of the Ordinance). An application for individual ruling may concern the factual state of affairs or future events.

Legal regulations pertaining to written interpretations of tax law provisions were analysed in judicial decisions of the Supreme Administrative Court.[7] In the justification of its resolution of 7 July 2014 (Supreme Administrative Court II FPS 1/14), the Supreme Administrative Court explained that the individual tax law ruling is a type of external unilateral activity of tax administration, as well as an act of authorised bodies of public administration, which does not demonstrate features of an authoritative decision and does not resolve the matter with respect to exercising tax rights and fulfilling tax liabilities by the party concerned. In particular, it should be emphasised that the subject of rights complying with the content of the ruling rather than issuing the ruling ensures the related legal protection. This is a non-authoritative activity, notifying of the binding law, and more precisely – of justified possibilities of the application thereof, leading to uniform application of and compliance with the tax law, presenting convincing arguments and certain propositions. At the same time, in the justification

5 See Dzwonkowski, 2018.

6 In 2016, 34,200 individual rulings were issued; in 2017, their number dropped by about one fourth. See businessinsider.com.pl, 2017.

7 See resolution of the Supreme Administrative Court of 7 July 2014, II FPS 1/14, ONSAiWSA 2015, no. 1, item 3. The resolution explained that "Provisions of Article 134 § 2 of the Act of 30 August 2002 – Law on proceedings before administrative courts (consolidated text: *Journal of Laws,* 2012, item 270, as amended) shall not apply in case of appealing against the individual tax law ruling to the administrative court."

of the judgement of the Constitutional Tribunal of 25 September 2014, K 49/12,[8] when assessing the legal nature of rulings, it was concluded that individual tax law rulings do not themselves authoritatively determine rights or obligations of the taxpayer and do not determine its legal status. They are "road signs" or "statements of views" of fiscal authorities with respect to the legal issues at hand, and only subsequent autonomous decisions of the taxpayer (tax remitter or tax collector) have certain effects. Issuing the tax information in no case substantiates rights or liabilities of the taxpayer, because the tax object and the scope of tax liability, as well as the tax point and tax rate are set out in tax acts. Consequently, activities of tax authorities involving notifying of the "scope of application of law" may not result in, generate or substantiate any liability or an elimination or limitation thereof.

5 No-harm Rule

By its very nature, issuing an individual ruling should mean that the party concerned will have an opportunity to get acquainted with the views of the tax authority regarding the meaning of certain tax law provisions, taking into account the factual state of affairs presented in the application, and that the party concerned will have an actual opportunity to refer to these views in case of potential disputes with tax authorities.

Tax law rulings, both individual and public, are not a source of law and are not binding. After receiving the ruling, the taxpayer is not obliged to follow its provisions. However, following the provisions of the ruling ensures that the so-called no-harm rule is applied. It can be considered from two principal perspectives – narrow and wide.

The first one arises from Art. 14k of the Tax Ordinance. In accordance with this article, application of an individual ruling before a change thereof, stating the expiry thereof or before service to the tax authority of a copy of a valid pronouncement of an administrative court setting aside the individual ruling may not be detrimental to the applicant, as well as in the case when it has not been taken into account in the resolution of the tax case.[8] To the extent related to applying a ruling which was changed, its expiry was stated or which was not taken into account in the resolution of a tax case, proceedings in cases involving fiscal offences or fiscal petty offences shall not be initiated and proceedings initiated in such cases shall be discontinued and no default

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8 See Judgement of the Constitutional Tribunal of 25 September 2014, K 49/12; OTK-A 2014, no. 8, item 94. In the judgement, the Constitutional Tribunal concluded that "Article 14o § 1 of the Act of 29 August 1997 – Tax Ordinance (*Journal of Laws,* 2012, items 749, 1101, 1342 and 1529; *Journal of Laws,* 2013, items 35, 1027, 1036, 1145, 1149 and 1289; and *Journal of Laws,* 2014, items 183, 567 and 915), understood in such a way that the notion of "no […] ruling issued" does not mean non-delivery thereof within the time limit referred to in Art. 14d of the Act in question, complies with the principle of the citizens' trusts in the state and its laws, arising from Art. 2 of the Constitution of the Republic of Poland."

8 A very similar principle is expressed in Art. 14k § 2 of the Tax Ordinance, pertaining to public rulings: "Application of a public ruling before a change thereof may not be detrimental to the person who applied it, as well as in the case when it has not been taken into account in the resolution of the tax case."

interest shall accrue (Art. 14k § 3 of the Tax Ordinance). In accordance with the above, the narrow protection offered by the ruling is based on eliminating the possibility of initiating the fiscal penal proceedings against the taxpayer, who acted based on the ruling, and imposing no default interest on this taxpayer. The aforementioned reward is difficult to overestimate.

The wide protection arises from Art. 14m of the Tax Ordinance. Application of a ruling which was subsequently changed, its expiry was stated or which was not taken into account in the resolution of a tax case shall result in exemption from the duty to pay tax to the extent resulting from the event being the subject-matter of ruling if:

1. The obligation was not performed properly due to application of a ruling which was changed or which was not taken into account in resolution of a tax case; and
2. the tax effects connected with the event to which the factual state of affairs being the subject-matter of ruling corresponds occurred after the publication of the public ruling or after the service of the individual ruling.

6 Tax Clarifications

Tax clarifications and the established ruling practice are new institutions introduced into the Polish tax system as of 1 January 2017, by the Act of 16 December 2016 amending certain acts to improve the legal environment for entrepreneurs (*Journal of Laws,* 2017, item 2255, as amended).

Pursuant to Art. 14 § 1 point 2 of the Tax Ordinance, the minister competent for public finance shall attain at ensuring uniform application of tax law provisions by tax authorities, in particular by issuing *ex officio* general explanations of tax law provisions regarding the application of such provisions (tax clarifications), having regard to the judicial pronouncements of the courts, the Constitutional Tribunal or the Court of Justice of the European Union. Clarifications are primarily addressed to entitled obliged parties (taxpayer, tax remitter, tax collector). The content is what distinguishes public rulings from tax clarifications. This is because public rulings pertain to official interpretation of regulations, while the essence of tax clarifications involves linking the content of a provision to its application in practice with respect to model situations.

The introduction of the institution of tax clarifications as part of endeavours to improve the legal environment for entrepreneurs is aimed at offering an alternative for taxpayers, who had to apply for an individual ruling. Now, by following tax clarifications, they will be able to obtain legal protection faster. Publication of tax clarifications in the *Biuletyn Informacji Publicznej* (Public Information Bulletin) together with the date of their publication and ensuring the same legal protection in case of following these clarifications is to generate a measurable result involving a reduced number of applications for less important issues. The expected outcome is also to ensure greater efficiency of the tax authorities by reducing the number of individual rulings issued.[9] The application of tax clarifications by taxpayers is to offer solutions pertaining to legal protection as the one available in case of applying public or individual rulings.

7 Established Practice

The established ruling practice is defined in Art. 14n § 5 and § 6 of the Tax Ordinance. In accordance with the aforementioned provisions, the established ruling practice shall be deemed to be the explanations of the scope and manner of applying tax law provisions which prevail in individual rulings issued in the same factual states of affairs or with respect to the same future events and in the same legal circumstances, in the course of the settlement period, in which the taxpayer applied them and for 12 months before the beginning of this settlement period. However, in the case where the aforementioned period is governed by public rulings or tax clarifications issued, then, starting from the day of publishing of such public ruling or placing such tax clarifications, the established ruling practice shall be deemed to be, respectively, the explanation of the scope and manner of applying tax law provisions resulting from the public ruling or from the explanation of tax law provisions concerning the application of such provisions which are included in such tax clarifications (Wilk, 2017).

The main purpose of the new institution is extending legal protection for taxpayers applying the content of individual rulings issued and published in the *Biuletyn Informacji Publicznej* (Public Information Bulletin). "New regulations extend this protection to instances of application of individual rulings constituting the established ruling practice, also in the situation, where the taxpayer is not the addressee of any of them" (Nowak, 2017: 42–43). If, in a given settlement period, a taxpayer conforms to the established ruling practice of the authorities of the Domestic Fiscal Administration, protection arising from provisions of Art. 14k and Art. 14m shall apply respectively.

8 Planned Amendments

Intensive works are currently underway on drafting the bill of the new Tax Ordinance.[11] The draft bill retains, with some modifications, the institutions of individual and public rulings, as well as tax clarifications, recognising their role and importance in the existing tax law system.

The new solution involves the duty of the minister competent for public finance to issue, *ex officio,* information on the content of tax law provisions, in addition to public rulings and tax clarifications.

[9] See justification of the bill on amending certain acts to improve the legal environment for entrepreneurs, Sejm printout no. 994, Sejm of the 8th term of office.

[11] General Taxation Law Codification Committee (Komisja Kodyfikacyjna Ogólnego Prawa Podatkowego, KKOPP) established by the Regulation of the Council of Ministers of 21 October 2014.

Taking into account public rulings, the new solution is an opportunity to present legal questions to the Supreme Administrative Court by the Minister of Finance (Art. 505 § 3 of the new Tax Ordinance). Asking a legal question has to be justified by the occurrence of discrepancies in judicial decisions within the scope necessary to issue a public ruling. The right to present legal questions to the Supreme Administrative Court granted to the Minister of Finance confirms only a further strengthening of public rulings. At this stage, problems with the interpretation of provisions of substantive tax law should be ultimately solved. This will eliminate numerous disputes before administrative courts at the stage of verification of individual rulings, and will limit the development of diverging judicial decisions.

A new provision has also been proposed requiring the Minister of Finance to issue a public ruling without unnecessary delay in case of receiving a significant number of applications for individual rulings regarding the same factual states of affairs or future events, submitted in the same legal circumstances (Art. 506 of the new Tax Ordinance).

Taking into account individual rulings, primarily in order to ensure full centralisation of issuing such rulings, the option to issue such rulings by local tax authorities will not be available.

The Codification Committee has introduced a special consultation and conciliation procedure into the bill of the new Ordinance, allowing for consultation of the tax implications of the transaction, as well as defining the legal implications of the decision issued as a result of this procedure, referred to as the "decision on tax implications". As part of this procedure, the applicant and the tax authority will be able, in the consultation process, to agree on tax implications of the activities of the applicant – before a potential dispute arises. In this procedure, the party obliged will be able to obtain a binding confirmation of tax implications of business events or processes described in the related application. The consultation procedure will include identifying the facts, evidence hearing, as well as discussions between tax authorities and taxpayers (e.g. pertaining to determining the transaction value, price level, etc.). The procedure will result in issuing an authoritative resolution (decision). These features differentiate it from the procedure for issuing an individual ruling.

9 Conclusion

The existence of various taxes and forms of taxation, frequent changes thereof, applicability of EU regulations and international law lead to an increase in the complexity of tax law, uncertainty as to its content, and thus also interpretation and application. This is a source of potential conflicts between interests of taxpayers and tax administration representing fiscal interests of the state. For these reasons, institutions of public and individual tax law rulings should be considered an important extension of the scope of protection of rights and economic freedoms of the taxpayer. Rulings are also a crucial stabilising element of the process of resolving disputes between taxpayers and tax authorities. They are also one of the most important safeguards for the protection of legal rights of taxpayers. Without doubt, rulings provide taxpayers with the knowledge of the rules that together with the provisions of tax law co-create the potential legal situation of every addressee of the law. These entities develop their sense of legal certainty and legal security not only on the basis of tax acts, but also on the basis of how the tax administration applies the tax law.

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Legal Regulation of Taxes in the Period of the First Czechoslovak Republic and at Present

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Abstract

The aim of this article is to evaluate opinions on taxes and tax legislation at the time of the First Czechoslovak Republic and to compare these views with current opinions on taxes in the Czech Republic and with the current state of tax legislation in the Czech Republic. Obviously, we are faced with many problems of tax legislation of the period of the First Czechoslovak Republic even now. On the other hand, there is considerable improvement in certain areas.

Keywords

tax; legal regulation; tax legislation

1 Introduction

Taxes and tax law are the topic of many experts, politicians and scholars. This was already true in the past at the time of the First Czechoslovak Republic. Legislation in the field of tax law is referred to as tax legislation.

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The aim of this article[3] is to evaluate opinions on taxes and tax legislation at the time of the First Czechoslovak Republic and to compare these views with current opinions on taxes in the Czech Republic and with the current state of tax legislation in the Czech Republic. Methods of description, comparison, synthesis and analysis are used in the paper.

The hypothesis that needs to be confirmed or denied is: Current tax legislation faces similar problems as tax legislation at the time of the First Czechoslovak Republic.

In the individual parts of the article, we will focus on five topics related to taxes and tax legislation, which we consider important. It concerns the constitutional basis of taxes and tax legislation, the structure of the tax system, the protection of taxpayers, the formal aspects of tax legal regulation and the amendments of tax laws.

At the end of the article, we assess whether the hypothesis has been fulfilled or not.

2 The Constitutional Basis of Taxes and Tax Legislature

The constitutional basis of taxes and tax legislation, or more precisely tax law, was realised during the First Czechoslovak Republic section 111 of the Constitutional Charter of the Czechoslovak Republic of 1920. According to this provision, taxes and public levies could be imposed only on the basis of the law. Thus, the Constitutional Charter used the term "veřejné dávky" (public levies) for the designation of taxes in the broad sense of the word. However, some authors[4] have supported using the term "berně" (another Czech word for levies than "dávky") for the designation of taxes in the broad sense of the word.

The term "veřejné dávky" is also used in the Civil Code, in section 2961 that regulates the funeral expenses in connection with compensation for damage. Pursuant to that provision, the person who caused damage is required to compensate the person who has incurred the costs of the funeral to the extent that these costs have not been paid by public funds under another law. This is especially the so-called "pohřebné" (funeral grant), which is the state social support benefit provided under the State Social Support Act (Sections 47 and 48 Act No. 117/1995 Sb). Thus, the Civil Code uses the term "veřejné dávky" for the designation of transfers from the expenditure side of public budgets. The term "veřejné dávky" has thus changed from the monetary levies

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[4] For example Funk; compare Funk, 1934: 15.

representing a particular part of the public revenues of public budgets to monetary payments provided from public budgets as expenditures.

Nor is the term "berně" (another Czech word for levies than "dávky") currently often used. The exception is Radvan and Mrkývka who used the term "berní právo" (levies law) but they, however, add that this term cannot be recognised as a dogma but as a didactic tool (Radvan, 2008: 44).

However, much more important than the use of the term for designation of taxes in a broad sense of the word is the content of the above-mentioned provision of the Constitutional Charter of 1920 or more precisely the interpretation of the term "na základě zákona" (on the basis of the law).

Funk says that *"the only interpretation that can be admitted as acceptable is that the law according to our constitution must lay down all substantial rules of material and formal nature"* (Funk, 1934: 42). However, he stated in his later work that the wording of the particular provision gives rise to various interpretations since the term "daně" (taxes) and the term "veřejné dávky" (public levies) are not precisely defined. He added that due to this uncertainty, particular adjustments have been made to some payments, that are undoubtedly taxes in the broad sense of the word (Funk said that they are public levies), without authorisation by law, not even by ministerial decrees (Funk, 1939: 24).

Currently, Art. 11 (5) of the Charter of Fundamental Rights and Freedoms provides that *"taxes and charges may only be imposed on the basis of the law"*. The question arises as to how it is with other taxes in a broad sense of the word (for example duties, levies, premiums, contributions, etc.), whether these monetary payments can be imposed only on the basis of the law or whether the law is unnecessary for their imposition. There is a rather unequivocal answer to this question that even these monetary payments can be imposed only on the basis of the law, specifically on the basis of Art. 4 (1) of the Charter of Fundamental Rights and Freedoms (Bakeš, 2004: 566).

More important, however, is the interpretation of the term "on the basis of the law". In this respect, reference can be made to the book *Daňové příjmy veřejných rozpočtů* [Tax Revenues of Public Budgets] (Government decree No. 376/2017 Sb.) that emphasises the interpretation that duties can be imposed only by law and not by secondary legislation. Secondary tax legislation is therefore admitted. The practice is, however, that the legal regulation of individual taxes in a broad sense of the word is contained almost exclusively in regulations with the force of law. Secondary legislation regulates rather marginal issues.

The exception was the government decree implementing the Sales Records Act (Government Decree No. 376/2017 Sb.) which was repealed by the Constitutional Court. The Constitutional Court deduced that the legislation contained in this decree should be contained in the act itself because it was about the determination of exceptions to the fulfilment of the obligations laid down by law.

Before the Constitutional Court (Usoud.cz, 2018), however, another related problem is currently being solved, namely the issue of the so-called tax filing forms,[5] which are used especially for the filing of tax returns and the registration procedure. The essence of the dispute is whether these filing forms should not be issued in the form of secondary legislation.

The issuing of forms[6] was common even in the First Czechoslovak Republic. An example is the Act on direct taxes (Act No. 76/1927 Sb.). Rather than the illegality of these forms, the number of them, the uneconomic nature of their publication and the administrative burden associated with their filing has been pointed out. Novotný says: *"There are over 6,000 different formulas in use, they have a variety of formats, inconsistent text and purpose. [...] Central standardization of formats, types, papers, texts, and concentration of printing would save very large amounts costs of paper and printing. [...] The country merchant who has a house, a small field with potatoes and a 1000 CZK labour loan has to fill in thirty pages of the big office format of various declarations to the tax authorities annually"* (Novotný, 1937: 79).

The main argument of the complainants is that the obligations should be determined directly by law and not by the filing form. It can be said that the obligation to submit the relevant filing is set out by law with the fact that the law generally states what the content of the relevant submission should be. In fact, complainants demand a greater specification of the obligation directly in the act and alternatively in the secondary legislation.

If the Constitutional Court accepted the complainants' claim, the forms would probably be issued by a decree of the Ministry of Finance. This would lead to a large increase in these types of legislation.

It can be summarised that the constitutional basis of taxes and tax legislature today and in the period of the First Czechoslovak Republic is basically the same. However, the interpretation of these constitutional provisions is problematic.

3 The Structure of the Tax System

Regarding the form of the tax system, there is a significant difference between the First Czechoslovak Republic and the present Czech Republic.

In 1918, the reception of the Austro–Hungarian law took place with the failure to replace these provisions during the period of the First Czechoslovak Republic or more precisely they have succeeded only partially in replacing them.

Funk said in 1934 that: *"There has not yet been a full unification of legislation and therefore the legislation of former Austria is in force on the Czech and Moravian–Silesian territories and the legislation of former Hungary is in force on the territory of Slovakia and Carpathian Ruthenia, as regarding the charges, excise taxes on sugar, on alcohol and on*

[5] For more see Tuláček 2018.

[6] In the terminology of the First Czechoslovak Republic "vzorů" or "vzorců" (patterns or formulas).

mineral oil, card stamp, pension law applicable to indirect taxes, moreover with regard to limitation periods and certain procedural rules" (Funk, 1934: 16). In the field of direct taxation, the unification of the legislation was made especially by Act No. 76/1927 Sb., on direct taxes, and in the field of customs duties by Act No. 114/1927 Sb., on customs.

Novotny points out that tax legislation suffers from a *"multiplicity and diversity of norms",* namely Austrian, Hungarian, Czech, Moravian, Silesian norms, and points to the fact that in one state territory the interstate agreements between former Austria and former Hungary apply (Novotný, 1937: 22). The absence of the general tax act like the German Reichsabgabenordnung (Archive.org, 2018) was also considered negative (Funk, 1934: 18). On the basis of the above-mentioned facts, it is evident that the tax system in the First Czechoslovak Republic was complex and confusing and there was no general tax law that would contain general rules for all taxes and their administration.

On the other hand, the creation of the Czech Republic in 1993 succeeded in adopting a general tax act regulating the administration of taxes and charges (Act No. 337/1992 Sb.) which was replaced by the Tax Procedural Code that came into effect on 1 January 2011 (Act No. 280/2009 Sb.). This fact should be seen positively because such a general regulation unifies the particular area of law, contains general principles and contributes to the uniform interpretation of tax laws.

Similarly, new tax laws, regulating taxes in the narrower sense, have been adopted and come into effect in 1993. The reception of the Czechoslovakian law was realised in the field of charges and other similar monetary payments but these regulations were gradually replaced by new regulations.[7]

We believe that the current tax system can be further improved. Certainly, it would be possible to formally classify a series of monetary payments similar to taxes and charges that fulfil the features of taxes or charges as taxes or charges. This would certainly help to make the tax system in the broad sense of the word more transparent. Why is monetary payment referred to as a levy when it is a tax from a material point of view? The reason may be the fact that this way, the true nature of the payment can be hidden.

Another option is to reduce the number of individual taxes, charges and other similar monetary payments. Less taxes in the broad sense of the word and the tax system in the broad sense of the word will be simpler. On the other hand, it is true that less taxes in the broad sense of the word are imposed, still the more unfair the tax system in a broad sense of the word can be since there will be no taxation of certain objects of taxation and some objects of taxation will be taxed more than now.

However, Funk's statement, that is quite up to date, says that *"the tax system should be simplified and modified so that private business is not undermined, but its healthy development is allowed"* (Funk, 1939).

It can be summarised that the structure of the tax system today is clearer than the structure of the tax system of First Czechoslovak Republic. The new tax laws were

[7] An exception is, for example, Act No. 565/1990 Sb., on Local Charges, as amended.

adopted with effect from 1993 and the general act governing tax administration is in force. However, the tax system can be constantly improved.

4 The Protection of the Taxpayers

Novotny stated in 1937 that he saw the problem of the tax system *"in lack of legal protection of the taxpayer and in the unnecessarily high authority of the office"*. Examples were the impossibility of a taxpayer's defence against the inactivity of the office and the lack of means by which it is possible to obtain compensation for damage caused by the exercise of official authority (Novotný, 1937: 26). Both of these examples are no longer true, since the Tax Procedure Code regulates the protection against inactivity of the tax administrator (Sec. 38 of the Tax Procedural Code) and it is also possible to defend against the tax administrator's inactivity before an administrative court (Sec. 79 of Act No. 150/2002 Sb.).

However, today's legislation of taxable entities protection, which is contained especially in the Tax Procedural Code and the Code of Administrative Justice, can be considered much more substantial. In this respect, we believe that the new tax procedure codes adopted after 1989 (Act on Administration of Taxes and Charges and the Tax Procedure Code) and their application within the framework of the constitutional order of the Czech Republic have brought about a major change.

First of all, it is necessary to mention the regulation of the right to judicial and other legal protection that is laid down by the Charter of Fundamental Rights and Freedoms (Sec. 36 of the Charter of Fundamental Rights and Freedoms) and the regulation of the principles of tax administration that is laid down by the Tax Procedure Code (Sec. 5 to 9 of the Tax Procedure Code and Sec. 2 of the Act on Administration of Taxes and Charges), previously by the Act on Administration of Taxes and Charges. The taxable entities are provided with legal protection not only in the framework of tax administration, but also in the framework of judicial review within the administrative judiciary, possibly in the constitutional judiciary.

The completion of this process was the adoption of the Tax Procedural Code and its redefinition of the objectives of tax administration. According to the Act on Administration of Taxes and Charges 1992, the purpose of tax proceedings was to set and collect taxes so that the tax revenues of public budgets are not reduced (Sec. 2(2) of the Act on Administration of Taxes and Charges). However, the purpose of the tax administration according to the Tax Procedure Code is the correct identification and determination of taxes and securing the payment of taxes [Sec. 1(2) of the Tax Procedure Code]. Although some authors consider this change to be symbolic (Šimek, 2011: 3), it can be considered a confirmation and completion of the process of emancipating the rights of taxable entities.

It should be added to this that, in our view, any excesses that lead to a breach of the purpose of tax administration, such as excessive preference of public interest in gaining revenues of public budgets and excessive preference for the rights of taxable entities, are harmful. These tendencies should, in principle, be balanced and directed towards the purpose of tax administration, i.e. to set and collect the tax in the right amount.

It can be summarised that there is a large improvement in ensuring the protection of the rights of tax entities between the legal regulation of the First Czechoslovak Republic and the current legal regulation.

5 Formal Aspects of Tax Legal Regulation

The tax laws in the period of the First Czechoslovak Republic were criticised for a number of imperfections. According to Novotný, these tax laws were characterised by *"total inconsistency of their construction and their main concepts. There is no uniform and complete scheme on which basis all taxes would be clearly and unambiguously construed and the precision of individual concepts lacks"* (Novotný, 1937: 26).

At present, tax laws are also being criticised for lack of clarity and non-systemicity.[8]

Funk also pointed out that *"tax laws, both before and nowadays, are prepared in ministerial departments without maintaining uniform points of view in defining basic concepts. The processing of tax laws does not take sufficient care, especially where the laws are quickly issued to ensure public revenues of them as soon as possible"* (Funk, 1934: 18).

As regards the first complaint, we believe that positive development in tax law over recent years can be highlighted. If a new tax law is adopted, or more precisely a new tax is regulated, such a legal norm has a clear structure and a constant adjustment of the structural elements of the tax and its administration. First, the structural elements of tax are set out in the usual order (taxable subject, tax object, tax base, tax rate, tax calculation, tax period and budgetary determination of tax) and consequently specific procedural rules for the administration of the tax are laid down in accordance with the general legislation regulating the administration of taxes i.e. the Tax Procedure Code. An example of such tax laws are regulations governing the tax on the acquisition of immovable property (Legal regulation of the Senate No. 340/2013 Sb.) or the tax on gambling (Act No. 187/2016 Sb.).

The change has also taken place as regarding the unified processing of tax laws. In 2010, the Tax Legislation Department was established at the Ministry of Finance which is, among other thing, responsible for unifying the structure and form of tax laws and it ensures their unity and content coherence. There is a lot of work for this department. Especially, it is necessary to replace the old tax laws of 1992, which no longer correspond to the current requirements of the tax law.

It can be summarised that the formal aspects of tax legal regulation were in the period of the First Czechoslovak Republic and are now referred to the lack of clarity

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8 For example see Aktualne.cz 2018.

and non-systemicity. However, in recent years, it is possible to see a positive trend in the development of tax legislation.

6 The Amendments of Tax Laws

In terms of tax laws, it is not only their content and form that are important, but also the frequency of their changes.

Funk, in 1939, blames tax laws for having been *"changed many times and in short time which has led to the confusion and impediment of tax administration. The legislature is the reason for the great difficulties of the tax administration"*. Funk adds: *"Various governmental designs have been implemented at short notice and inadequately handled both materially and formally"* (Funk, 1939). He therefore points to the numerous and frequent changes to tax laws and, secondly, to their inadequate quality caused by the frequency of their adoption.

The frequency and speed of tax law changes is a problem even today. However, it is difficult to find a solution to this problem as taxes are one of the foremost political topics because they affect a wide range of recipients and must react to the development of the economy. Therefore, their legal regulation will be constantly changed.

Nevertheless, a certain solution is to observe particular rules and principles when realising these changes, namely general legal principles, principles of structure of particular taxes and legislative principles. A specific expression of these rules and principles is, for example, the requirement to change only the parameters and not the nature of the basic essential elements of the tax or the requirement to comply with the principle of legislative restraint.

It can be summarised that the number and frequency of the amendments of tax laws were the problem in the period of the First Czechoslovak Republic and are the problem nowadays.

7 Conclusion

The aim of this article was to evaluate opinions on taxes and tax legislation at the time of the First Czechoslovak Republic and to compare these views with current opinions on taxes in the Czech Republic and with the current state of tax legislation in the Czech Republic.

The second aim was to verify or rebut this hypothesis: Current tax legislation faces similar problems as tax legislation at the time of the First Czechoslovak Republic. Five topics have been described and evaluated for this purpose with the following conclusions:

1. The constitutional basis of taxes and tax legislature today and in the period of the First Czechoslovak Republic is basically the same. However, the interpretation of these constitutional provisions is problematic.
2. The structure of the tax system today is clearer than the structure of the tax system of the First Czechoslovak Republic. The new tax laws were adopted with effect from 1993 and the general act governing tax administration is in force. However, the tax system can be constantly improved.
3. There is a large improvement in ensuring the protection of the rights of tax entities between the legal regulation of the First Czechoslovak Republic and the current legal regulation.
4. The formal aspects of tax legal regulation were in the period of the First Czechoslovak Republic and are now referred to the lack of clarity and the non-systemicity. However, in recent years, it is possible to see a positive trend in the development of tax legislation.
5. The number and frequency of the amendments of tax laws were the problem in the period of the First Czechoslovak Republic and are the problem nowadays.

Obviously, we are faced with many problems of tax legislation of the period of the First Czechoslovak Republic even now. On the other hand, there is considerable improvement in certain areas (the structure of the tax system, the protection of tax subjects). The above hypothesis was only partially confirmed.

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Flexibility of Tax Law Provisions and Legal Definitions

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Abstract

Simultaneously using legal definitions and vague wording in tax law provisions was subject to analysis in the article. These are namely the situations where while structuring the legal definition, the tax lawmaker simultaneously uses vague wording. It creates interesting interpretative problems and difficulties regarding tax law application for both tax theory and practice. The author indicates that the Polish tax legislator does not use the determinants which would allow to properly create legal definitions, at the same time making use of vague expressions. Hence, the aim of the article is to tell these determinants.

Keywords

legal definitions in tax law; vague wording in tax law; determinants

1 Introduction

Considering tax law regulations from the point of view of a characteristic relationship between tax law and civil law – and including the consequences of economic turnover – we can see two ways of the so called legislative attitude, namely using typical legislative drafting measures that are indicated by the legislator in a regulation entitled *Legislative Drafting Principles* (Regulation of the Prime Minister on the *Legislative Drafting Principles* of 20 June 2002). On the one hand, these are legal definitions; on the other hand, these are measures ensuring the flexibility of tax law provisions. The two categories are not all available legislative drafting measures that could be used by

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the tax legislator to express this relationship and allow for the consequences of economic turnover. However, it seems that they are characteristic in this respect. The point is that it is essential to open the scope of tax law regulation due to the necessity of embracing tax effects of the behaviours of the entities in civil law area, or taking into account the dynamic development of economic turnover – which consequences should be worthy to be mindful of in concrete tax regulations. In order to fulfil this plan, the tax legislator has the legislative drafting measures at his disposal; these measures ensure the flexibility of the text of the normative act, that is the flexibility of this law.[2]

Moreover, the context of pinpointing the expressions used in tax provisions by introducing legal definitions should be taken into consideration. There are various justifications for these definitions, related both to the relationship between tax law and civil law, and taking into consideration the indicated consequences of economic turnover.

The two types of legislative solutions discussed are not in opposition to each other. Hence, they may be considered from the point of view of the purposes pursued by the tax legislator[3] who has i.a. those legislative measures at his disposal, the measures that should be successfully put in tax law provisions. Using the word "should" in this respect is not accidental. The tax legislator does not always spot not only the consequences of using vague wording or legal definitions, but also the effects of using both those two normative solutions at the same time. The simultaneous using of both of them might be perceived as a good mechanism of shaping the area subject to taxation, both from the point of view of the Treasury's needs (local government units) or the taxpayer's situation. This way, it is possible to formulate a research hypothesis in this paper. Its purpose, in turn, would be to identify the "areas of coexistence" of both the measures ensuring flexibility of tax law and legal definitions. Within this purpose, an attempt will be made to formulate the determinants of their use in the cases where both types of legislative technique measures are used at one stage, that is for example vague wording used in terms of a legal definition.

2 Looking for the "Areas of Coexistence" of Vague Wording and Legal Definitions in Tax Law

It seems that while looking for the "areas of coexistence" of vague wording and legal definitions in tax law, the output solution should be the one that the legislator described in the regulation *Legislative Drafting Principles*. However, it should be highlighted that the discussion on implementing the peculiar principles of this legislative technique allowing for the specificity of this branch regulations is a separate issue – equally attractive as regards looking for proper legislative measures for tax law. Hence, some of the solutions proposed in this regulation tend to change their normative shape after

[2] For particularly vague expressions and general clauses see Borszowski, 2017: 62 et seq.
[3] On the possible functions of legal definitions in legal acts see Breziński, 2001: 225.

transposing them to tax law; the normative shape is a result of the specificity of this law – the point is the criterion of necessity instead of need while formulating vague expressions or general clauses in the Polish tax law.

It is also worth noticing that the described regulation *Legislative Drafting Principles* – as a starting point to the issue under examination – does not mean that its creators use "areas of coexistence" expressed in this way. The idea is to employ the functional view of these typical legislative drafting measures which use was indicated in the regulation. First of all, we should consider this area for the legislative measures mentioned with regard to the criteria/bases of their formulation. In other words, we seek for an answer to the following question: should this area be determined within the criterion (which, if fulfilled, results in introducing vague wording into tax law provisions) or within the bases of formulating legal definitions?

It was stated that transposing the criterion of the need to ensure flexibility of the normative text to tax law leads to its sharpening; moreover, it results in understanding the criterion as the necessity to ensure flexibility of tax law provisions. However, the criterion expressed this way does not give any basis to acknowledge that it is simultaneously an opportunity to analyse the "area of coexistence" of vague wording and legal definitions in tax law. It should be kept in mind that it is only used to make tax law provisions more flexible. Thus, in this case there is no subject area for these two different typical legislative drafting measures. It can be obtained within the bases of formulating legal definitions, indicated in the regulation *Legislative Drafting Principles.* Among the four bases formulated,[4] the basis described as a requirement to limit the vagueness of a given notion by a legal definition should be seen as the one which gives the opportunity to determine the "area of coexistence". It is worth noting that in this case, the analysed issue is somehow inscribed into the essence of the basis of formulating a legal definition in tax law provisions. These two types of legislative drafting measures are aggregated within this basis.

Moreover, it seems that the studied area will be visible also when it comes to the basis expressed in the final part of § 146 of the regulation *Legislative Drafting Principles* and its reference to tax law provisions. The point is the need to determine a new meaning of a given expression. We can also spot the "area of coexistence" of vague wording and legal definitions here.

3 "The Area of Coexistence" of Vague Wording and Legal Definitions within Reducing the Vagueness

As stated, this area is somehow planned within the regulation *Legislative Drafting Principles* in the event of a vague expression; and simultaneously if it is determined that reducing the vagueness would be desired. Such a situation is also characteristic for

[4] See § 146 of the regulation *Legislative Drafting Principles.*

the solutions found in tax law provisions. Regulations concerning the tax avoidance clause are a clear example of it.[5]

Thus, the starting point in this case is to determine that a vague expression exists. At this stage, it is impossible to determine the indicated coexistence. In other words, introducing a vague expression in tax law provisions cannot at the same time mean a basis to formulate a legal definition in this law. Therefore, there is an obligation to make an assessment between the introduction of a vague expression and the possibility of its coexistence with a legal definition. Ultimately, this legislative measure should be assessed from the point of view of the desire to reduce its vagueness. Therefore, the determinants of the desirable reduction of vagueness will become crucial. If the determinants are not determined and then used by the legislator, and they are not used to decide whether to formulate the legal definition, it may have negative consequences both as regards vague wording and the legal definition itself. While doing research on the indicated determinants, it should be primarily stated that the point is the existence of a desirable reduction of vagueness – not the potentially predictable state. It is particularly important as the term 'reduction of vagueness' is a vague expression itself. Therefore, adopting the determinant in this respect at the potential, predictably desirable state of the reduction of vagueness would lead to formulating a so called premature definition, so a definition which is not required as a reduction of the vagueness area. Introducing a premature definition would result in highlighting the area to be defined without any justification to the process, as we can call it conventionally. The consequences of this may be assessed primarily as an unnecessary hardening of the scope of the defined expression. Second, it may be assessed as an unnecessary hardening of the scope of the regulation or even of whole mechanism where the defined expression will be put. Furthermore, if there is no desirable reduction of vagueness in a given field of regulation yet, formulating a legal definition (when it is determined that a vague expression exists) may lead to disrupting the fulfilment of the purpose for which the vague expression was introduced. Further negative consequences may be indicated as far as the relationship between tax law and economic turnover is concerned. This may lead to eliminating the flexibility required to reflect the relationship between economic turnover and tax law. As a result, it is difficult to assess further consequences that it may have on other regulations which are directly or indirectly related to the defined notion.

Therefore, it may be assumed that the aim is to create a determinant of the existing desirable reduction of vagueness. It is worth setting further determinants within one determinant that is expressed this way, and we may consider this determinant a starting one. The idea is not to do any reduction – we seek the desired reduction. Finding determinants within this expression is difficult as they are vague.

It seems that we can indicate several other determinants, that is determinants of implementation. First of all, the determinant concerning the degree of reduction of vagueness, secondly – the determinant concerning the ground of reduction. In the second

5 See more broadly in Borszowski, 2018: 631–639.

case, it is about the assessment from the point of view of this ground in relation to which the reduction of vagueness will be desirable. Taking into account the first indicated determinant of implementation, we should assume that the degree of vagueness reduction cannot be excessive (on the contrary: it should be relevant). It is worth keeping in mind the results that the excessive vagueness reduction could cause – it cannot lead to a situation where this area actually ceases to exist. It seems that it is difficult to indicate an individual determinant by which it would be possible to determine the degree of relevant vagueness reduction. This will depend on the place where the given legal definition is put. Depending on this location – whether it is put in general or specific tax provisions – the determinant will be indicated in relation to the legal relationship of tax obligation (or other general tax law institutions) or other elements of tax legal construct.

If the determinant regarding the ground of reduction is subject to analysis, we may assume that it is a consequence of putting a vague expression, what is worth considering at the level of legal regulation and legal institution. The heart of the matter is a relevant degree of vagueness reduction due to a given legal regulation, and also due to a given legal institution – where a given regulation or group of regulations is put. Therefore, it may be stated that these two determinants are functionally related. Thus, we should adopt the determinant of the degree of vagueness reduction for a legal regulation and the determinant of the degree of vagueness reduction for a legal institution.

Considering the degree of vagueness reduction due to putting a vague expression in a given regulation, this determinant will depend on the number of regulations – whether there is one regulation that the vague expression is put into, or there is a group of regulations. The desired reduction of the degree of vagueness will be then determined for one regulation or for a group of regulations. It is therefore appropriate to indicate a determinant of relevant vagueness reduction for one regulation or for a group of them.

In turn, the determinant of the degree of vagueness reduction for a legal institution may be adopted for a given institution – both general and specific tax law. In the first case, the point would be to reduce the vagueness area within a legal relationship of tax obligation (or other institutions of general tax law), and in the second case – within a legal construct of a tax. The reduction of vagueness area for an institution of tax liability should be assessed from the point of view of a dynamic analysis, that is creation, securing and termination of the tax liability in the cases when the legislator would find it necessary to introduce legal definitions in order to clarify the expressions used as part of the analysis. Moreover, we should discuss the determinant of the degree of vagueness reduction as far as the legal definitions used in order to create tax avoidance clauses are concerned. It will be significantly important to look for a determinant of the degree of vagueness while stating particular elements of a tax legal construct, especially the objective scope of taxation and objective exemptions. Therefore, it is worth recalling the problems with implementing the scope of revenues in personal income tax.[6] On the other hand, research on the determinant of the reduction of vagueness

6 See also Borszowski, 2018: 57–66.

for the objective scope in relation to the objective exemptions leads to the necessity of considering legal definitions for vague wording used with these exemptions. If the tax legislator can tell the indicated determinants, and simultaneously bases the process of formulating legal definitions to reduce vagueness on them, it ensures that there is an area of the assumed coexistence of legal definitions and vague wording, guaranteeing proper realisation of general and specific institutions of tax law.

4 The "Area of Coexistence" of Vague Wording and Legal Definitions as Part of Determining a New Meaning of a Given Expression

As stated, the situation of the tax legislator simultaneously using vague expressions and legal definitions may also occur within another ground of formulating legal definitions; that is when the legislator creates a new meaning of a given expressions due to the field of regulated matters. In this case, tax law will be this field, to be more precise – the necessity of the tax legislator to take into consideration the relationship between economic turnover and tax law. This situation is not programmed by the legislator, as in this case it becomes crucial to determine a new meaning of a given expression. Nevertheless, the tax legislator may use – and does use – vague expressions in such cases, what is clearly confirmed by the definition of business activity in the provisions of both general[7] and specific tax law,[8] despite the fact that the definition was earlier introduced in the provisions of the Act on Freedom of Business Activity (Act of 2 July 2004 on Freedom of Business), or recently – the Entrepreneurship Act (The Entrepreneurship Act of 6 March 2018).

Also in this case, considering the "areas of coexistence" of vague wording and legal definitions requires indicating certain determinants; compliance with these determinants by the tax legislator guarantees that the measures ensuring flexibility of tax law provisions will be used correctly in the area of legal definitions. First of all, it should be noted that the highlighted criterion of the need to determine a new meaning of a given expression in the area of definitions formulated in tax law takes a whole new meaning. It seems that it is not the criterion of need that should be stipulated, but the necessity of determining a new meaning of a given expression. Due to the specificity of tax law and some actual autonomy of the tax legislator, the criterion of need is too lenient and thus may justify too often the use of definitions that lead to determining new meaning of a given expression. We may expect negative consequences of such a situation not only in the area of tax law system, but also within the whole legal system. As a result, the criterion used to formulate this type of definitions should be the necessity of determining a new meaning of a given expression.

7 In the provision included in Art. 3 point 9 of the Act of 29 August 1997 – Tax Ordinance Act.

8 Namely the definition in Art. 5a point 6 of the Personal Income Tax Act of 26 July 1991, or Art. 15 section 2 of the Act of 11 March 2004 on Value Added Tax.

It should be considered that a criterion expressed in this way should be also used to indicate determinants of using vague wording within formulated legal definitions. Therefore, we may accept the determinant of the necessity to indicate a semantic novelty of a given expression that should refer to using legislative drafting measures ensuring flexibility of tax law provisions. It seems that fulfilling this determinant in the area of tax law faces many obstacles. Not only the already mentioned definition of business activity, but also other cases – as for example the definition of a building in Art. 1a Section 1 Point 1 from the Local Taxes and Fees Act (Act of 12 January 1991 on Local Taxes and Fees) – may raise doubts about its fulfilment.[9] The already described determinant should be referred directly to the vague expressions used by the tax legislator in this case. It seems that it is difficult to fulfil for the legislator. First of all, by the use of vague wording, the given legal definition is somehow opened so that it may embrace a broader extent of situations. Then, the point is that the determinant of the necessity to indicate a semantic novelty – with an extended scope of it – should be fulfilled. Secondly, we should assess the way of using vague expressions within its frames, in order to fulfil this determinant. A certain situation may raise doubts concerning its fulfilment; it is a situation where the tax legislator uses a vague expression with the same normative shape as a definition included in another normative act. For example, the vague term of organised and continuous business in Art. 5 Point 6 of Personal Income Tax Act and Art. 3 of the Act on Freedom of Business Activity. In such cases, when as part of the defined term, the tax legislator uses vague expressions of the same normative shape, it does not necessarily mean that the determinant of the necessity to indicate a semantic novelty is not fulfilled. However, this requires an assessment of the whole scope of the legal definition with the use of this legislative measure, from the point of view of this semantic novelty – which could be avoided if a solution with other normative shape was used.

Therefore, the discussed determinant is fulfilled when the tax legislator uses vague expressions with a different normative shape than the one that in relation to which it is a semantic novelty. However, if the legislator uses an identical – or a similar in terms of normative shape to the given vague expression – determinant, then its fulfilment requires an assessment of the whole scope of the definition in terms of semantic novelty.

Thus, when analysing the indicated "area of coexistence" of vague expressions and legal definitions, we should note that it is – or at least should be – a consequence of fulfilling the determinant of the necessity to ensure the semantic novelty. Its fulfilment guarantees that this area will be properly shaped without negative consequences not only for the scope of the definition, but equally with the legal system – where its element is the legislative solution according to which the so called semantic novelty is determined.

[9] Fulfilling the determinant of semantic novelty raises doubts.

5 Conclusion

The issue of simultaneous use of legal definitions and vague wording by the legislator in tax law provisions should be discussed not only within the doctrine, but also as part of the tax practice. The results of the research should be particularly significant for the tax legislator that simultaneously uses such normative solutions. This study identifies two areas in which we can spot that the legislator simultaneously uses these two different typical legislative measures. If such a process is to succeed in the tax practice – that is at the stage of employing tax law, the legislator must fulfil the determinants of using vague expressions while formulating legal definitions. These determinants were formulated both for a situation where the tax legislator aims at reducing vagueness of a given expression, and for a situation where the aim is to determine a new meaning of a given expression. It seems that the determinants of the first situation are somehow a natural consequence of some programmed "area of coexistence" of vague expressions and legal definitions.

On the other hand, in case of determining a new meaning of a given expression, fulfilling the determinant of semantic novelty is key; in this case, the tax legislator treats fulfilling this determinant too mildly. When translated to vague expressions used in legal definitions, it brings consequences not only for tax law. It may have a negative impact on the relationship between tax law and other branches of law, or on the relationship between the economic turnover and tax law.

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The European Union's Budget: Focus on Own Resources Post-2020

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Abstract

This paper provides an overview of the European Union's revenue system, focusing on own resources and their possible reform. It further analyses the European Commission's proposal of the next multiannual financial framework post-2020 and its financing. The next MFF proposal introduces, in addition to the traditional resources, a basket of new own resources (based on the Common Consolidated Corporate Tax Base, the European Union Emissions Trading System and plastic packaging waste that is not recycled).

Keywords

budget; European Union; Multiannual Financial Framework; own resources

1 Introduction

This paper deals with recent issues of EU finances and their future. The particular focus will be on own resources of the European Union. In May 2018, a legislative package regarding the multiannual financial framework and new own resources was presented by the European Commission. The aim of this paper is to analyse the current situation of the EU budget revenue and how it could be reformed if the proposals are adopted. Therefore, the latest Commission texts together with other relevant EU documents concerning this topic represent the most important source for this work.

The paper is divided into three chapters describing the current state of EU budget revenue, reform needs and actual proposals for the upcoming period post-2020. The methods of description, analysis, comparison and synthesis will be used.

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2 Current State

2.1 Legal basis

The EU budget serves as a financial plan which comprises all the revenue and expenditure of the European Union. The concept of the general budget also refers to a legally binding act that has to be adopted according to the ordinary budgetary procedure. Every annual budget must be established within the Multiannual Financial Framework (MFF) and is governed by a number of budgetary principles deriving from the provisions of the Treaty on the Functioning of the European Union (TFEU) (Kosikowski, 2008: 120–123).

The legal basis for the EU budget revenue is laid down in Art. 311 TFEU (ex Art. 269 TEC):

(1) The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

(2) Without prejudice to other revenue, the budget shall be financed wholly from own resources.

(3) The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

(4) The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament.

The current form of revenue was specified in 2014 by the Council and comprises three main categories of own resources (Council Decision 2014/335/EU, Euratom):

a) Traditional own resources (levies, premiums, additional or compensatory amounts, customs duties, contributions and other duties regarding markets in sugar)
b) Value Added Tax-based resource
c) Gross National Income-based resource

However, only the traditional own resources listed under the letter a) can in fact qualify as "real" own resources since VAT and GNI-based resources are national contributions.

The system and collection of own resources reflect the financial autonomy of the European Union. Any failures in transferring funds caused by the Member States are recognised as failures to fulfil the obligation under the Treaties (Tyniewicki, 2008: 31).

2.2 Traditional own resources

Traditional own resources cover the customs duties (including agricultural levies) that are imposed on the products of third countries and are collected at the external borders of the single market. The Member States retain 20% of the collected amounts (as collection costs), whereas the rest is forwarded straight to the EU budget. Another resource is sugar levies paid by sugar producers (Final report and recommendations of the High Level Group on Own Resources: 40).

2.3 Value Added Tax (VAT)

The VAT is paid by all Member States and calculated by applying a uniform rate of 0.30% to the harmonised tax base (which shall not exceed 50% of the gross national income for each Member State). For the period of 2014–2020, the rate for Germany, the Netherlands and Sweden shall be fixed at 0.15% [Art. 2 of the Council Decision (2014/335/EU, Euratom)].

2.4 Gross National Income (GNI)

Each Member State is obliged to transfer a standard percentage of its GNI to the EU budget. However, there are corrections to reduce excessive contributions by certain Member States. For the period of 2014–2020, Denmark, the Netherlands and Sweden benefit from gross reductions in their annual GNI contribution of 130 million, 695 million and 185 million EUR. Austria benefits from a gross reduction in its annual GNI contribution of 30 million EUR in 2014, 20 million EUR in 2015 and 10 million EUR in 2016. These gross reductions shall be financed by all Member States [Art. 2 of the Council Decision (2014/335/EU, Euratom)].

The total amount of own resources allocated to the EU to cover annual appropriations for payments shall not exceed 1.23% of the sum of all the GNIs of Member States and 1.29% when it comes to the total amount of appropriations for commitments [Art. 3 of the Council Decision (2014/335/EU, Euratom)].

In addition to the above-mentioned VAT and GNI correction mechanisms, there is also a special correction measure in favour of the United Kingdom (Arts. 4 and 5 of the Council Decision).

2.5 Miscellaneous

The revenue of the EU budget deriving from other sources can be formed by any surplus available from the preceding financial year, borrowing and lending activities, revenue from administrative operations, taxes on EU employees' salaries, etc. (Kosikowski, 2008: 78).

3 Reform

The financing system of the European Union has remained unchanged since 1988. If we look at the revenue side, the GNI dominates (see Chapter 4.3 for comparison). The High Level Group on Own Resources (with Chairman Mario Monti) was established in 2014 to examine how the revenue side of EU budget could be more simple, transparent, fair and democratically accountable. In its final report from December 2016, the Group analysed existing resources, examined which should be maintained and prepared a list of potential new own resources. Based on the report and recommendations, the European Commission has assessed whether the reform is appropriate. The Reflection Paper on the Future of EU Finances (European Commission, 2017) published in 2017 confirms the need to reform the EU budget.

The legislative proposals of the Commission regarding own resources introduced in 2018 are listed in Chapter 4 of this paper. However, not only resources but also expenses must be properly reviewed.

To analyse and evaluate the effectiveness of each resource, all of them must be assessed according to some criteria. For example, Petr König (König, 2009: 54) uses three groups: economic, administrative and political criteria; Marcin Tyniewicki (Tyniewicki, 2008: 29–30) uses financial, economic and legal criteria.

The High Level Group worked with the below-mentioned set of various criteria to assess and compare different types of resources. All examined revenue sources were given a score in each of these categories (Final report and recommendations of the High Level Group on Own Resources, 2016: 87–94):

- Equity/fairness
- Efficiency
- Sufficiency and stability
- Transparency and simplicity
- Democratic accountability and budgetary discipline
- Focus on European added value and constrain narrow-self interest
- Subsidiarity principle
- Limitation of political transaction costs

3.1 Candidates for new own resources

As previously mentioned, there are several candidates for new own resources presented by the High Level Group which were communicated to the institutions and public. Besides the reformed VAT-based resource, the options are as follows:

- CO_2 levy/carbon pricing
- Inclusion of the EU Emissions Trading Scheme proceeds
- Motor fuel levy
- Electricity tax-based own resource
- EU corporate income tax, CCCTB
- Financial transaction tax, FTT or as an alternative option: bank levy/tax of financial activities
- Seigniorage

Although the European Union does not have the power to levy taxes under the Treaties, some of the proposals may sound controversial.

4 Multiannual Financial Framework 2021–2027

4.1 Proposal

On 2 May 2018, the European Commission published a proposal for the EU long-term budget, the Multiannual Financial Framework, for the years 2021–2027. The date of application is 1 January 2021 and is presented for a Union of 27 Member States, in line with the notification by the United Kingdom of its intention to withdraw from the European Union. The future MFF should bring more flexibility, modernisation and should reflect new priorities and challenges that the EU will be facing in the upcoming decade. It also counts with a reformed set of own resources that would generate additional income [Proposal COM (2018) 322 final].

The Commission is therefore proposing, together with the next MFF proposal, a legislative package (European Commission, 2018) for the reform of the Union's own resources system, including a proposal for a new Council Decision on the system of Own Resources of the European Union. The proposed decision maintains and reforms the existing resources (traditional own resources, a modified version of the Value Added Tax-based resource and the Gross National Income-based resource). In addition, the proposal introduces a basket of three new own resources, based on the Common Consolidated Corporate Tax Base, on the European Union Emissions Trading System, and on plastic packaging waste that is not recycled. The legislative package further contains:

Proposal for a Council Regulation on the methods and procedure for making available the Own Resources based on the Common Consolidated Corporate Tax Base, on the European Union Emissions Trading System and on plastic packaging waste that is not recycled, and on the measures to meet cash requirements

- Proposal for a Council Regulation laying down implementing measures for the system of Own Resources of the European Union
- Proposal for a Council Regulation amending Regulation (EEC, Euratom) No 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from value added tax

The present proposals do not create any new tax for EU citizens. Existing own resources should be modernised in the following way:

a) Traditional own resources: collection costs reduced to 10%
b) Value Added Tax-based resource: simplified
c) Gross National Income-based resource: smaller share

Corrections will be phased out through a transitional mechanism. The own resources ceiling for appropriations for payments should be increased to 1.29% of the sum of the GNIs of all Member States and to 1.35% for appropriations for commitments [Proposal COM (2018) 325 final].

4.2 Characteristics of New Resources

Common Consolidated Corporate Tax Base (CCCTB)

CCCTB is linked to the single market and taxation policy. Corporate taxation is aimed at multinational companies operating in the single market and should help the EU efforts to tackle tax avoidance. This resource shall be calculated each year by each Member State by applying a uniform call rate of 3% to the share of taxable profits attributed to that Member State pursuant to Union rules on the Common Consolidated Corporate Tax Base [Proposal COM (2018) 326 final].

European Union Emissions Trading System

The European Union has created its common instrument to fight climate change. The Emissions Trading System is harmonised at the Union level and revenues flow to national budgets. By allocating 20% of certain revenues from the total number of allowances available for auctioning to the EU budget, this resource could bring up to 3 billion EUR each year.

Plastic packaging waste that is not recycled

This proposed resource would be directly proportional to the quantity of non-recycled plastic packaging waste generated in each Member State. The contribution will therefore provide an incentive for the Member States to reduce their waste streams. In this way, the EU budget would help to meet the objectives of the European Strategy for Plastics in a Circular Economy. Contributions of the Member States would be calculated by applying a call rate of 0.80 EUR/kg to this quantity [Proposal COM (2018) 325 final].

4.3 Estimated revenue

As indicated in the Council Decision proposal shown in the table below:

Table 1. Estimated evolution of the structure of EU financing

	Budget 2018		Estimated average 2021–2027	
Type of resource	**EUR billion**	**% of total revenue**	**EUR billion**	**% of total revenue**
Traditional own resources	23	15.8%	26	15%
Existing national contributions of which:	120	82.9%	128	72%
(Reformed) VAT	17	11.9%	25	14%
GNI	103	71%	103	58%
New own resources of which:	–	–	22	12%
CCCTB	–	–	12	6%
Emissions Trading System	–	–	3	2%
Plastic packaging waste	–	–	7	4%
Total own resources	143	98.7%	176	99%
Revenue other than own resources	2	1.3%	2	1%
Total revenue	145	100%	178	100%

Source: Proposal COM (2018) 325 final for a Council Decision on the system of Own Resources of the European Union

5 Conclusion

The paper described the structure of the EU own resources system and its potential changes with regard to the latest multiannual financial framework post-2020 proposal.

The new own resources Council Decision proposal anchors the plan to lower the percentage of GNI-based contributions by introducing three new own resources. It is questionable whether such a system could help to achieve simplification efforts. In any case, the EU budget should be reviewed and modernised in order to become more transparent and to reflect the current needs of the European Union. It is not possible to successfully reform its revenue without reforming its expenditure.

Since the adoption of legislative proposals is now subject to political decision, it will be interesting to watch the debate on the future EU budget and see if a consensus is reached on such sensitive topic as the system of revenue which affects all Member States.

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Access to File: Right(s) of the Defence or Defence of the Right(s)?

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Abstract

In November 2017, the Court of Justice of the European Union ruled in the Romanian *Ispas* case and decided that taxpayers are entitled to have access to file in VAT inspections. The unprecedented recognition of the fundamental right(s) of the defence leads to a number of questions as to the extent of the breach the Court made in the regular defence of national tax administrations. The paper aims to look into the lights and shadows of the European VAT inspections and to scientifically build a specific model for the appropriate exercise of taxpayers' access to file, in particular with regard to VAT fraud cases. In this respect, the author shall consider comparative approaches and a thorough analysis of the Court's case law concerning VAT and procedural rights. Equally important, the paper shall consider the possible effect of the Ispas judgement on the general development of the European rights of defence in all tax cases.

Keywords

administrative file; VAT; tax inspection; tax fraud; evidence

1 Introduction

In recent years, I came across a number of tax cases involving the exercise of the rights of defence and particularly of the right of access to the administrative file of the tax case. As a lawyer, I had the chance to take the matter before the Court of Justice of the European Union in the recent *Ispas* case. And from this point on, my interest grew,

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as I realised that we need to ask ourselves serious questions concerning the right(s) of the defence and the defence of the right(s) of taxpayers.[2]

The purpose of this research is to review the current state of affairs by means of a comparative approach and to comment on the possible impact the recent judgement in the *Ispas* case might have on the future development of access to file in tax procedures. References are made to the relevant case law of the Court of Justice of the European Union and national courts and the European tax doctrine, while also analysing the efforts of legislators and professional bodies in Europe and across the world.

2 Emergence of the Right of Defence in Tax Procedures

As the emergence of a *Magna Charta* of the taxpayers' rights always seemed to be an impossible mission within the European Community or the later European Union, the right of access to file, particularly in tax procedures, is a rather new topic of discussion. In fact, during the past 40 or 50 years, the Court of Justice of the European Union acknowledged the existence of a general right of defence, as a fundamental principle of the Community (European) law,[3] which was later on enshrined in a rather fragmented manner in the Charter of Fundamental Rights of the European Union.[4]

2.1 General remarks concerning the recognition of the right of defence and right of access to file in the European Union

In fact, most of the earlier cases submitted for analysis to the Court of First Instance or the Court of Justice of the European Union concerned investigations carried by the Commission in complex competition cases. Therefore, the right of defence was naturally put forward in immediate connection with the right of access to file, as the parties under investigation considered that they could not have exercised they right of defence properly without access to the (administrative) files in possession of the Commission or other authorities. The *Limburgse Vinyl Maatschappij and others* case is a good example in this respect, as the Court pointed out that: "The right of access to the Commission's file is therefore designed to ensure effective exercise of the rights of

2 For a similar analysis, see Mastellone, 2018.

3 For a general recognition of the right of defence as a fundamental right, see Court of Justice of the European Union, judgement of 17 October 1987, case 85/87, *Dow Benelux NV* v *Commission of the European Communities,* ECLI:EU:C:1989:379, par. 3.

4 See, for example, the provisions in Arts. 41, 47 and 48 of the Charter of Fundamental Rights of the European Union, O.J. C 326, 26 October 2012: 391–407.

the defence. Those rights are not only fundamental principles of Community law but are also enshrined in Article 6 of the ECHR."[5]

Developing from this point, it ruled that: "Infringement of the right of access to the Commission's file during the procedure prior to adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed. [...] In such a case, the infringement committed is not remedied by the mere fact that access was made possible during the judicial proceedings relating to an action in which annulment of the contested decision is sought. Where access has been granted at that stage, the undertaking concerned does not have to show that, if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that it would have been able to use those documents for its defence."[6]

Therefore, in such cases, the Court always carried an analysis of all circumstances of the affair before concluding on the annulment (or not) of an administrative decision.

2.2 The right of defence and right of access to file in tax procedures

In the last decade, the Court of Justice developed its earlier case law[7] concerning the right of defence and the right of access to file in competition and customs duties cases. A look into a few relevant cases of this type is therefore relevant.

In the *Sopropé* case, the Court had to decide whether the taxpayer had a 'proper hearing' before the customs authorities, which allowed 8 days for the taxpayer subject to a customs investigation to provide its observations on the investigative report. As the Portuguese company did not complain about access to file, the Court mentioned: "In accordance with that principle [of the right of defence], the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. They must be given a sufficient period of time in which to do so."[8] Although the procedural matter seemed to be in competence of national authorities, the Court of Justice approached the matter from the perspective of the European principle of equivalence and effectiveness, in par. 38: "The authorities

[5] Court of Justice of the European Union, judgement of 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and other* v *Commission of the European Communities,* ECLI:EU:C:2002:582, par. 316.

[6] Court of Justice of the European Union, judgement of 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and other* v *Commission of the European Communities,* ECLI:EU:C:2002:582, par. 317–318; see also Court of Justice of the European Union, judgement of 8 July 1999, case C-51/92 P, *Hercules Chemicals NV* v *Commission of the European Communities,* ECLI:EU:C:1999:357.

[7] For a detailed presentation of the most important judgements, see Costaş, 2016: 30–33.

[8] Court of Justice of the European Union, judgement of 18 December 2008, case C-349/07, *Sopropé – Organizações de Calçado Lda* v *Fazenda Pública,* intervening party *Ministério Público,* ECLI:EU:C:2008:746, par. 37.

of the Member States are subject to that obligation when they take decisions which come within the scope of Community law, even though the Community legislation applicable does not expressly provide for such a procedural requirement. As regards the implementation of that principle and, in particular, the periods within which the rights of the defence must be exercised, it must be stated that, where those periods are not, as in the main proceedings, fixed by Community law, they are governed by national law on condition, first, that they are the same as those to which individuals or undertakings in comparable situations under national law are entitled and, secondly, that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the Community legal order." It therefore rested with national courts to ascertain, on a case-by-case approach, if national (tax) authorities granted sufficient time to taxpayers to prepare their defence, taking into account criteria such as the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration (par. 40 of the Court's judgement) and taking into account that taxpayers must be able to furnish proof, for the purposes of inspection, of the lawfulness of all the transactions that they have effected (par. 41).

A significant development in this field is the *Solvay* case.[9] As in many other competition cases, the Belgian company complained that it did not have access to the administrative file the European Commission based its decision on. The case was decided by the Grand Chamber of the Court of Justice, in an appeal procedure and considering the recent (at that time) Charter of Fundamental Rights:

"Observance of the rights of the defence in a proceeding before the Commission, the aim of which is to impose a fine on an undertaking for infringement of the competition rules requires that the undertaking under investigation must have been afforded the opportunity to make known its views on the truth and relevance of the facts alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (*Aalborg Portland and Others* v *Commission,* par. 66). Those rights are referred to in Art. 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union."

The Grand Chamber, following the Advocate General Kokott approach, underlined that the right of access to the file means that the Commission (or any other public authority, in our view) must provide the undertaking concerned with the opportunity to examine all the documents in the investigation that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (par. 54). Moreover, the European court stressed the fact that access to file should be granted to taxpayers in the early administrative procedure and that failure to do so justifies the annulment of

9 Court of Justice of the European Union, judgement of 25 October 2011, case C-109/10 P, *Solvay SA* v *European Commission,* ECLI:EU:C:2011:686.

the administrative decision taken in disrespect of the rights of the defence. A particularly strong paragraph is the following:

"In such a case, the infringement is not remedied by the mere fact that access was made possible during the judicial proceedings (*Limburgse Vinyl Maatschappij and Others* v *Commission,* par. 318). As the examination undertaken by the General Court is limited to review of the pleas in law put forward, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. Moreover, belated disclosure of documents in the file does not return the undertaking which has brought the action against the Commission decision to the situation in which it would have been if it had been able to rely on those documents in presenting its written and oral observations to the Commission."[10]

Furthermore, the Grand Chamber argued that where access to the file, and particularly to exculpatory documents, is granted at the stage of the judicial proceedings, the undertaking concerned has to show, not that if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that those documents could have been useful for its defence (par. 57). After carrying its own analysis, the Court acknowledged that Solvay was not granted access to certain sub-files, which led to the annulment of the Commission's decision.

Further advance concerning the right of defence and particularly the right to be heard before an administrative decision is issued came with the *Kamino* case.[11] The Court of Justice underlined that observance of the rights of the defence is a fundamental principle of European Union law, in which the right to be heard in all proceedings is inherent and that the right to be heard in all proceedings is now affirmed not only in Arts. 47 and 48 of the Charter of Fundamental Rights of the European Union, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Art. 41 of the Charter, which guarantees the right to good administration. Art. 41(2) provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (par. 28–29).

One should note that judicial efforts seem to be the most productive ones, particularly in the European Union. It is true that, in its 2012 *Action Plan against Tax Fraud and Tax Evasion,* the European Commission launched in 2016 a document entitled *Guidelines for a Model for a European Taxpayers' Code.* The Model never became more that a *soft law* instrument, that is a mere recommendation for the Member States of the European Union. Most scholars and practitioners regard it as a unilateral statement of rules and principles that tax administrations would allegedly like to implement when dealing with taxpayers with the specific aim of ensuring an adequate balance between the rights and the duties of those taxpayers.

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[10] See *Aalborg Portland and Others* v *Commission,* par. 103 and the case law cited, par. 56.

[11] Court of Justice of the European Union, judgement of 3 July 2014, joined cases C-129/13 and C-130/13, *Kamino International Logistics BV, Datema Hellmann Worldwide Logistics BV* v *Staatssecretaris van Financiën,* ECLI:EU:C:2014:2041.

From a comparative point of view, the results seem to be slightly different in the private professional environment. Our research shows there is a private alternative developed by three major professional bodies: Confédération Fiscale Européenne (CFE), Asia Oceania Tax Consultants' Association (AOTCA) and Society of Trust and Estate Practitioners (STEP), launched in 2013. Precisely, the *Model Taxpayer Charter* was drafted in 2013 based on an analysis regarding taxpayers' rights and duties carried in 37 countries representing 73% of the gross domestic product worldwide. The 2015 version extended the research to 41 countries and 80% of the world's gross domestic product. The declared aim of the *Model Taxpayer Charter* is to provide for a regulation template that could be adapted and used by states that wish to implement in their own legislation the basis of a balanced approach between taxpayers' rights and duties. The model is in fact the result of the experience of some 500,000 members (mainly tax advisors) of the three professional bodies that worked on the document. The *Model Taxpayer Charter* (2015 version) consists of 37 articles with explanations.

3 The *Ispas* Judgement and Its Consequences in Romania

On 9 November 2017, the Court of Justice of the European Union delivered its judgement in case C-298/16, *Ispas*.[12] It is worth mentioning that on 7 September 2017, the General Attorney delivered his opinion and discussed thoroughly matters concerning the development of procedural rights in VAT cases and particularly the extent to which such rights might be exercised at the European level. The key points of this case and the effects of the *Ispas* judgement at national level are explained below.

3.1 Facts and the Court's judgement of 9 November 2017

Mr and Mrs Ispas both live in Cluj-Napoca, Romania. Between 2007 and 2009 especially, they obtained 5 building permits in Florești (Cluj county) and constructed apartments that were later sold. A number of 73 sale contracts were actually concluded, without the spouses registering for VAT purposes, collecting and paying VAT to the state budget. In fact, the *Ispas* case does not differ, in that regard, from the *Salomie* and *Oltean* case[13] decided by the Court by its judgement of 9 July 2015. Mr and Mrs Ispas had to register for VAT purposes, they should have collected VAT when

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[12] Court of Justice of the European Union, judgement of 9 November 2017, case C-298/16, *Teodor Ispas, Anduța Ispas* v *Direcția Generală a Finanțelor Publice Cluj,* ECLI:EU:C:2017:843.

[13] Court of Justice of the European Union, judgement of 9 July 2015, case C-183/14, *Radu Florin Salomie* and *Nicolae Vasile Oltean* v *Direcția Generală a Finanțelor Publice Cluj,* ECLI:EU:C:2015:454. In this particular case, the Court ruled that the tax authorities' failure to inform the real estate developers of

concluding most of the sale contracts and they were at the same time entitled to deduct VAT paid for their acquisitions.

In judicial proceedings carried at national level, the spouses raised the question of access to administrative file, particularly to all the documents and information used by the tax authority to determine their supplementary tax obligations. They both claimed that they never had access to file and that they had never been in the position to challenge these documents and information (of which a significant part was collected illegally before the tax inspections begun). They also claimed that the judge could not decide the case without analysing the administrative file, an argument that later led to the national court ordering the tax administration to provide the files for both taxpayers (those files were submitted to the Cluj Court of Appeal and therefore became public in December 2015, more than 3 and a half years after the tax decisions had been issued).

Under these circumstances, the Cluj Court of Appeal decided to stay the proceedings and to refer the following question for a preliminary ruling: "Is an administrative practice consisting in the taking of a decision imposing obligations on an individual without allowing that individual to have access to all of the information and documents considered by the public authority when it adopted that decision, being information and documents contained in the administrative file (not a public file) drawn up by the public authority, compatible with the principle of respect for the rights of the defence?"

On 9 November 2017, the Court of Justice ruled that: "The general principle of EU law of respect for the rights of the defence must be interpreted as a requirement that, in national administrative procedures of inspection and establishment of the basis for the assessment of value added tax, an individual is to have the opportunity to have communicated to him, at his request, the information and documents in the administrative file and considered by the public authority when it adopted its decision, unless objectives of public interest warrant restricting access to that information and those documents."

It is worth mentioning that the Court recalled: "In a tax inspection procedure, the purpose of which is to verify whether the taxable persons have performed their obligations in that regard, it is indeed legitimate to expect that those persons would request access to those documents and information, with a view to, if need be, providing explanations or supporting their claims against the point of view of the tax authorities" (par. 33) and that: "If the rights of the defence are to be genuinely respected, there must nonetheless be a real possibility of access to those documents and that information, unless objectives of public interest warrant restricting that access" (par. 34).

One last note here. Even if the judgement itself is revolutionary, as it extends the application of the right of defence to VAT cases from previously heard competition

their status for VAT purposes does not amount to exonerating those developers from registering for VAT purposes ["(48) *Such a practice, however regrettable it may be, is not in principle such as to provide the taxpayers concerned with precise assurances that VAT will not be levied on property transactions such as those at issue in the main proceedings*"].

and customs case, the more interesting lecture is that of Advocate General Bobek's opinion. That opinion is a fine piece of analysis of the European law and the right of defence (including its component of the right of access to file), under the so-called theory of lights and shadows, that actually justifies the application of procedural rules in the field of harmonised taxation, such as VAT.

3.2 Effects of the *Ispas* judgement at national level

Our analysis shows that in Romania tax courts valued the Court of Justice's case law concerning the right of defence and particularly the right to be heard before the *Ispas* judgement. In fact, in reference to Art. 9 of the old Tax Procedure Code,[14] in force until 31 December 2015, the High Court of Cassation and Justice and lower courts developed a case law in the sense of annulment of tax decisions issued without the prior hearing of the taxpayer.[15]

Just a few months ago, relying on Art. 9 of the new Tax Procedure Code[16] concerning the right to be heard in tax procedures, the High Court of Cassation and Justice set up a new standard and decided that Art. 41 of the Fundamental Charter and the associated case law of the Court of Justice does not allow tax authorities to consider the taxpayer had been heard if he/she/it replied questions during the tax inspection, was informed of the tax inspection's results and was provided with a copy of the tax report. The national court stressed that the taxpayer should be actually heard, in accordance with the principle of the right of defence.[17] It is precisely the solution of Art. 9 par. (4) of the new Tax Procedure Code, which allows the annulment of the tax decision if the taxpayer has not been heard.

Before the delivery of the Court's judgement in the *Ispas* case, on 9 November 2017, national courts and administrative bodies did not approach the matter of access to file and refused to assess its consequences. In fact, most courts relied their decisions on the fact that there was no national rule allowing access to file for the taxpayer and that taxpayers could exercise their rights before the court. It should be noted that tax courts

14 Government Ordinance no. 92/2003, republished in the *Official Journal,* no. 513 of 31 July 2007.

15 Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 2615 of 21 May 2009; Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 4489 of 21 October 2010; Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 4759 of 29 March 2013; Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 4008 of 28 October 2014. All available at: http://www.scj.ro. For an account of the case law of lower tax courts in Romania, see Costaș, 2016: 28.

16 Law no. 207/2015, *Official Journal,* no. 547 of 23 July 2015.

17 Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 2323 of 4 June 2018. Available at: http://www.scj.ro.

have the power, relying on Art. 13 of Law no. 554/2004, to order the tax authorities to produce all the evidence and information they collected and used before and during the tax audit (a prerogative that was actually used in the *Ispas* national case).

Following the Court's decision, the orientation of national courts is rather odd. Most of the tax courts, probably relying on the fact that legislators did not react after the judgement of 9 November 2017, refused to apply the decision in the *Ispas* case. It is particularly the case of Mr and Mrs Ispas, in the national case, who saw their argument as to the breach of the rights of defence (and particularly the right of access to file) rejected before the Cluj Court of Appeal.[18]

There is, however, a very interesting decision taken by the same Cluj Court of Appeal, in a VAT case. During the tax audit, the company was not allowed access to file. Relying on Art. 13 of Law no. 554/2004, the Cluj Court of Appeal ordered the tax authority to produce all relevant documents and overpassed serious objections from the tax authorities which actually refused to provide such documents and information relying on tax secrecy. During discovery, it was revealed that content from the tax report was provided to tax inspectors by the Prosecutor's office on a stick and that some evidence had been collected by a certain secret service. Moreover, the Prosecutor specifically asked for a certain result of the tax inspection, in order to use the tax report as evidence in the criminal file which was advancing in a parallel procedure. By its decision no. 385 of 6 December 2017, the Cluj Court of Appeal ruled that the right of access to file has been recognised by the Court of Justice in its judgement of 9 November 2017 in the *Ispas* case and that tax authorities are under the obligation to respect this right. Therefore, the court quashed the administrative decision and sent the tax case back to be heard before the tax administration, instructing tax authorities to provide full access to the administrative file and to respect the taxpayer's right to be heard after allowing him enough time to process the documents and information received.

The decision mentioned is, for sure, a fine piece of national application of the Court's judgements in the *Sopropé, Solvay* and *Ispas* cases. Its future, however, rests uncertain since the High Court of Cassation and Justice still has to hear the case on appeal (probably in two-years' time).

4 Conclusion

In a nutshell, I can clearly say that the purpose of this research has been reached. On the one hand, it proved important to assess the origins of the right of defence and to conclude that there is a full recognition of this right, with all its components, at the European level. More recent judgments refer to the Charter of Fundamental Rights of the European Union and point out that Arts. 41, 47 and 48 provide not only for

18 See Curtea de Apel Cluj, Secția a III-a Contencios Administrativ și Fiscal [Cluj Court of Appeal, Third Section Administrative and Tax Litigation], decision no. 404 of 20 December 2017, not yet published. The case is to be heard on appeal before the High Court of Cassation and Justice.

the general right of defence, but also for the right of access to file. On the other hand, the judicial developments, both in the European *Ispas* case and at the national level prove that former tax rules that disregarded taxpayers' rights are under serious pressure.

In fact, as Advocate General Bobek nicely put it in par. 65 of his opinion in the *Ispas* case, "…one point remains clear: where there is light, there must also be shadow (that of the EU fundamental rights). If, as a matter of EU law, the Member States are obliged to provide for effective enforcement in the name of EU law, that enforcement must be controlled from the same source, that is, by EU fundamental rights. It would be inconceivable to oblige the Member States to carry out certain activities (such as to effectively collect VAT) while the control of and limits to that exercise would suddenly fall outside of the scope of EU law".

To conclude with, I must say that the Court's case law so far provides sufficient element for the determination of a matrix of the right of access to file. Therefore, if Member States do not regulate in this field, it is for the tax courts to make reference to this case law and ensure the respect of the European Union fundamental rights.

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Protection of Taxpayers' Rights in the Romanian Legislation

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Abstract

Our study will analyse, in national and European context, the normative and administrative dimensions of the taxpayers' rights. Romanian legislation is generous in granting administrative rights to the taxpayer, especially in administrative procedures, such as communication with the administrative authority or tax control. The study will identify the legal regime of these rights and the legal consequences deriving from a possible breach. Romanian legislation also ensures a number of judicial rights, in accordance with the European Convention of Human Rights and the European Charter of Fundamental Rights. The judicial rights are at the centre of the study, especially in the cases when the procedure is mixed with criminal elements. However, a significant number of particularities of the tax procedure mutate the content of these rights, such as the object of the complaint, the access to a judge through a mandatory preliminary procedure. In this sense, taxpayers' rights have a different dynamic than the rights granted in common civil or criminal procedures. Through these lenses, our study will generate an inventory of rights underlining their enforcement regime and their particularities as to the common regulation.

Keywords

taxpayer; rights; charter; code; tax audit

1 Introduction

Our study tries to assure an analysis of the taxpayers' right in the national and pan-national legislation, with interrogations regarding the need for such a normative context, the content of these rights, the source and force of a unified regulation. The purpose

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of the article is to observe some alive legal phenomena, where different levels of regulation are evolving and interacting simultaneously. These common elements and the continuous evolution has a set of common standards, but also leads to a variety of normative solutions. The study tries to identify the guideline of this process in evolution, with an accent on the minimum standards of action.

The study uses the comparative method of analysis of legal texts from different normative sources, both pan-national and national, and focuses on the particularities of the Romanian legislation in the contexts. Classical methods of legal analysis are used to identify and present normative, doctrinal and case law contents. The study continues a tradition in approaching this subject, in correlation with previous works (Costaș, 2008; Lazăr, 2015).

2 General Legal Framework of Taxpayers' Rights

All modern legislation has a particular interest in protecting the weakest party in a legal relation, especially within the frame of public law branches, such as administrative law, criminal law and fiscal law. Of course, the general groundwork is given by the instruments for protecting human rights, such as the European Charter, the European Convention and, traditionally, the national constitutions. These instruments have a variable efficiency in relation to the time frame of their intervention (for example, in a judicial procedure they are more preeminent than in administrative procedures) and to the intensity of the protection of the right (for example, criminal procedures tend to menace the right to life or freedom as tax procedures could affect the right to property or the right to a fair trial). As to specific domains of public activity, a certain necessity to regulate rights and procedures has been answered by national legislation. In the field of tax law, modern European legislation share a vastly spread formula of a Taxpayers Rights' Chart[2] or Code; a preoccupation for the subject has been shown at supranational level by bodies such as the International Monetary Fund, the Organisation for Economic Co-operation and Development, the European Union or the CFE Tax Advisers Europe (formerly known as Confédération Fiscale Européenne).[3] The instruments in this field tend to meet at least two relevant questions: 1. Is a unique document a viable instrument for regulating these procedures and ensuring a standard of legal protection? 2. Which is the legal standard of protection and hence the enforceability of a certain regulation?

2.1 The national Charter or Code – An efficient unique document?

We have to underline that procedures in administrating taxes involve a significant quantity of rights and obligations for both sides of the legal relation, which define

[2] Catálogo de Derechos del Contribuyente, 2003.
[3] European Commission, 2016.

themselves mutually. For example, the Romanian and the French legal solutions have been created to regulate in a distinct normative act – a Charter – a set of rights and obligations. As to the legal force of these normative interventions, in the Romanian example, the Charter is a normative act of third level, a normative administrative act such as an Order of the President of the National Fiscal Administration Agency (NFAA). However, the enforceability of the stipulated rights and obligations does not depend on the force of this source, as the regulation has a summative function and inventories procedures of tax administration, collects rights and obligations and then establishes a procedure of communicating these elements to the taxpayer prior to a tax audit. This legal formula has at least two vulnerabilities; firstly, there will never be a sufficiently comprehensive and supple normative solution to identify all aspects of a complex procedure as the tax procedure is. At its best, such a Charter can be a brief, accessible statement needing to be detailed by further regulation when applied to specific procedures. Secondly, the "interaction" between the taxpayer and the tax administration is extremely various and continuously founded on a "strong party – weak party" dynamic. When examining the context of these rights and obligations, they all blend under the general frame of constant communication between the two parties, not only during audit or litigation, but especially under current administration procedures: registration, debt determination, declarative procedures, authorising procedures, payments, forced execution, etc. Of course, audit procedures and subsequent litigation are the most acute interaction, captivating at normative level, but the complexity of the tax procedures which are regulated through a significant set of normative acts – Fiscal Procedure Code, special regulation for different procedures ensure a complexity of desirable conducts, prescribed by law which requires a broader regulation. All these normative interventions tend to stipulate rights and obligations of the parties as they prescribe a certain conduct in order to achieve the fundamental goal of generating public revenue. And if we add the ingredient of public interest, we can easily assume that these rights and obligations need a significant legal force in order to ensure effectiveness.

2.2 Which is the legal standard of protection?

These rights can be categorised into two major groups; one is granted by law to the public authority in order to ensure its tax functions and have a significant legal force deriving from the public interest and proven by the vast and extremely intense regime of sanctions applicable in tax administration: penalties, fines and criminal sanctions. The second is granted by law to the taxpayer, the weaker part in the tax legal relation in counterbalance with the first category. By regulating the taxpayers' rights and the means to sanction possible violations, the tax law ensures a protection of the taxpayer. This legal protection is necessary throughout the procedure, but with different intensity, an intensity that varies proportionally with the intensity of the public entity's prerogatives.

To the purpose of an effective protection, we can understand the normative intervention at the supranational level, such as the OECD or the European Union. It is certain that these instruments are *soft law* instruments, guides, guidelines and that the only purpose of such an intervention is to progressively generate a common standard of protection. This common standard, of course, serves as a minimum standard for national legislations and have human rights' dynamic to encourage a certain level of protection. It also accommodates a taxpayer's mobility as a common standard that will eventually facilitate the shifting of the taxable base from a jurisdiction to another under the same minimal procedural guarantees.

A general guide has an even easier task as to the national regulation as it will draw some defining lines of action and have a certain degree of generality that is comfortable in regulating. For example, the European Taxpayers' Code indicates the functions of such regulation, as a set of goals*: equal treatment of all taxpayers,*[4] *a higher level of legal certainty, transparency, reduce disputes, standardise compliance processes, be a benchmark for third countries, improve practices and predictable assessment of tax liability, specify principles, ensure a better understanding when communicating with the tax administration of another Member State.* As to the content of these rights, the EU model proposes a set of principles governing this legal relation non-binding for the EU member states: lawfulness and legal certainty; non-discrimination and equality of taxpayers; presumption of honesty; courtesy and consideration; respect of the law; impartiality and independence; fiscal secrecy and data protection; privacy; and representation.

The OECD model (Practice Note)[5] also proposes a number of standards, non-binding as well: lawfulness and legal certainty; non-discrimination and equality of taxpayers; presumption of honesty; courtesy and consideration; respect of law; impartiality and independence; fiscal secrecy and data protection; privacy; and representation.

CFE (Confédération Fiscale Européenne)[6] Tax Advisers Europe[7] proposes the same working strategy, conglomerated in a set of standards: integrity and equality; certainty; efficiency and effectiveness; appeal and the right to dispute resolution; appropriate assistance; confidentiality and privacy; payment of the correct amount of tax; representation; proportionality; and honesty.

Such principles are transposed by a proactive set of measures enforced to the public administration, that present a degree of generality, such as: providing information and guidance to taxpayers; services to taxpayers; key service standards; interpretations of a general nature; and advance rulings.

These instruments are stating a group of fundamental, general and all comprehensive set of rights and obligations. As to the rights, they have a general content, for example: the right to be informed, assisted and heard (OECD, EU Charter, CFE); the right to

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4 European Commission, 2018.
5 EOCD, 2018.
6 Cadesky et al., 2015.
7 Ibidem.

an appeal (OECD); the right to reasonable procedures (CFE), the right to impartiality and independence (EU Charter); transparency (CFE); the right to representation (EU Charter); the right to pay no more than the correct amount of tax (OECD, EU Charter, CFE); the right to certainty (OECD, EU Charter, CFE); the right to privacy (OECD, CFE); the right to confidentiality and secrecy (OECD, EU Charter); the right of non-discrimination (EU Charter, CFE); and presumption of honesty (CFE).[8]

3 Romanian Taxpayers' Rights – A Brief Overview

The regulation in the Romanian legislation of taxpayers' rights (and obligations) seems to be given by the Order of the President of the NFAA (OPNFAA) no. 713/2004.[9] A set of preliminary observations is necessary: 1. the enumeration is detailed, but not all-including – the Charter regulates only rights within the tax audit; 2. these rights are also regulated in the Fiscal Procedure Code, with significant content as the Code details the content of a certain right and its procedural dimensions, e.g. *the right to be notified about the future audit* is regulated in Art. 1 of the OPNFAA and in Art. 122 of the Fiscal Procedure Code, that is more elaborate and contains procedural aspects, exceptions, etc. We can firmly state that the Charter ensures only a communication channel and it only underlines some perspectives for the taxpayer. In fact, in order to assert his/her rights, the taxpayer has to consult a significant amount of legislation and determine the content of these rights; 3. there are also other procedural limitations as to the tax administration prerogatives which are not stipulated *expressis verbis* as rights of the taxpayers, but have a protective dimension and could lead to legal consequences in case of breach, such as the tax authority's obligation to present identification papers and a mandate at the beginning of the audit.

3.1 Different regulation sources

In order to properly assert the rights of the taxpayer under Romanian regulation, one should browse through the entire Fiscal Procedure Code and identify a conglomerate of elements, which we would categorise in administrative rights and audit-judicial rights.

One should start a general analysis from the principles of the Fiscal Procedure Code, stipulated in Arts. 4 to 12, such as legality, unitary enforcement of legislation, exercising the right to appreciation within the limits of reasonability and equity, active role and other rules of conduct for the fiscal authority, official language in tax administration, the right to be heard, the obligation to cooperate, fiscal secrecy and good faith (the presumption of honesty). Other rights, such as the right to be represented, are given by scattered provisions, such as the articles of the Fiscal Procedure Code.

[8] Cadesky et al., 2015.
[9] Order of the President of the NFAA, 2004.

Another significant source of rights and obligations are the provision for collecting and administering evidence and for the burden of proof; this procedural stage is not an audit-litigation related procedure, but essentially a procedure of day-to-day communication between the two parties. But as these two parties have contradictory interests and as a certain premise in factual elements can determine further legal consequences, the procedural elements for hearing the taxpayer or sampling of documents or material evidence of fiscally relevant facts can generate significant legal effects. In fact, we consider that in the entire tax administration process, the question of the burden of proof is a relevant one. The fiscal debt is indeed determined unilaterally by one of the two parties with contradictory intentions; the debtor has a central, but censored role. The creditor has a forceful intervention through audit and taxation decisions. These decisions – as administrative acts – benefit from the specific force of public acts and thus the legal relation is potentially disproportionate and damaging to the debtor. All taxpayers' rights tend to ensure protection from an abusive intervention of the public authority. In this context, the burden of proof is distributed between the two parties, as to the claim of their volitional act; the debtor has all kinds of accounting obligations in order to ensure access to correct and relevant tax information. The creditor – through the tax authority – tends to deny or supplement this initial evidence context, when convinced that tax debt is eluded or evaded. This process of proving a different tax context, as it intervenes with public authority and under a presumption of legality has set, through regulation and jurisprudence,[10] a set of standards. These standards objectively generate a right of the taxpayer.

The most famous set of rights and obligations for the taxpayers derive from the procedure of tax audit; these rights tend to limit a forceful intervention of the public entity. The Romanian Charter provides for a set of rights,[11] which are characterised by

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[10] Court of Justice of the European Union, 2015, request for a preliminary ruling from the Naczelny Sąd Administracyjny, reference for a preliminary ruling – Taxation – Value Added Tax – Sixth Directive – Right of Deduction – Refusal – Sale by an entity regarded as non-existent, par. 50: *"It is for the tax authorities, having found fraud or irregularities committed by the issuer of the invoice, to establish, on the basis of objective factors and without requiring the recipient of the invoice to carry out checks which are not his responsibility, that that recipient knew, or should have known, that the transaction on which the right to deduct is based was connected with VAT fraud, this being a matter for the referring court to determine (see, to that effect, judgments in Bonik, C-285/11, EU:C:2012:774, par. 45, and in LVK — 56, C-643/11, EU:C:2013:55, par. 64)."*

[11] 1. The right to be informed about the fiscal inspection (as confirmed by the tax inspection procedure through the approval phase); 2. the right to be audited only for taxes and social contributions within the limitation period (as enshrined in the statute of limitation in tax law and in the provisions of Art. 117 of the Tax Procedure Code); 3. the right to request the change of the starting date of the tax inspection (as established by Art. 122 par. 5, Fiscal Procedure Code); 4. the right to be verified once for each tax or social contribution and for each period subject to verification/taxation (as established by Art. 118 par. 3, Fiscal Procedure Code); 5. the right to request the legitimating of the tax inspection bodies (the correlation obligation is imposed by Art. 118 par. 4, Fiscal Procedure Code); 6. the right that the activity of the taxpayer/payer be affected as little as possible during the audit (Art. 118 par. 6, Fiscal Procedure Code); 7. the right to be informed (Art. 118 par. 6, Fiscal Procedure Code); 8. the right to be first requested to provide information (no longer has the normative support under the Fiscal Procedure Code); 9. the right to refuse to provide information (Art. 66, Fiscal Procedure

normative doubling, as these rights are also regulated by the Fiscal Procedure Code. This double regulation diminishes the legal context and we assume that the Charter, as a normative act with minor legal force, is reduced to a communication tool, a form of leaflet to caution the taxpayer on the importance of the moment and the existence of these rights. The Charter content is "supplemented" (in fact, it is effectively regulated) by the provisions of the Fiscal Procedure Code and even other normative acts. A consistent legal advice would be complete only in correlation with these texts. For example, *the right to be audited only for taxes and social contributions within the limitation period* can be determined as to its content only in correlation with the provisions regulating the statute of limitations in the Fiscal Procedure Code, Civil Code and Civil Procedure Code. The mechanism of determining the viability of a tax creditor's right through the filter of the statute of limitations is rather complex and implies an analysis of the generating moment, of the possible interruptions/extensions in the course of the term; *the right to be audited only once* is also a complex legal construct, as it has a complex filter for application and a number of exemptions that are regulated by the Fiscal Procedure Code.

The right to appeal is the most complex right in the tax procedure; this right is extremely regulated under the Romanian Fiscal Procedure Code, with the heavily accentuated role of the preliminary procedure. This regulation in the Fiscal Procedure Code is contextualised by the regulation in the Law regarding administrative procedure and the Civil Procedure Code. The first line of regulation from the Fiscal Procedure Code puts an accent on the role and content of the preliminary procedure. This accent on the administrative source of the conflict leads to a filtered access to the court through a preliminary appeal submitted and defended under strict procedural regulations in front of the tax authority. The filter is extremely formal as it tends to postpone the hearing before a judge to after the preliminary procedure is closed by the grace of the tax authority. Only in case of failure to respond to the administrative appeal within a six months' delay, the taxpayer can address the Court. This limitation is enhanced in comparison to other administrative procedures and it is criticised within the national doctrine[12] as an obstruction of the right to a fair trial by delaying the right to appear before a judge.

As to the sanction guaranteeing the implementation of these rights, we also underline a mitigated regime. The intervention of the judge in order to protect such a right is done under two forms. One is a direct intervention, where the law stipulates certain sanctions. For example, it is the case of infringement of the norm regulating the duration of the tax audit, where the law stipulates the sanction of closing all procedures and thus the judge will confirm the nullity of the tax decision issued after

Code); 10. the right to receive specialised assistance (expressly referred to in Art. 124 par. 3, Fiscal Procedure Code); 11. the right to be protected by the fiscal secret (enshrined in Art. 11, Fiscal Procedure Code); 12. the right to receive written proof in the case of retaining documents by the tax inspection bodies; 13. the right to know the results of the tax inspection (Art. 130 par. 2, Fiscal Procedure Code); 14. the right to challenge the tax assessment decision issued after the tax inspection (Art. 281, Fiscal Procedure Code).

12 Lazăr, 2015: 118.

this period. The other one is an indirect intervention (vaguer and more general), when the taxpayer should prove a relative nullity under the condition of a patrimonial prejudice. For example, if the right to be heard was not respected, the nullity is conditioned by a supplement of evidence, showing not only the infringement of the right, but also patrimonial consequences of such an infringement (which are difficult to prove).

3.2 New rights on the horizon?

As to the evolution of this regulatory mechanism, we can observe the fact that this regulation is rather static. The national sources date back from 2004 and are rather stable as to their content. The supranational instruments are more dynamic, but tend to evolve in large periods of time, even decades. So the practical dimension has an important role in pushing boundaries and promoting new ideas.

One example is the protection of natural persons with regards to processing of personal data and on the free movement of such data. Even if at a general level this preoccupation for the protection of secrecy in tax procedures is confirmed, a new dimension of the problem is given by the arising issue of protecting personal data. The context is confirmed by the CJUE jurisprudence in case C-201/14 originating from Romania, the Bara case. The Court established that: *"Articles 10, 11 and 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing."* In this context, a new light on the taxpayers' right is cast, as a non-fiscal regulation generates a fiscal effect.

Another example is the constant communication of the tax authorities in the European framework. In the light of the cooperation instruments used by tax authorities and of the mobility in the internal market, a new right is emerging in order to protect the taxpayer against unnecessary expenses in order to communicate with different tax administrations. One of the purposes of the European Charter is the *availability of information in several languages and promotion of a commonly used language.* This instrument is more than necessary, but still, it involves supplementary costs for the taxpayer. New and simplified communication schema is needed in order to reduce translation procedures and costs in tax procedures.

4 Conclusions

Our study has identified a series of difficulties in granting a solid and effective context of administrative and judicial rights to the taxpayer. The taxpayer has a number of rights that vary in intensity and utility, as to the content of the regulation and the moment in the procedural agenda. The perspective of further evolution at a national and supranational level is a direction worth investing in and would probably influence the quality of the dialogue between taxpayers and the tax authority.

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Reshaping Institutional Structure for Financial Consumer Protection

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Abstract

The article presents the significance of proper consumer protection for the stability of the financial market. It presents the basic assumptions of such protection and the direction of changes introduced as a result of the crisis of 2007 and the following years. It discusses the change of the consumer protection paradigm from the disclosure obligation to institutional and supervisory protection. It presents the adopted supervision models, including the twin peaks supervision, as well as the objectives that a proper supervision should execute in terms of financial services consumer protection.

Keywords

financial services; consumer protection; financial stability; twin peaks supervision

1 Introduction

Economic integration within and across the European Union countries, deregulation, advances in technology, the growth of the Internet and wireless communication technologies are changing the structure and nature of financial services. Technology is revamping the ways in which financial services are produced and delivered. The complexity of many financial products poses substantial challenges to consumers. The area of financial services is very complex and involves serious risks for consumers, especially when they are unable to understand the complex financial products, or when they take out inappropriate loans based on uninformed choices. This holds, in particular, for countries where financial literacy is low and where households have not gained long-term experience with making financial decisions.

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Inadequate consumer protection not only led to considerable consumer detriment, but was a major contributor to the global financial crisis. One of the key causes of the great financial crisis of 2007 was the misselling of subprime mortgages in the USA and their securitisation which spread the sub-prime crisis throughout the world. The crisis has highlighted the importance of consumer protection for the stability of the financial sector and provided an opportunity to carefully rethink the existing legislature and regulation. It revealed many irregularities in the operation of the financial system, in particular in the banking and insurance sector. Considering the significant potential detriment that financial services can cause to individual consumers and financial markets, consumer and investor protection are important functions of the public policy. There is a general consensus among policy-makers that stronger consumer protection, together with an enhanced financial education, is an essential pillar of well-functioning financial markets. It is required because consumers are often not capable of understanding the complexity and risks of certain financial products. Sole financial education, however, while important, is insufficient to protect consumers. It is very important that public authorities provide adequate protection. The objective of this paper is to present changes in the institutional structure for the financial consumer protection and to present the reasons and directions of such changes.

The main hypothesis adopted in the article is that a proper and adequate consumer protection is necessary for maintaining the stability of the financial market. Strong and competent public authorities should constitute an element of such protection. In the author's opinion, attention should be paid to the twin peaks supervision model, in which there are two independent entities present. One of them exercises micro-prudential supervision over the financial institutions, the other one supervises the provided services and offered products. The study uses mainly the dogmatic and legal method by analysing legal acts and the literature of the subject.

2 The Importance of Financial Consumer Protection for the Financial Market and Its Stability

Stability is an indispensable value for the proper functioning of the financial market in the European Union. The stable functioning of the financial system is a precondition for sustainable economic growth. A financial system is in a range of stability whenever it is capable of facilitating (rather than impeding) the performance of an economy, and of dissipating financial imbalances that arise endogenously or as a result of significant adverse and unanticipated events (Schinasi, 2004: 8).

The stability of the financial market is not its natural feature. In case it is violated, a deep intervention of the authorities, involving huge public investments, is required, aiming at balance restoration. Finding the answer to the question how to protect the financial markets against other crises or relatively limit their effects, has become important. The concept of financial market supervision has undergone a profound transformation. The principles of the new security architecture of the market has been established in the scale of the European Union, but also the entire world. The protection of the financial system against destabilisation, which could disrupt the functioning of the entire economy, has become one of the main aims of the policies of individual countries and the entire European Union (Jurkowska-Zeidler, 2008: 166–167).

The financial crisis has led to the loss of confidence in the financial market and undermined the opinion about banks as institutions of public confidence. Thus, apart from supporting the solvency, the second main area of activities aimed at overcoming the crisis was to restore the confidence in the financial system. It is one of the crucial conditions for the stable functioning of the financial market (Szustak, 2014: 115). It transfers to the quantity and quality of transactions concluded, and also to the proper execution of the concluded contracts. Equally crucial is the confidence of the market participants in the public law bodies equipped with the control and supervision competences. The level of confidence is a value difficult to measure, and yet it has a significant impact on the shape of the financial market. Both too low, as well as excessively high level might bring negative consequences to the individual client, financial institution and even the entire financial system. Loss of confidence makes clients seek alternative markets, sometimes situated outside the state control or even protection. Too high level of confidence that is not accompanied by an adequately high level of client knowledge may significantly reduce the caution in making financial decisions, which sometimes leads to very serious consequences.

Therefore, for the proper functioning of the financial market, it is necessary to establish a proper protection of the market participants, with a particular emphasis on the consumers. This is to prevent the use of complex legal relations between various entities in order to dilute the liability for inadequate performance of services or even to pass the liability on the user. Consumer protection on the uniform financial market is part of the more broad consumer protection policy as the party economically weaker, executed by the European Union.

3 A New Approach to Consumer Protection

The system of consumer protection is a system of interrelated institutional and procedural solutions, and also principles of the substantive law, the primary objective of which is to ensure a proper level of security to clients, and in a broader sense to all participants of the financial market. This objective is not executed through favouring the position of one of the parties, but through restoring balance in the scope of information possessed by all participants of the financial market, compensating the lack of knowledge and limiting the excessive risk imposed on the client. The essence of protection is not to refrain clients from concluding unfavourable contracts on the financial market, but enabling them to make informed decisions in the conditions of full information, on a market free of deception and fraud. The client protection system should prevent panic on the financial market and eliminate the so-called contagion effect, which means transferring, sometimes hidden, risks to individual participants of the financial market. It should also reduce the risky and sometimes aggressive sales of financial services, in order to obtain unilateral benefits by a financial institution or its employees, at the expense of legitimate rights and interests of the client (moral hazard).

This system is one of the essential elements of the financial safety net, the objective of which is to maintain the financial market stability. It should be effective, which means it should cover every protection area in a way that at the same time excludes the competence injunctions. Institutions that constitute its links should possess appropriate competences, and where deemed necessary, also the power to intervene in the activities of the individual financial market participants, but with respect to the principles of the free market, including the freedom to conduct business activity and the principle of freedom of contract.

The system of client protection on the financial market undergoes evolution and its shape is constantly changing. It is in part connected to the gained experience, both as part of the European market, as well as the global markets. It should also adopt to new conditions, including those resulting from the dynamic technological development and the rise of a new market segment, referred to as Fin Tech and the related challenges (Świeszczak, 2017: 143).

At the beginning, the consumer protection system was a secondary subject of regulation. On the basis of the paradigm of the free market principles, it was recognised that free market and competition would be sufficient factors guaranteeing the proper protection of clients and an appropriate balance between them and the financial institutions. Therefore, it seemed sufficient to introduce an appropriate micro-prudential supervision, which did not interfere with the internal corporate order or the assumed business model of the supervised institutions. It was to ensure stability, which was considered a natural feature of the free financial market. It turned out, however, that this assumption was flawed. Therefore, in the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy the primary principles, on which the protection of the consumer economic interests should be based, were formed. The Treaty on European Union, signed on 7 February 1992 recognised consumer protection as the essential aim of the Communities and introduced a new title "Consumer Protection". From that moment, consumer protection started to develop as a separate and autonomous objective adopted and executed by the European Union.

Another paradigm of protection through information was based on the obligation to provide clients with information essential for them to make an informed and rational financial decision. This was the stage of introducing a series of standards defining the scope and method of disclosing information. Clients, especially consumers, were equipped with a series of legal instruments, including, among others, the right to withdraw from a contract concluded at a distance or outside the entrepreneur's registered office. This extended the time for reflection even after the conclusion of the contract. The 2007 crisis questioned the premises of rationality of the clients' behaviours. Consumer preferences are influenced by emotions and psychological experiences, sometimes leading to poor decision-making. Biases and cognitive limitations may be particularly important in financial markets. Some aspects of human behaviour are not rational, like hyperbolic discounting, over-optimism and framing effects. Though improved financial literacy benefits consumers, the study and the latest research on financial education highlight that, on their own, policies aimed at raising financial literacy are not enough.

This gave rise to the new regulatory and supervisory paradigm, based on the assumption that the financial market is unstable and pro-cyclical, with a tendency to irrational, "herd" behaviour of its participants (Monkiewicz, 2015: 6). Instability is further deepened by the complexity of financial systems and applied business models and financial innovations. In such a paradigm, the main role is played by the institutional limitations and counteracting systemic risk. The burden of client protection should lie on the institutions understood as entities of public law, less commonly private law, equipped with supervisory competences, which influence the shaping of the clients' legal environment. If we are abandoning the dogma of a rational man, who acts in a logical and economically optimal way, on the basis of all available information, for a man guided more often by emotions rather than a cold analysis, who sometimes places immediate gratification (e.g. from the received money) above the incurred costs (e.g. high costs of a loan), the functioning of strong and competent institutions is necessary. They should have appropriate control and supervision competences, fitting the current situation, and also the possibility to enforce the substantive law that allows flexible reaction to the emerging threats to protected values. Within the framework of their operation, the principles of monitoring the market and the behaviours of entrepreneurs who offer financial products should be specified, including in terms of compliance with the adopted soft law principles, codes of conduct or public authorities' recommendations. The possibility to inspect contract templates, entrepreneurs' activities related to offering financial services and identification of client's interest infringements is important. Such institutions, as the executors of the established law, should have the possibility to influence its content through the participation in the legislative process. Such understanding is in contrast with the new regulatory and supervisory architecture, in particular the designing and constructing of the Banking Union (Monkiewicz, 2016: 59).

However, important questions emerge as to how deep the regulatory and institutional protection can and should interfere with the free market, including its fundamental principle of freedom of contracts and *pacta sunt servanda*. Two views of consumer protection seem to exist. One view holds that consumers must be protected from other parties, for example possibly hazardous products or misleading advertising and aggressive sales strategies. The other view holds that consumers must be protected from themselves. Even when given full information, a wide range of products and services, as well as access to valuable advice, consumers will make choices that are not in their own long-term interest. The doubts concerning the concept of clients protection itself, in particular whether it should be made possible for them to undertake financial activity, sometimes risky, but under conditions of full knowledge and awareness of the risk taken, or whether in the form of imposed bans to prevent them from being offered those services which are provided under conditions considered unfair. The answer to such questions requires a multidimensional analysis of objectives, which protection is to serve them and the effects that an excessive interventionism could bring. It is based not only on logical arguments, but also on axiological arguments, in particular values considered priorities. Finally, it requires the redefining of the adopted consumer model (Nieborak, 2016: 95 et seq.).

4 Financial System Regulations

The change of paradigm into the regulatory and supervisory raises the significance of the adopted supervision model over the financial market. It becomes responsible not only for the proper functioning of the supervised units, but also for the quality of the services they provide. The European laws do not indicate a universal model of the financial supervision, leaving it up to the individual Member States.

There are four main approaches to financial system regulations. The institutional approach tends towards a heavily fragmented regulatory environment.[2] Each regulator is responsible for both financial system stability and market conduct and consumer protection issues. This approach is regarded as least capable of dealing with financial conglomerates, the activities of which blur the boundaries between different types of financial institutions. The functional approach focuses on the types of transactions or products under regulation.[3] Each regulator is responsible for the safety and soundness of the financial institutions, as well as the business conduct of the institutions, as it applies to each type of product covered by the jurisdiction of each regulator. This system may be effective, provided there is a high degree of communication and co-operation between regulators.

In the intergrated approach, there is a single financial regulator responsible for safety, soundness and business conduct considerations as well as consumer protection.[4] The financial conduct regulator usually resides in the same agency as the prudential supervisor, although the two functions are commonly performed by separate units within the agency. In these jurisdictions, the safety and soundness of the banking system is considered hand-in-hand with consumer finance protection. In some cases,

[2] This mode of financial system regulation is used in China, Mexico and Hong Kong.
[3] This approach is currently employed in Italy, France and Brazil.
[4] The integrated approach is currently employed in Japan, Singapore, Germany, Poland and the Scandinavian countries.

there is a consolidated regulator of markets, conduct and consumer/investor protection, separate from the prudential supervisor for banking and insurance. There are also cases where the responsibility for consumer finance protection is spread across a number of agencies. Responsibility is usually assigned based on factors such as business segments.

The analysis of the reasons for the 2007 crisis has underlined the significance of an appropriate consumer protection on the financial market. It proved that inappropriate protection generates a significant systemic risk and can disrupt the financial stability of not only a single country, but it can spread to the remaining financial markets as a result of the so-called domino effect. This led to the increased interest in the supervision model, which would pay appropriate attention to consumer protection in a way independent from the micro-prudential supervision. This led to the formulation of the basis for the fourth supervision model.

Twin peaks supervision was first suggested by Michael Taylor, in 1995. It was principally a reaction to the "blurring of the boundaries" phenomenon in the financial services sector in the UK (Taylor, 1995). Since its introduction in Australia in 1998, the model has been adopted in a number of countries, also in Europe (Wymeersch, 2007: 14). A twin peaks regulatory model comprises two peak regulators. One is responsible for the financial system stability, the other for market conduct and consumer protection. The separation of the consumer protection function from the system stability function is the cornerstone and, supposedly, one of the principal advantages of a twin peaks system. Of the total of four financial regulatory systems currently in use, twin peaks has garnered the most interest, and gained widespread recognition. In this approach regulators can be more effective, with each having clear objectives that do not overlap. As a result, they can be more accountable and more focused. It creates checks and balances between agencies, and their objectives. It allows each regulator to create its own culture that best suits its objectives (Goodhart, 2013: 156). The twin peaks supervision takes into consideration that the protection of the financial market against destabilisation and client protection may potentially be in conflict, therefore, they should not constitute the competences of a single entity.

5 Conclusion

Consumer protection has proved to be one of the important pillars on which the stable financial market is based. Financial products and services are considered to have the potential to be highly disruptive to financial markets. While improved financial literacy will benefit consumers, policies aimed at raising financial literacy are not enough. Financial sector regulators and institutions responsible for consumer protection in financial markets should adopt a more pro-active approach to ensure that financial markets work well for consumers, to rebuild consumer trust in financial markets. Regulators should actively aim to prohibit retail financial products which they view as being too complex for consumers to be able to understand, too risky for consumers or involve unexcused high transaction costs.

The necessity for an increased involvement of the supervisory institutions not only in the micro-prudential supervision, but also the supervision over the provided financial services and the products offered, becomes more and more recognised. A tendency to distinguish the institutions responsible for appropriate protection of financial services of consumers can be observed. Those changes led to the creation of a new model of supervision, based on two, mutually complementary supervisory bodies. It is the answer to the previous negligence of consumer protection, which is one of the major causes of the recent crisis. Its solutions are surely worth considering.

Although, the twin peaks model was not adopted by many countries, tendencies can be observed that change the national supervision models taking into consideration the necessity to ensure institutional and supervisory support to the consumers of financial services. Poland is an example. A model of integrated supervision over the financial market was adopted. Equipping the consumer protection institutions (Office for Competition and Consumer Protection, in particular) with new competences and establishing new institutions, the sole objective of which is to protect consumers on the financial market, results in an increasingly strong, complementary supervision over the services provided on the financial market.

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Ne Bis in Idem in the Tax Process

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Abstract
The article deals with the institute of deadlines within the framework of the Tax Code, especially the possibilities and obligation of the tax administrator to extend the deadline on the request of a taxpayer. The article focuses in particular on the analysis of decisions of administrative courts and, on the basis of this, tries to define theoretical legal bases for the conditions that the tax administrator examines if the tax payer files the request for an extension of the deadline.

Keywords
time; deadline; extension on request; tax

1 Introduction

Time and follow-up institutes are an important element of any, not just tax, process. Although they may appear to be of little importance at first glance, they enable to apply principles of tax administration (e.g. principle of economy) (Section 7 of the Tax Code) and aim at achieving the basic objective of tax administration, i.e. to assess and select tax [Section 1 (2) of the Tax Code]. They also help to increase the legal certainty of taxpayers, since tax proceedings and its individual institutes are properly circumscribed over time, and provide limits not of the tax administrator but also of the taxpayer (Section 148 and 160 of the Tax Code).

A meaningful definition of the purpose of deadlines in the Act no. 280/2009 Coll., Tax Code, as amended (hereinafter: Tax Code) has been brought by the Constitutional Court: *"The purpose of the institute of deadlines in general is to reduce the entropy (uncertainty) in the exercise of rights respectively the competence, the time limitation of*

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the state of uncertainty in legal relations, the speeding up of the decision-making process in order to achieve real goals" (The Constitutional Court, III ÚS 738/2000). The Supreme Administrative Court added: *"The deadlines are therefore mainly used to enhance legal certainty in legal relations. The deadlines strengthen legal certainty not only in private law relations, which should be designed in such a way as to ensure equally the legal certainty of all parties to a particular legal relationship, but also in the context of public-law relations. In the case of public-law relations, it is also necessary to take into account the principle according to which the state authority may be asserted only in cases, within the bounds, and in the manner provided for by law [Article 2 (3) of the Constitution and Article 2 (2) of the Charter of Fundamental Rights and Freedoms]"* (The Supreme Administrative Court, 2 Afs 144/2004-110).

This article deals with the taxpayer's request, respectively the request of any other person involved in the tax administration, for the deadline extension. Its purpose is to describe the basic conditions that must be fulfilled in order to extend the deadline. The article is based on the hypothesis that the only condition that the tax administrator examines if the tax payer files the request for an extension of the deadline which is set by the tax administrator, is a serious reason to justify the request.

2 Legislation

With regard to the principles on which the Tax Code is based, the taxpayer has the right, in accordance with Section 115 (2), to acquaint himself with new facts and in particular to comment on the new facts which the tax authority (appellate body) has discovered in the course of the taking of evidence in the appeal proceedings and the evidence, which prove them. This corresponds to the duties of the tax administrator: a) to inform the taxpayer of the new facts and evidence that prove them; b) to allow the tax entity to comment on the new facts and evidence; and c) to set a deadline for the taxpayer. The deadline may be set for a maximum of 15 days by the tax administrator. The amendment to the Tax Code, which was implemented by Act no. 30/2001 Coll., allows the tax administrator to extend the deadline for comment on the request of the tax payer in accordance with the provisions of Section 36 of the Tax Code.

The institute of the request for the extension of the deadline under Section 36 of the Tax Code is intended to enable the taxpayer to prepare properly for the defence of his interests. In general, an extension of the deadline may be requested both within the deadline laid down by law (statutory deadlines) and within the deadlines set by the tax administrator (on the basis of specific or general competence of the tax administrator). In case of statutory deadlines, the Tax Code contains a limitation that the extension must be expressly permitted by the law. Paragraph 36 (5) of the Tax Code establishes another condition which must be investigated by the tax administrator when assessing the application for an extension of the deadline. The deadline cannot be extended if the law associates the expiration of the deadline with the termination of the right. According to Šimek et al. (2011) the administrative deadline defined in Section 115 of the Tax Code for the comment on the new facts and evidence which proved them in the appeal proceedings, is the deadline with which the law associated the termination of the law. In this case, the right to propose further evidence terminates, respectively the tax administrator is not obliged to take the evidence into account (Nejvyšší správní soud, 1 Afs 321/2016 – 31).

Section 36 (3) of the Tax Code provides for certain legal guarantees designed to protect the right of the taxpayer to properly defend his interests and, on the other hand, to exert pressure on tax administrators to economic decision making. The first guarantee is the legal fiction of the tax administrator's consent with an extension of the deadline if the decision to extend the application is not issued within 30 days of the date of the receipt of the taxpayer's request. The second guarantee responds to a situation where the tax administrator's decision to extend the deadline is delivered after the expiry of the deadline (and it must be added that the request has not been fully complied with). In this case the Tax Code states that the deadline is automatically extended by the time which remained at the time of filing the request until the original deadline expiration. If these conditions are fulfilled, the deadline is extended *ex lege*.

3 Case Law

The tax administrator has imposed the value added tax additionally. The tax administrator justified the decision by the fact that the taxpayer had failed to prove the actual realisation of the taxable transactions which had to consist in the delivery of the advertisements placed on the cars. The taxpayer filed an appeal against the payment order. In the course of the appeal proceedings, the tax administrator made evidence of witnessing. The record of the evaluation of the evidence was submitted to the tax subject at the oral hearing on 27 November 2014. The tax entity had the opportunity to comment on the tax administrator's conclusions within 10 days from delivery (until December 8, 2014 as Monday). The taxpayer on the second day (28 November 2014) submitted a request to extend the deadline for comment by 15 days (i.e. by December 22, 2014). The tax administrator complied with the request partially. By the decision of 2 December 2014, the tax administrator extended the deadline until 17 December 2014 (i.e. 9 days). The decision to extend the deadline was delivered to the taxpayer on December 12, 2014. The tax administrator issued a payment order on 19 December 2014. The taxpayer's statement was received by the tax administrator until December 22, 2014.

The taxpayer appealed to the Administrative Court on 19 December 2014, on the ground that the decision was unlawful because the proceedings that preceded it were affected by an inalienable procedural defect. According to the taxpayer opinion, the deadline for commenting the evaluation of evidence according to the provisions of Section 36 (3) of Act no. 280/2009 Coll., Tax Code expired on December 22, 2014, when the tax administrator actually received a statement of the tax subject. The taxpayer also referred to the instruction in the decision of the tax administrator, which extended the deadline: "If the decision that does not fully comply with the request is notified (delivered) after the expiry of the deadline for which the extension is requested, the end of this period ends with the expiration of the number of days remaining after the date of notification of this decision, how many days remained at the time of application until the expiry of the time limit."

The tax administrator disagreed with the taxpayer's arguments. He considered that the provisions of Paragraph 36 (3) of the Tax Code provided that "the extension of the deadline due to the late notification of the decision only occurs when the decision to extend the deadline is notified only after the expiry of the new deadline." In this case, it was not. The decision to extend the deadline was delivered to the taxpayer before the expiry of the deadline.

The Regional Court annulled the decision of the Appealing Financial Directorate and returned the case for further proceedings. The regional court agreed with the objection of the taxpayer and closed the case with the conclusion, that the expiration of deadline for comments was on 22 December 2014 and the tax administrator should issue a decision on the appeal only after it expires. By issuing a decision on the appeal on 19 December 2014, the tax administrator has breached the procedural right of the taxpayer to comment on the factual situation under Section 115 (2) of the Tax Code.

The Appealing Financial Directorate filed a cassation complaint against the decision of the regional court, in particular on the grounds that the provision of Section 115 (2) of the Tax Code cannot be extended by a request within the meaning of Section 36 (1) and (5) of the Tax Code because it is a statutory deadline (determined by law), not an administrative deadline (determined by the tax administrator), and the law associates it with the termination of the taxpayer's rights.

The Supreme Administrative Court dismissed the cassation complaint for its unreasonableness. According to the Supreme Administrative Court, the deadline laid down in Section 115 (2) of the Tax Code is a typical example of an administrative deadline. Regarding the application of the provisions of Section 36 (5) of the Tax Code, the Supreme Administrative Court stated that the condition for the termination of the taxpayer's rights relates only to the termination of material, not procedural rights. If the provisions of Section 36 (5) were to cover the termination of procedural rights, the provision would not be applicable. By the expiration of the procedural deadline, the procedural rights always terminate, i.e. the right to make a specific procedural act. Further, the Supreme Administrative Court referred to an amendment to the Tax Code, which came into force on March 1, 2011 and removed the part of sentence from Section 115 (3) of the Tax Code, which prevented the tax administrator from extending the deadline set by the tax administrator for the comments.

The Supreme Administrative Court agreed with the Regional Court judgment. The tax administrator should apply the provisions of Section 36 (3) of the Tax Code which provide: "If a decision which does not fully comply with the request is notified after the expiry of the deadline for which the taxpayer requests, the deadline shall expire after such days after notification (delivery) of the decision as how many days remained until the expiry of the deadline on a day when the request was received by the tax administrator." As the decision on the deadline extension was delivered, i.e. on December 12, 2014 and 9 days of the original deadline was left, according to Section 36 (3) of the Tax Code, the deadline expired 9 days from the date of delivery of the decision (on December 22, 2014). The tax administrator should have decided after the expiry of this deadline (after December 22, 2014). The tax administrator, by this action, affected the rights of the taxpayer to comment on the evidence supplemented in the context of the appeal proceedings.

Fiction of decision, respectively of the consent to the extension of the deadline also appears in the Tax Code in the light of the principle of economy. The tax administrator must comply with the first application, which, in particular, in the case of request for a short extension or the request for a relatively short extension filed just before the deadline will lead to the factual impossibility of the tax administrator to decide otherwise than to actually agree with the extension, because he will not be technically and practically able to issue a decision within a short deadline, but mainly he will not to be able to announce it in this deadline. Therefore, the provision is in principle designed so that in the case of full consent to the application, de facto, there is no need to issue a decision because of the fiction of decision stated by the Tax Code. In the case of partial consent or disagreement with the tax administrator, with regard to the legal certainty of the taxpayer, the law provides, that on the day of delivery of the decision to extension of the deadline, the taxpayer will always have at least as many days to meet the obligations as he has in the moment of filing the request. That means that issuing consistent decisions, or even disapproval, as in our case, is unnecessary and ineffective.

In this case, the taxpayer used its procedural rights quite smartly. The tax administrator responded promptly on request and issued a decision on the second working day after the request was made. However, the taxpayer did not hurry to pick up the delivery (from December 3, 2014 to December 12, 2014) and the delivery occurred just before the delivery fiction stated by the Tax Code. And since he is aware of the legal regulation, he was aware that although the tax administrator's decision would be any, the deadline would not end before 9 days from the day of delivery of the new decision.

The question is, why the tax administrator reacted this way. If he did not respond at all and "saved" the action, the result would be the same. This should be assumed by a smart tax administrator. It would be clear from the whole situation that he was interested in resolving the appeal to reach the deadline stated for the tax assessment.

4 Conclusion

The essence of the analysed decisions of the administrative courts is the question whether it is possible to extend the deadline to comment on the new facts and evidence that prove them in the subsequent appeal proceedings established pursuant to Section 115 (2) of the Tax Code by the tax administrator.

The tax administrator based his argumentation on the interpretation that the deadline under Art. 115 (2) of the Tax Code is the statutory deadline, i.e. a time limit which may be extended by the tax administrator only if the law so provides. In this case, the Regional Court in Brno and the Supreme Administrative Court together with the commentaries on the Tax Code agree that the deadline under Section 115 (2) of the Tax Code is a typical administrative deadline, within the deadline set by the tax administrator, in this case, by explicit legal authorisation (Nejvyšší správní soud, 1 Afs 321/2016 – 31).

Furthermore, the tax administrator has inferred that the deadline defined in Section 115 (2) of the Tax Code is the deadline which is associated with the termination of the right, hence it is a deadline which cannot be extended under Paragraph 36 (5) of the Tax Code (Lichnovský et al., 2016).

In this case, the Supreme Administrative Court assumes that the limitation laid down in Section 36 (5) of the Tax Code applies only to the termination of material rights, because in case of procedural rights such a provision would be devoid of purpose and would not be applicable (Nejvyšší správní soud, 1 Afs 321/2016 – 31). It is necessary to agree with this interpretation. The procedural right of a taxpayer, which is associated with a certain deadline, must always be extinguished if it is not applied within the set deadline. It is the essence of the institute of deadlines in tax proceedings.

The objective is to achieve the maximum efficiency of tax administration, i.e. to temporarily limit it to fulfil the basic objective of tax administration (to impose and collect tax) [Section 1 (2) of the Tax Code], while protecting the rights and interests of the taxpayer to the maximum extent possible. Therefore, it is not possible to agree with Šimek et al. (2011) that according to Paragraph 36 (5) of the Tax Code, the deadline under Section 115 (2) of the Tax Code cannot be extended by reference to the fact that the law associates it with the termination of the right of the taxpayer to propose evidence. In addition, with regard to the principle of free evaluation of evidence, the tax administrator is not bound by the taxpayer's proposal (Nejvyšší správní soud, 1 Afs 321/2016 – 31). The right of the taxpayer to propose evidence therefore still exists, but is significantly weakened as a result of the expiry of the deadline.

The hypothesis set out in the introduction has been confirmed. The only condition that the tax administrator examines for the request for a procedural deadline extension set by the tax administrator is the serious reason which justifies the request. In case of procedural deadlines, the restriction according to Section 36 (5) of the Tax Code cannot be applied.

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The Risks of Municipalities in Case of Free Financial Fund Investments

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Abstract
Municipalities, as they work with public funds, should act as a "good farmer": the local municipality has to use its available resources properly, with an efficient and economical management. Municipalities are in a difficult situation when they have to decide on the temporary use or "storage" of their temporarily free funds.

Keywords
local municipalities; free financial funds; investments; national assets

1 Introduction

In the last few years, especially in 2015–2016 the management of the local municipalities and their lawfulness and efficiency became a daily topic in Hungary due to the fact that several municipalities were affected by the bankruptcy of financial service companies such as Quaestor, Hungária, Buda Cash etc.

In addition to the loss of billions of private individuals and private companies, the public sector and, in particular, the local governments got involved in the process, because they have lost (or temporarily failed) the fixed assets, which is public money and that is why in principle it has to be used under stricter rules.

During the years 2015–2016, the State Audit Office, the Office of the Prosecutor General and other public bodies conducted investigations at the local authorities in which it was established that there were local governments that were doing their job properly and carefully and there were those that did not.

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A professional debate has emerged beyond the political debate, whether the actors in the public sector can invest with their temporarily free financial funds or whether they are obliged to do so?

2 Legal Background

Act CXCVI of 2011 on national assets (hereinafter: Act on National Assets) regulates the preservation and protection of the wealth of local municipalities, as well as the requirements of the responsible management of the national assets [Art. 1 (1) of the Act on National Assets]. The provisions of the Act on National Assets are not applied to the financial funds of the bodies and persons at the level of the central government and local communities (Art. 2 a) of the Act on National Assets). The regulations of the Act on National Assets cannot be applied to the financial funds of municipalities, although in the case of purchase of stock or securities, the fulfilment of the consideration comes therefrom.

Municipalities, as they work with public funds, should act as a "good farmer": the local municipality has to use its available resources properly, with an efficient and economical management. Art. 61 (1) of Act CXCV of 2011 on the national budget said that *"the purpose of public finance controls is to ensure regular, economical, efficient and effective management of public finances and national assets, to ensure the proper fulfilment of the reporting and information obligations"*. Successfulness means that farming should have fruits and a yield. Moreover, if the subject of the study is the result of success, it means that it is also the goal of achieving profitability, so the yield and the fruits. It can also mean that it is necessary to invest free resources, because if this does not happen, the value of the money will reduce, so the purchasing power of the available resource is less (it is lost, if only nominally), namely it has lost its property, so the owner of the temporary free money did not take proper care.

Regarding Art. 5 (1) of the Act on the national budget, the amount of budget revenues and budget expenditures that are fulfilled in the budget year (a budget year is the same as the calendar year at budgetary institutions in Hungary) is determined by the municipality's budget regulation for the local government subsystem. Also in point h) of Art. 23 (2) of the Act on the national budget, the powers related to the implementation of the budget, in particular the revenue and the expenditure in financing, must be included in the municipal budget regulation. The financing revenues and expenditures are defined in Art. 6 (7) of the Act on the national budget. According to the subpoints aa) of point a) of this paragraph, financing revenues and expenditures are the revenues and expenditures arising from the purchase and sale of debt securities. Also regarding Art. 4/A (3) of the Act on the national budget, the use of the budget surplus is realised through financing revenues and expenditures.

3 The Practice

Usually, local governments define their rules and powers in their budget regulation in force at any time, these are the bases of the local government's financing expenditures and revenues. Consequently, local governments may allocate their temporarily free funds – which are at a given moment in their budget, but are intended to finance for the obligatory and voluntary commitments later – as fixed-term deposits, state-guaranteed securities or risky (riskier) securities with a possible higher yield. The latter solution is not illegal under any law.

There are other investment methods with which it is possible to use temporarily free money, but they are usually not used in the shorter term (for example real estate investments). However, there may be special situations, when such an investment cannot be unthinkable in the short term. Although, some of these investments already leads to the asset management area from financial investments.

There are usually three periods of the municipal management within a calendar year when a budget surplus may appear at local governments, not including the income which is accidental and single, unforeseen property utilisation (mainly from property sales). These three periods are fundamentally linked to the local taxation system and it can appear in March, September and December because of the local tax payments by taxpayers. These incomes are used to finance the entire annual tasks of local governments, but they are relatively evenly distributed over a calendar year.

Municipalities are primarily responsible for fulfilling their public tasks, including the provision of public services to the public, and they should act with due diligence. According to this, they can do two things: either they are not using their temporarily free money (for example by placing deposits, purchasing state-guaranteed government bonds, etc.) and in taking on the inflation, they suffer the consequences of a purchasing value decrease measured in the purchasing power parity; or they try to reduce and mitigate the inflation of the money, maybe gain profits, namely manage efficiently, thus keeping the value of their resources for later municipal performance.

Most of the local governments choose and usually chose the latter one during their management. And it must not be forgotten that if they decide to invest and buy a government bond, they will contribute to the financing of public debt, thus ensuring a source of funds to manage the deficit of the central government within the system of public finances.

4 Overview of the Investment Methods

What is the difference between the bank deposit, holding funds on the payment account (i.e. when the money is still not tied up) and the investment in a state-guaranteed security or other investments? The bank deposit or the payment account can no longer be considered safer in terms of investment or custody than state-guaranteed securities, namely government bonds. Moreover, government bonds are the safest form of investment, since the State is responsible for the purchased government securities. In case of local governments, there are no guarantees for the bank deposit and the payment account: it is not covered by the National Deposit Insurance Fund and the Investor Protection Fund, which means if the financial service provider goes bankrupt, there is no guarantee for the local governments. All other investment instruments are riskier than these solutions, such as paying accounts, deposit or government bonds, since there is no guarantee for the investment, and also without an extraordinary situation, it is questionable whether the capital invested may be refunded at the end of the investment, which is ensured by the former three solutions.

It should also be noted that point b) of Art. 136 (1) of Act CXXXVIII of 2007 on investment firms and commodity exchange service providers and their activities states that "during the liquidation of investment firms, financial assets and cash [...] entitled to or owned by the client are not part of the liquidation assets [...]". Therefore, if an investment firm goes bankrupt, clients' customer accounts (assets managed on their bank accounts or securities accounts) will not be part of liquidation assets, because they are subject to the deposit account rules governed by Art. 147 of Act CXX of 2001 on capital markets. Namely, they must be given to their owners immediately after the proper procedure has been carried out. Another question is that in such a situation, the matter of urgency can be a multi-year procedure, since this can happen when the liquidator checks the claims, examines those belonging to the same rank, and whether the coverage actually exists. If everything is cleared, then the expenditure can be fulfilled. This can cause the investor a temporary problem, especially if he has a liquidity problem. At the same time, it may also lead to higher yields (mainly in repo transactions), as in case of secondary government securities, the yield is usually the amount that the distributor waives, which is less than the one on the day of the conversion. So, on the day of the conversion, the government bond may be owned by the investor, so it will get higher returns than originally planned.

It is also important how to judge whether a government buys a government bond with the Hungarian State Treasury. The government securities are issued by the Hungarian State Treasury as the primary securities distributor, which may be purchased through it.

As a primary and non-secondary distributor, he holds no government bonds, he is only acting on behalf of the Hungarian State, and therefore his financial transactions are also limited. If the local government wants to maintain its liquidity, it also has to buy from others, since at the Hungarian State Treasury the local government has to expect that the maturity would expire, or the purchaser of the government securities and then the person wishing to sell it would have to look for a person who bought his government securities on the secondary government securities market. Alternatively, using a limited repurchase option, the State Treasury may sell the government bond at a daily rate which results in a non-predictable return, and the exchange rate does not often support the intention to repurchase. On the other hand, at the Hungarian State

Treasury, only government bonds whose subscription is in progress, may be purchased, given that it is a primary distributor, thus the government bonds issued earlier (up to ten years) with a substantially higher yield cannot be obtained. Finally, it is worth noting that secondary distributors are usually institutional investors who usually have access to government bonds with a higher yield on government bond auctions than non-institutional investors, such as those who directly buy government bonds through the Hungarian State Treasury.

It should be noted that, in case of a securities purchase, and if it was the investor's request, the purchased securities are kept by Keler Zrt. in a sub-account of a financial investor under the name of the investor, which is opened under its account. The legal nature of the deposit is an account, and not the property of a financial service provider. Otherwise, the register will not be named, but the financial service provider will separate the securities under its own name on an operating account which makes it much more difficult or even impossible to obtain access, as is the case of some local governments in recent years.

The practice of local governments is the repo transaction, which is one of the safest forms of securities purchasing. This means that at a given time, securities (e.g. shares, bonds, government bonds) will be received and, at the same moment, they will make a transaction on their sale at a later date. The difference between them is an exchange difference; this exchange difference is the yield profit of the buyer. The repo transaction is a secure form of investment, given that the securities being subject of the purchase until they are repurchased are the property of the buyer. In the event that a subsequent repurchase price is not paid to the former buyer, namely to the later seller, the securities remain the property of the buyer.

Of course, it is imaginable that a local government may not buy government securities, but other types of riskier but more promising securities (such as shares), as well as it may not enter into repo transactions, but pass the securities in another way (eventually finding a buyer later), losing the certainty that you know at the time of purchase that you have the buyer and also at what price. Thus, there may be a risk of holding securities (for example shares) for a long period of time or risking if you do not find a buyer, you may have a liquidity problem or you may be in a bad condition due to constraint to sell it. In case of higher returns, however, the local government can expand its financial scope to achieve goals and tasks that would not otherwise be possible in the absence of resources.

5 Decision about Investments

It should also not be ignored in case of money market operations that financial investment is a quick decision-making operation, which typically takes decisions for up to several days, but more often only for hours. This implies that if a body (a representative body or a committee) has to make a decision on an offer, and the board's decision will be properly taken (e.g. because of the rules of reconvene), it is almost certain that the offer will not be available. Thus it is worth taking the decision-making competence in the direction of personal decision (mayor or clerk), which raises the question of whether or not it may be allowed or can be referred the decision on hundreds of millions or billions to a person's decision-making competence or whether that person will assume this responsibility politically, professionally and legally.

Professional competence can be assumed either at the professional committee (e.g. financial committee) or at the office apparatus, which is capable of carrying out a risk analysis or impact assessment in preparing or taking the decision.

It is necessary to find the balance between quick decision-making, well-founded decision-making, professional competence, and responsibility, and expectations of the responsibility. The impact assessment cannot be missed by a prudently operating manager before any public spending. In case of attribution of powers, the decision must be taken, and the most viable solution shall be chosen, at the same time, with greatest expertise and security.

6 Other Risks

The possibilities outlined above concerns the case when the concerned persons acted properly. In this case, there is a business risk that may threaten temporarily free funds and it may be that the negative return on capital will have the investment. However, it is not possible to account for the risk when one party acts unfairly from the beginning, namely when the party intends to deceive the other party. There are some bodies for checking whether a financial service provider has sufficient capital, whether the coverage is available during the issuance of securities, and whether it issues and distributes the proper securities and in the quantity for which it is licensed, and so on. In such a case, as any natural person or legal entity, all public-sector entities may legitimately trust that the competent bodies perform their duties properly and have the authority to operate and perform certain financial market activities within the legal framework. It cannot be prepared for someone who behaves deliberately, either directly or by chance, in a way that it hurts another. This may be the case when a financial service provider sells securities that they do not have a license or issued in a much larger amount than the authorised amount. In such cases, the investor cannot do anything, since apparently everything is appropriate, a bond was given to him, while in reality it is not under his name. At the same time, there are legal institutions that have tried and are trying to reduce this risk, such as the fact that the establishment of a commitment or the execution of a payment in public funds is only possible with a transparent body. However, there is no guarantee that a transparent organisation will not do so.

7 Conclusion

Based on the abovementioned topic, it must be stated that municipalities are in a difficult situation when they have to decide on the temporary use or "storage" of their temporarily free funds.

They can be interested in buying a government bond, depositing it as a bank deposit, choosing investments with a higher return, or leaving it on the payment account without making a deposit.

They must act with utmost care and with due regard for the laws and the effectiveness aspects; it is questionable whether they can choose a solution that would be not risky either legally, professionally or politically; still the government bond investment seems to be the safest form for local governments.

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Written Explanations of the Russian Tax Law

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Abstract

The article is devoted to the theoretical description of the interpretation of the norms of the tax law and the definition of the legal status of written explanations of the tax legislation, their place in the mechanism of legal tax regulation. The purpose of the article is to confirm or refute the following hypothesis: written explanations of the tax legislation – an act of official interpretation of the norms of the tax law and mandatory for subjects of tax law enforcement. Methods: the methodological basis of the study was a set of methods of scientific knowledge. General scientific (dialectics, analysis and synthesis, abstraction and concretisation) and private scientific methods of research (formal-legal, comparative-legal, technical-legal) were used. To obtain new knowledge, the author also used the systemic and instrumental approach, empirical methods of description, comparison; methods of analogy, abstraction and the structural-functional method.

Keywords

written explanations; interpretation of tax law; tax law enforcement; law procedure

1 Introduction

First of all, tax and legal science is the theoretical understanding of the interpretation of tax and legal norms. Interpretation is an important component of tax law enforcement,

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since there is no and there can be no enforcement without interpretation (Monaenko, 2013: 193). Due to interpretation, the law enforcement entity (first of all, the tax authority) establishes the true meaning and content of the tax and legal norm.

The need for interpretation of legal norms arises before law enforcement. The reasons for this are the general nature of the legal rule, the use of terms not established by law, errors and ambiguities in the text of the law (Vengerov, 1999: 450–452). These shortcomings are also inherent in tax legislation. Part one of the Tax Code of the Russian Federation contains gaps in the regulation of tax relations. The technology of the presentation of the norms of the tax law in the Tax Code of the Russian Federation is incomplete. Part two of the Tax Code of the Russian Federation is a step backwards. This is the result of the fact that lawyers were practically not involved in its development. This is evidenced by the style, language, terms and legal illiteracy of the statement of norms (Mihajlova and Pepeljaev, 2004: 6). More than 10 years have passed since the approval of this idea, but the legal technique of the tax law is still far from perfect. The tax legislation objectively requires interpretation. The reason is the use in the tax law of institutions, concepts and terms of civil law. Such terms should be understood in the meaning and sense defined by the norms of civil law, unless otherwise stipulated by the Tax Code of the Russian Federation (Art. 11 of the Tax Code of the Russian Federation).

Russian tax law contains several rules governing the interpretation of its provisions. For example, this is par. 7 of Art. 3 of the Tax Code of the Russian Federation, according to which all irremovable doubts, contradictions and ambiguities in the acts of legislation on taxes and fees are interpreted in favour of the taxpayer. Art. 34.2 of the RF Tax Code defines the powers of the Ministry of Finance of Russia and of the financial bodies of the subjects of the Federation and municipal entities on a written explanation of the tax legislation.

Some problems of interpreting tax and legal norms were covered in the periodical press, but they did not receive a theoretical generalisation.[2]

It seems that the need for a theoretical and methodological study of the interpretation of the norms of tax law has matured.

In the present work we will focus on the issues of determining subjects of interpretation of the norms of tax law, types of acts of interpretation of tax norms and their legal force.

2 Interpretation in the Mechanism of Tax Law Regulation

In legal theory, interpretation is defined as a component of law enforcement, a kind of law regulation (Malahov, 2012: 276). The process of application of the norms of law consists of successive stages, which reflect the sequence of mental operations of

[2] See Zaripov, 2015: 51–55; Pilipenko, 2012: 25–29; Mironova, 2009: 155–156; Nikitina, 2008; Cerenov, 2007.

the law enforcer. The process of applying the rules of law is a logical sequence. First, it involves understanding the concrete factual circumstances of the case, the substance of the matter. At this stage, the proof of the legally significant circumstances of the case. The second stage is legal due diligence. At this stage, the actual and legal circumstances acquire a legal assessment. To do this, the law enforcer seeks a legal rule that should regulate the situation in question. The third stage is the preparation and decision-making to set, change and make concrete abolishing of the rights and obligations of the participants of legal conflicts (Rassolov, 2014: 278).

At the second stage of law enforcement, the law enforcer interprets the law. Interpretation is carried out not only at the stage of application of the norms of the tax law, but also at the stage of tax rulemaking. Normative interpretation of tax norms is connected with tax norm-setting, the existence of which will be proved below. The theoretical and methodological basis for understanding the interpretation of the norms of tax law is the construction of a mechanism for tax and legal regulation. The mechanism of legal regulation is a system of legal means by which an effective legal influence on public relations is provided. The concept of the mechanism of legal regulation allows us to bring together phenomena of legal reality – norms, legal relations, legal acts, etc. These legal phenomena are built in a system-dynamic form and they show their specific functions. Their relationship and interaction with each other becomes obvious (Alekseev, 2009: 267). The mechanism of legal regulation includes the following elements: “norms of the law – legal relations – acts of the implementation of rights and obligations”. Between them can be acts of the application of law. They bring the mechanism of legal regulation into motion in cases where this is impossible without the authoritative organising activity of authorised entities.

The mechanism of tax and legal regulation allows to transform normative tax and legal regulation into individual tax and legal regulation, norms of tax law into individual prescriptions contained in individual tax and legal acts. The regulatory legal regulation of tax relations includes tax norm-setting, which results in normative-legal acts. The normative interpretation of tax norms is connected with tax norm-setting. Its result is the acts of normative interpretation of tax legislation. Individual legal regulation of tax relations is carried out during the course of tax enforcement. Individual tax and legal acts are means of individual regulation of tax relations. In such acts, an enforcement decision is made by the tax authority. In the course of tax enforcement, a casual interpretation of tax rules is carried out. Acts of casual interpretation of tax and legal norms can be objectified in a separate document (an interpretative act), or be part of an individual legal act (law enforcement decision). Casual interpretation as part of the law enforcement decision is contained in the reasoning of the act. It reflects the reasoning of the law enforcer, the analysis of tax law norms. In the process of such an interpretative interpretation, a legal interpretation of the legal norms can be implemented (Zaloilo, 2010: 110).

Interpretation of legal norms is the establishment of the content of normative legal acts aimed at disclosing the norm-setting agent expressed in them (Pigolkin, 1998: 66).

Interpretation is, on the one hand, an internal cognitive process of clarifying the meaning of legal norms. On the other hand, interpretation is the result of the process of cognition, i.e. its external expression. It consists in clarifying the content and meaning of the norms of law (Pigolkin, 1962; Cherdancev, 1979).

3 Written Explanations of the Tax Legislation: Problems of Law Enforcement

The principle of interpretation of all the unavoidable contradictions, doubts and ambiguities of tax legislation in favour of the taxpayer, fixed by par. 7 of Art. 3 of the RF Tax Code, is formulated incorrectly. The interpretation of the law is aimed at eliminating contradictions and ambiguities. Therefore, if it is impossible to eliminate them by interpretation, then the interpretation is powerless. Such a norm is defective and must be removed or amended by the lawmaking body. This principle should be more correctly called the principle of application in the taxpayer's favour of a norm of tax legislation containing unavoidable contradictions, doubts and ambiguities.

It is necessary to clearly distinguish the powers of the Ministry of Finance of Russia (financial bodies) and the Federal Tax Service of Russia to clarify tax legislation. It is also necessary to include in the RF Tax Code the powers of the Federal Tax Service of Russia to clarify the tax legislation. Then par. 6.3 of the Regulation on the Federal Tax Service of Russia will receive a legislative basis. The law should define and distinguish the competence of the Ministry of Finance of Russia and the Federal Tax Service of Russia in interpreting tax legislation.

It is important to unify the names of acts of a written explanation of the tax legislation. Most often, the Ministry of Finance of Russia and the Federal Tax Service of Russia call them letters. Resolution of the Government of the Russian Federation No. 1009 of August 13, 1997 (which approved the Rules for the Preparation of Normative Legal Acts of Federal Executive Authorities and Their State Registration) determines the types of regulatory acts of federal executive bodies: decrees, orders, rules, instructions and regulations. But the legislator does not disclose the specifics of the indicated types of acts. In which cases when regulating managerial relations, are the instructions adopted when – rules or regulations? (Starilov, 2011: 130) The form and types of acts of interpretation of law are not defined normatively. It is necessary to issue a law on normative legal acts and acts of interpretation. To date, there are three draft laws on regulatory legal acts of the Russian Federation.

In 1996, deputies of the State Duma drafted the RF Law "On Regulatory Legal Acts of the Russian Federation" (No. 96700088-2), submitted to the State Duma, but was never adopted. The Institute of Legislation and Comparative Law at the Government of the Russian Federation (ILCL) in 2012 developed a draft law "On Regulatory Legal Acts in the Russian Federation" (Proekt federal'nogo zakona, 2013). This is the second draft law on normative acts. It contains a chapter on the official interpretation of normative acts. The official interpretation of normative legal acts is generally binding; its legal force corresponds to the interpreted act. The third draft of the Federal Law "On Regulatory Legal Acts in the Russian Federation" was prepared by the Ministry of Justice of Russia in 2014, but was not submitted to the State Duma of the Federal Assembly of the Russian Federation.

Unfortunately, in Russia, not a single draft law has ever been adopted. Although, for example, the Republic of Belarus has the Law of the Republic of Belarus of 10.01.2000 "On Regulatory Legal Acts of the Republic of Belarus". All bills contain a section on the interpretation of regulatory legal acts. But this does not exclude a special legal regulation of the interpretation of the norms of tax law.

The official interpretation of the tax legislation can be considered from the general philosophical categories of form and content. Clarification of the meaning of the tax norm is a content, and explanation is a form of interpretation. Therefore, it is correct to refer to the act of a written interpretation of tax legislation as an "explanation", and not a letter. The internal form of explanation is its structure, and the external form can only be written. The act of normative interpretation should contain an introductory, descriptive-motivational and resolutive part. The act of normative interpretation becomes an integral part of the interpreted tax and legal norm and is applied in unity with it.

Therefore, the principle of mandatory acts of an official written explanation of the tax legislation should be consolidated. An officially interpreted tax and legal norm can operate and be applied only in unity with an act of official interpretation. Acts of a written explanation of the tax legislation should be officially published on the website of the Ministry of Finance of Russia and the Federal Tax Service of Russia. Non-published acts should not be binding.

I believe that the Tax Code of the Russian Federation should provide for the reverse action of acts of a written explanation of the tax legislation. According to par. 5 of Art. 58 of the draft law "On Normative Legal Acts" of the Ministry of Justice of Russia, the interpretation acts are retroactive and effective from the moment of coming into force of the act to be interpreted. A similar norm is also contained in the above-mentioned draft law ILCL (par. 5 of Art. 77). This rule should be consolidated in the Tax Code, because judicial practice is not uniform. For example, the explanation of the Ministry of Finance of Russia exempts taxpayers from liability only if it is received before the commission of a tax offense (Federal Arbitration Court of the Moscow District, Decree No. KA-A40/8197-08 of 04.09.2008, Federal Arbitration Court of the West Siberian District of 04.04.2007 No. F04-1836/2007 (32977-A27-42), as of 07.06.2007 N Ф04-3146/2007 (35046-A70-29), but there is also an opposite practice: Decree of the Federal Arbitration Court of the North Caucasus District of 15.05.2009 in the case No. A53-12417/2008 -C5-14.

According to Art. 217.1 Code of administrative procedure RF, cases on challenging acts containing explanations of legislation and possessing regulatory features are under the jurisdiction of the Supreme Court of the Russian Federation. Such cases are examined according to the rules of challenging normative legal acts, but with some procedural features.

The contestation of a written explanation of the tax legislation is possible if three conditions are met:

1. the act violates the rights and legitimate interests of the taxpayer;
2. the act has normative properties;
3. the content act does not correspond to the actual meaning of the clarified normative provisions.

The burden of proving the compliance of the content of the act with the meaning of the norms of law is assigned to the Ministry of Finance of Russia and the Federal Tax Service of Russia.

The act of normative interpretation has the right to be challenged by the persons against whom this act is applied.

From January 1, 2015, tax control in the form of tax monitoring is applied in Russia. Analysis of Art. 105.30 of the Tax Code of the Russian Federation and the Requirements for drawing up a motivated opinion of the tax authority leads to the following conclusion. A motivated opinion is an act of interpretation of tax rules and facts of economic activity of a taxpayer organisation and is not an enforceable act. It does not imply the possibility of enforcement. If the taxpayer does not agree with the reasoned opinion, then a mutually agreeing procedure is initiated in the Federal Tax Service of Russia.

A literal reading of Art. 105.31 of the Tax Code of the Russian Federation leads to the conclusion that there is no possibility of judicial challenge to a motivated opinion. Since a taxpayer cannot fulfil a motivated opinion, it is not a non-normative legal act. Consequently, a motivated opinion cannot be challenged in court. A motivated opinion is also not an act of normative interpretation, so the Supreme Court of the Russian Federation is not authorised to consider its compliance with the law. It turns out that the notification of the Federal Tax Service of Russia on the basis of a mutually agreeing procedure is final and is not subject to judicial challenge. It is unlikely that this state of affairs is consistent with the constitutional right to judicial protection.

4 Conclusion

It is necessary to develop and include in the RF Tax Code a normative construction of interpretation of tax norms.

It seems that due to the lack of normative powers of the Federal Tax Service of Russia, only the Ministry of Finance of Russia, the financial bodies of the constituent entities of the Russian Federation and municipal entities have the right to issue written explanations addressed to an indefinite circle of taxpayers (normative interpretation). The Federal Tax Service of Russia should be empowered to clarify the application of tax legislation at the request of a particular taxpayer (casual interpretation). At the same time, the interpretation position expressed in the written explanation of the Ministry of Finance should have greater legal force than the interpretative provision contained in the letters of the Federal Tax Service of Russia.

The delineation of written explanations of tax legislation and informing taxpayers should be carried out according to the degree of intellectual and logical processing of normative material. Informing should be limited to literal reproduction of the text of the norms of tax legislation without formulating conclusions and advice of the tax authority. If the text of the letter of the Federal Tax Service of Russia contains a logical reasoning and formulates a legal advice, then this should be understood not as informing, but as a written explanation of the tax legislation (interpretation of the tax law).

Written explanations of the tax legislation are acts of official interpretation of tax laws and therefore must be mandatory for taxpayers, provided there is an effective legal mechanism for challenging the interpretations contained in them.

Since the interpretation position is valid and applied in conjunction with the interpreted norm of the tax law, it must have retroactive effect. The reverse effect of a written explanation of the tax legislation is not allowed only in the event of a deterioration in the legal status of the taxpayer.

The procedure for issuing and publishing written explanations of the tax legislation should be regulated normatively in the Tax Code of the Russian Federation or in the administrative regulations. The most acceptable name for acts of interpretation of tax rules is "explanation", and not "letter". All regulatory explanations of the tax legislation should be published on the official website of the Ministry of Finance and the Federal Tax Service of Russia.

An obligatory element of the structure of explanation of the tax legislation should be a descriptive-reasoning part containing logical reasoning of the interpreting subject, the presence of which will allow the court in case of challenge to check the correctness of the interpretation of tax norms.

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Taxation of Holding Companies in the Context of EU and International Tax Law

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Abstract

The objective of this paper is the analysis of the influence of European Union legal regulations, as well as international tax law on the development of tax law applicable to holding companies. It is particularly relevant for entities – holding companies conducting cross-border operation within the European Union. Currently, international holding companies create their tax strategies using internal domestic legal regulations, EU tax law, and international tax law (based on numerous agreements on avoiding double taxation). This contributes to creating tax optimisation policies that frequently boil down to international tax avoidance. Undoubtedly, the judicial decisions of the Court of Justice of the European Union have also influenced the development of tax law applicable to holding companies. Due to the lack of harmonisation of tax law applicable to international holding companies, the Court of Justice endeavours to support the processes of standardisation of the tax systems that these entities are covered by.

Keywords

tax; corporate income tax; harmonisation, holding

1 Introduction

The issue of taxation of holding companies conducting cross-border operation is becoming more and more significant both for the individual Member States and the European Commission. The problem is connected with the policy of free transfer of

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profit within a group of companies allowing the profit generated by one of the companies to be transferred to another company located in the so-called tax haven. This is, without a doubt, fostered by both EU and international tax law. Diversity of tax legislations in individual Member States is significant, as well.

The relationships among the law of the European Union, international law, and the jurisdictions of particular countries exert a considerable influence on the taxation of international holding companies. One must remember that holding structures that engage in cross-border settlements are based on rules of law established by European Union directives, international agreements on avoidance of double taxation and national legal systems in countries where holding companies and their subsidiaries are residents.

The European Union's legal provisions only partially regulate the taxation of holding structures, because it is primarily the national law that applies to cross-border settlements. Thus, it is worth considering whether we are witnessing the beginning of a new European tax law regulating holding companies or merely a process of spontaneous regulatory acceptance of legal relationships to prevent tax avoidance or evasion.

It is also essential to analyse whether European law combines seamlessly with international and national law to form a coherent system that protects particular countries against harmful tax-optimisation policies adopted by holding companies. Furthermore, it is worth considering whether European Union regulations create similar conditions for operating structures engaged in cross-border activity as are offered to national holding companies, thus complying with the principle of equality.

The influence of the phenomenon of the harmonisation of European Union law over the taxation of international holding companies must also be evaluated. Because there is only a negligible income tax harmonisation paid by groups of companies related by shares in the EU; Treaty freedoms play a key role in the European tax law.

Tax harmonisation is not intended to eliminate the national legal systems, on the contrary, it is intended to make them uniform. The process of harmonising direct taxes, which leads to national tax systems that are more coherent, is intended to obviate or at least to alleviate potential problems with their functioning. Because of this process, the negative phenomena of breaching fundamental freedoms through tax regulations and tax discrimination should be eliminated or reduced. Due to the increased effectiveness of the functioning of the internal market, the level of integration in the EU is likely to increase.

It is also worth examining whether the harmonisation process will eliminate differences among the corporate taxation systems of particular countries related to the rules on establishing a tax base. This issue is especially interesting with respect to depreciation, deductible costs, reserves, losses, capital gain taxation, tax exemptions and credits, along with methods for eliminating the double taxation of foreign income and establishing and determining tax rates.

2 The Role of the EU and International Law in the Development of Tax Law Applicable to Holding Companies

The relationship between international law and EU law and national law are important. For the purposes of this deliberation, it is necessary to provide definitions of international tax law and the law of the European Union (also called European Union law) applicable to cross-border settlements between entities forming a holding company.

There is no single coherent definition of the term international tax law, and the tax literature on the subject of its scope is usually quite controversial. It is definitely true that many rules of law related to situations involving cross-border operations (Mössner, 1974: 255–257) are associated with international tax law. A narrower and simpler definition of the rules of international tax law is readily available, if they are interpreted as rules of conflict of laws that either directly or indirectly distinguish among the tax jurisdictions of particular countries.

International tax law sensu stricto also encompasses both international common law and the case law. Moreover, one may also discuss international tax law sensu largo, which includes the rules of both public law and national law on the resolution of jurisdiction conflicts related to tax law (Haase, 2007: 5).

To put the definition of international tax law aside, it must be noted that international tax law is not a uniformly codified and formulated system, a fact that exerts an enormous influence on its application. Because international tax law is largely based on bilateral (international) tax agreements, it is a particular law that is created and applied exclusively by sovereign nations.

The rules of international tax law may be divided into rules distinguishing among the tax jurisdictions of particular countries (international rules of law) and national rules concerned with situations involving cross-border activity (national-international tax law). The sources of international tax law related to international rules of law are, foremost, agreements on the avoidance of double taxation aimed at distinguishing among tax jurisdictions of nations; those sources constitute a part of international public law, international custom and the general rules that govern international law (Schaumburg, 1998: 5). The rules that govern international common law oblige countries to follow the provisions stipulated in the abovementioned agreements. As part of international common tax law, countries are forbidden from imposing a tax obligation if there are neither subjective nor objective grounds to do so. This means that a given country may only tax activity related to that country (Vogel and Prokisch, 1992: 128–130). With respect to international tax law, general rules governing applicability of law, such as lex posterior derogat legi priori, and lex specialis derogat legi generali, along with general substantive rules, e.g. prohibition against any act aimed at circumventing the law (Seidl-Hohenveldern, 1994: 509), are of immense importance.

The primary goal of the rules of national-international tax law is to prevent double taxation as a matter of law. In contrast to international agreements that are bilateral or multilateral in nature, national tax law is unilateral (Frotscher, 2005: 21). By using the rules of national-international tax law, nations lay down the criteria for and scope of their claims related to cross-border situations. In practice, however, agreements related exclusively to taxation are applied in the vast majority of cases because after they are executed, the provisions of national-international law cease to apply. It is extremely rare for two EU Member States not to have concluded a tax agreement.

There are essentially no rules establishing the hierarchy of the sources of international tax law. Therefore, international common law, international agreements and general rules governing international law are, in principle, parallel (Verdross and Simma 1984: 413). Conflicts between the sources of international law are resolved in compliance with the general principles of how to apply the law, particularly the principles of lex specialis derogat legi generali and lex posterior derogat legi priori. This approach affects agreements on the avoidance of double taxation in that they are perceived as special rules of international law and thus displace international common law (Ipsen, 1999: 222).

One can observe the phenomena of the repeatability of legal provisions in various EU Member States and likenesses among them. Such norms of law are usually intended to prevent tax avoidance or evasion (e.g. provisions concerning a Controlled Foreign Company – CFC – or the so-called exit taxation). In particular, the last issue mentioned is directly connected to foreign situations. Although the rules of classic national-international law are not applicable in most cases because a tax convention prevails, applying these specific rules of internal law is not directly limited by any tax convention (although it is sometimes restricted by European Union law). Accordingly, it seems necessary to classify these norms of law, too, as a part of international tax law.

The term European tax law, as opposed to the notion of international tax law, is relatively new. European tax law may be defined as EU law whose subject matter is tax; it is related to taxes and influences national tax systems.

European tax law encompasses the following branches of law: the EU's own tax law (to a very limited extent), primary legislation – in particular, the Treaty freedoms, to the extent that they influence national (international) tax law – and secondary law (Weber-Grellet, 2005: 1). According to the ECJ's case law, the term tax should be based on objective criteria in the light of EU law (Judgment of the Court of 13 February 1996, Bautiaa and Société française maritime/Directeur des services fiscaux des Landes et du Finistère, C-197/94) regardless of its national law classification (Judgment of the Court of 19 March 2002, Commission of the European Communities v Hellenic Republic, C-426/98).

Because income tax harmonisation incurred by connected undertakings in the EU is only negligible, the rules of primary law (especially Treaty freedoms) are of key importance for European tax law. The ECJ uses Treaty freedoms to lift the tax barriers that prevent the efficient operation of the internal market. Consequently, European tax law is devoid of comprehensive rules governing income taxes on companies within the EU.

Compared to international tax law, European tax law is a completely different system. The will of the parties involved in international tax law establishes and shapes that law. It is a law that is simultaneously particular and widely varied. There is no centralised institution overseeing whether the legal provisions are obeyed and no court to interpret the provisions stipulated in each agreement.

In contrast to international tax law, European tax law is binding on all EU Member States. The European Commission is an EU institution that ensures that European Union tax law is obeyed; the ECJ's role is to interpret that law. From this perspective, how the law is applied (related to the Court's specific role) determines the nature of the European tax law. This exerts a direct and substantial influence over the relationship between international and European tax law.

These characteristics of international and European tax law largely determine the nature of the application of both these regimes and their rules, shaping their mutual relations.

Because national legal provisions may also influence taxation of foreign situations under certain (exceptional) conditions, the relationships among international, European, and national norms of law are significant for the taxation of international holding companies.

Major differences between international and European law are caused by their interactions with national legal systems. The main source of international law is international agreements. Ensuring that an international agreement becomes effective within a country's internal legal order might be achieved by introducing an international norm of law into the national law. An international agreement is thus executed indirectly through a national norm of law. Another solution consists of following an agreement directly. Thus, the agreement may operate within a national legal system as part of that system.

The legal systems of particular countries address the issue of the applicability of international agreements within their national legal orders (Hobe and Kimminich, 2004: 225). International law does not contain any rules about how to incorporate international rules into national law. From the perspective of international law, however, countries may not invoke national norms of law to justify failing to adhere to an international provision of law (Art. 27 of the Convention on the Law of Treaties concluded on 23.05.1969 [J. L. of 1990, no. 74 item 439]).

European law, which is external law not passed by national legislative bodies, completes the legal system that is directly applicable (Lasok and Bridge, 1991: 347–348) to Member States. The direct effect principle of European law provides that implementation of European Union law into national law depends neither on constitutional provisions that define the relationship between international and national law nor on the issuance of any act of national law, which is a rule in the case of international law. As a result, a European Union act becomes valid in all Member States at the same time and its application must be uniform. Additionally, a rule of European Union law may prevail over a constitutional provision applicable in a given state, which is unheard of in the case of international law. It must be highlighted, however, that international law is largely consensual in nature and is often applied indirectly.

The legal order in the EU Member States is multicentric in nature because instead of a classic system of hierarchy of sources of law, there are subsystems deriving from various centres (Łętowska, 2005: 4). The distinctness of the centres that pass national and European laws does not mean, however, that the norms of law created by them do not affect each other. Together, all of these laws form a common legal order that is effective not only in the entire EU but also in particular Member States, and pursuing the fundamental aims of that legal order primarily depends on the extent of cooperation among the abovementioned legislative centres. The most significant qualities of the EU law with the most profound impact on national law are as follows: the principle of precedence (superiority) of the European Union law over national law; and the direct effect of European law (Weber-Grellet, 2005: 2–3). One must note, however, that these are not specific qualities that exclusively characterise EU law: the rules of international law may have a similar effect but the distinctive feature of EU law is the intensity of both these qualities and their unique nature, which is unheard of in international law.

Clear differences concerning the scope of the applicability and validity of international and European law have a direct influence on how rules of international and European tax law are applied. International tax law has all of the characteristic features of public international law. Foremost, it is particular law, the source of which is international agreements for the avoidance of double taxation. EU Member States may freely specify the substantive rules of international tax law because no set of rules binds them with respect to determining the manners and methods of distinguishing among national tax jurisdictions. The commonness of agreements for the avoidance of double taxation (AADTs) has caused provisions of law concerning foreign situations (the so-called national-international tax law) to be of marginal importance because international tax law prevails over national tax law (Selera, 2010: 140–141).

In case of European tax law, whose qualities are determined by EU law, the situation is radically different. Actions undertaken by countries with respect to the international taxation of profits are subject to the ECJ's control but formally, that control is significantly limited with respect to European tax law because that law only exists to a very limited extent. Nevertheless, it has a major impact because of the law-making quality enjoyed by the case law of the Court of Justice, which is occasionally included in the literature among the sources of EU law. Nonetheless, EU Member States must adhere to the general rules that govern EU law when entering into tax agreements. Consequently, in the case of EU law, as opposed to international tax law, violations of tax law (general rules of EU law) by Member States are determined by an EU court. Further violations of the EU law may result in the imposition of penalties upon a country that has violated that law.

The situation is distinctive when AADTs are executed. Every time a convention (AADT) is not followed appropriately, national law (Par. 9.2 of the OECD MC Commentary) also is not followed appropriately because it is national law that imposes taxes.

For example, reducing the amount of a tax due to inappropriate application or misuse of a tax convention's provisions is tantamount to the inappropriate application of national tax law, including all provisions of national law aimed at countering tax avoidance. Therefore, it is important to determine whether a tax convention's provisions forbid countries from applying national law to counter or limit tax avoidance.

Misuse of an AADT does not necessarily denote the unlawful use of internal law. It is important to determine whether an AADT may be interpreted regardless of national law to deny a party the right to enjoy the benefits arising out of an AADT with respect to unlawful transactions (Par. 9.3 of the OECD MC Commentary to Art. 1 of OECD MC). In accordance with the Commentary on a model OECD agreement (Par. 9.4 of the OECD MC Commentary), regardless of the approach adopted by a country, the answer should always be the same: if a transaction constitutes the misuse of a convention, benefits arising out of that convention may not be provided. Such a precipitous generalisation must be limited by one condition, namely, transactions should not be "too easily" classified as a misuse.

Admittedly, the Commentary does not define a transaction constituting a misuse, however, it offers a "guiding principle" that may be employed to classify a transaction as a misuse: if its primary aim is to obtain the convention's benefits and if granting such benefits would contradict the objectives of the convention's provisions (Par. 9.5 of the OECD MC Commentary).

This claim is extremely important. It may be equivalent to the establishment of a treaty standard aimed at preventing tax avoidance. In any event, it introduces a certain element of balance. Not all transactions that lead to a reduced tax constitute a misuse. The optimisation of taxation is legal and one cannot expect taxpayers to manage their taxes so that they eventually pay the highest possible amount.

3 Judicial Decisions of the Court of Justice of the European Union and Tax Policies of International Holding Companies

An important role in the development of tax policies applicable to holding companies conducting cross-border operation is played by the Court of Justice of the European Union. There is an observable phenomenon of harmonisation of the law applicable to holding companies, which is occurring through the ECJ's case law (referred to as "backdoor" harmonisation). It consists of the introduction of similar solutions into national tax systems in reaction to the ECJ's case law. However, altering tax systems in reaction to the ECJ's case law is less of a spontaneous response by the Member States and more a demonstration of their own "common sense": if they did not alter their tax systems, Member States would have to accept the possibility that an analogous decision might be issued against them. This response is connected to the activity of the ECJ, which as authorised by the TEC (Art. 220), ensures its legitimacy in interpreting and enforcing the law (Gomułowicz and Małecki, 2008: 197–199). Since the beginning of the 1990s, the number of claims related to holding company taxation has increased considerably. Currently, it is estimated that the Court considers approximately 17 claims each year related to holding company taxation (and in 97% of the cases, the taxpayer prevails). ECJ decisions in this respect are most commonly issued based on complaints that a Member State has infringed the European Union law (Art. 226 or 227) or the consideration of a question referred for a preliminary ruling by a Member State's national court (Art. 234). Judgment on a complaint that the European Union law has been infringed binds the involved Member State and all of its authorities. If infringement of the European Union law is confirmed, the Member State is obliged to alleviate its consequences. A preliminary ruling is only binding on the national court that referred it. It might be assumed, however, that in line with the acte éclairé rule, ECJ case law issued in response to a question referred for a preliminary ruling will bind other national courts. That rule states that the courts have an obligation to use the interpretation previously made by the ECJ in a similar case provided the case has not been overruled (Mik, 2000: 520–521).

Because of the presented situation, although no ECJ judgment formally concerns all of the Member States, in practice, ECJ judgments indeed have such an effect. Disregarding judgments on providing analogy to the regulations applicable in a given country would be irrational because the Court would have rendered a similar verdict if that country had participated in the proceedings. Thus, Member States themselves engage in certain actions aimed at eliminating possible infringements of European Union law by national regulations. This is exactly how "backdoor" harmonisation is achieved.

When examining claims connected to corporate taxation, the ECJ verifies whether Member States' tax regulations infringe the TEC's provisions related to the fundamental freedoms or the non-discrimination principle because although the EU is not a regulatory authority with respect to direct taxes, by no means are EU Member States permitted to free their tax systems from the obligation comply with European Union law as a whole. Member states may shape their tax systems in line with their own preferences; however, they must abide by the EU law. The ECJ judges national tax provisions according to the principle that "even though direct taxation is within the power resting solely with Member States, they are nevertheless obliged to exercise it in line with European Union law" (Bernat, 2004: 18–19).

With respect to the taxation of holding companies, the ECJ's foremost consideration relates to regulations that implicate the fundamental freedoms and the principle of non-discrimination. The Court has also invoked the example of government assistance to entrepreneurs as a model for assessing the compliance of national tax provisions with that principle of the European Union law (Art. 87–89).

In accordance with the provisions stipulated in the TEC (Art. 163), the European Union's objective is to support Member States in their efforts directed at achieving mutual cooperation and to strive to provide entrepreneurs with the ability to fully exploit the internal market, especially by eliminating the fiscal barriers that interfere with this cooperation.

Examining the ECJ's case law, one might conclude that there remain many national tax regulations (including, inter alia, the inability to offset cross-border loss, transfer pricing, regimes concerning controlled foreign companies, burdens related to changes in tax jurisdiction, inconsistent treatment of national and foreign dividends, the withholding tax system, and thin capitalisation) that may not comply with the TEC. This conclusion has been confirmed by analyses of the compliance of national regulations related to taxation of holding companies with European Union law. If harmonisation of the legal provisions on taxing holding companies is not achieved (e.g. by introducing the concept of a common consolidated corporate tax base [CCCTB]), some harmonising processes are likely to occur through obeying the ECJ's case law (Opinion of the Economic and Social Committee on the creation of CCCTB, ECO 165, Brussels, 16.02.2006). One must remember, however, that the process of harmonising holding company taxation through ECJ activity is seriously flawed.

First, ECJ cases are long processes in which problematic issues are not comprehensively addressed. It is also commonly said that allowing the matter of direct taxation to develop through the case law and thus leaving it to chance by reacting only to taxpayers' claims is not an appropriate approach to accomplish the European Union's objectives.

Second, it seems unlikely that interpreting the TEC will be an adequate basis for solving all of the tax-related problems that are emerging relative to the operation of the internal market. This is because Court-imposed changes are not comprehensive in nature, but only partial, and they are often implemented by Member States fractionally and in an uncoordinated manner.

Third, regardless of the ECJ's voluminous case law, it is not always possible to comprehend how the TEC's general freedoms should be used within a complex tax law system. Recently, many verdicts have been announced. The case law related to the matter under discussion remains in a phase of ongoing development and essentially relates to particular tax provisions applicable in particular Member States. Therefore, full comprehension of the complete meaning of this case law and placing it into a wider context is not always easy for taxpayers, tax authorities, national courts and national legislative bodies. Accordingly, guidelines should be drawn up to inform these entities what rules may be derived from the ECJ's case law and how those rules might be applied to holding company taxation.

Fourth, the harmonisation process contributes to eliminating legal provisions that inhibit the fundamental freedoms and breach the principle of non-discrimination from the tax systems of Member States, but the ECJ may not offer its own solutions for eliminating such infringements. Its actions are undertaken in a form of negative integration, which is their major flaw. In some respect, the process might even become destructive. If the ECJ judges that some provision of a national law is discriminatory in nature, Member States are offered two possibilities. They may either remove that provision from their laws or expand its scope so that it will encompass both national and foreign entities and thus lose its discriminatory nature.

In reaction to the ECJ's case law, EU Member States adopt measures both to abolish the tax advantages offered by national tax systems and to achieve regulatory acceptance of cross-border settlements by introducing national legal regulations notwithstanding the fact that from the perspective of the fiscal policy, it is undesirable to do so. Such actions often contradict the principles that underlie the common market and interfere with the competitiveness of Member States' economies. Such a situation would be deplorable if in an attempt to avoid discrimination charges, Member States expanded measures preventing tax avoidance by cross-border operations to clearly domestic entities that pose no risk of fraud [The Application of Anti-Abuse Measures in the Area of Direct Taxation – within the EU and in Relation to Third Countries, COM (2007) 785]. The problem is that the ECJ has no influence over the direction of harmonisation that occurs in response to its case law (Keijzer, 2008: 166).

The case of Lankhorst-Hohorst (Judgment of the Court of 12 December 2002 Lankhorst, C-324/00), which involved the so-called thin capitalisation, provides the opportunity to observe how harmonisation prompted by the case law takes place. Because of the judgment in that case, some countries (e.g. Spain and Portugal) limited the personal scope of their thin capitalisation laws so that they would not apply to non-residents, whereas other countries (e.g. Great Britain, Germany and Denmark) expanded their provisions to extend to national entities. Because of actions undertaken by both of these groups of Member States, discriminatory regulations inconsistent with the TEC were removed from the law; however, this development was advantageous for entrepreneurs in the first case and disadvantageous in the second. These phenomena are referred to as downward and upward harmonisation. Downward harmonisation may cause Member States' systems of taxing holding companies to be non-discriminatory in nature but simultaneously render them equally unfavourable for domestic and foreign holding companies (Litwińczuk, 2006: 18).

Fifth, uncoordinated attempts to align Member States' tax laws may create new tax-planning possibilities: entities might be given new methods to evade taxation, thus resulting in an unintentional lack of taxation (Farmer and Zalasiński, 2007: 15).

It seems that the ECJ's case law may not be perceived as sufficient to eliminate tax barriers to the cross-border activity of holding companies operating on the internal market. Obviously, this does not mean that the ECJ's prior activity has been useless because were it not for this activity, many tax barriers eliminated in reaction to the Court's judgments would remain. It might be expected that in the future, the ECJ's case law will continue to reduce tax barriers to the cross-border activity of holding companies operating on the internal market. It will not, however, replace the comprehensive action to harmonise the taxation of holding companies that should be undertaken. If such harmonisation does not occur, the case law will continue to develop; however, in the end its effects might be negative.

4 Conclusion

Indubitably, European Union and international law exert significant influence on the development of tax policies pursued by holding companies that conduct cross-border operation. Despite the fact that European tax law related to taxing international profit is poorly developed, it exerts a considerable influence over the taxation of profits generated by international holding companies. This results from the fact that European tax law – in contrast to international tax law – is a collection of provisions of law created by a central legislative body. EU Member States are obliged to abide by European tax law. This difference is especially visible with respect to European legal provisions related to categories of international profits that are also regulated in the OECD MC and that often are included in bilateral tax agreements (i.e. so-called dividends, interest and royalty payments).

Essentially, the virtual absence of special legal rules to govern the income taxes (on profit) imposed on holding companies in the EU does not mean that EU Member States enjoy absolute freedom in this respect. On the contrary, while exercising their sovereign power, they must comply with the EU law. In such a case, the Treaty freedoms that act as general rules of law are of immense significance.

The Treaty freedoms constitute the pillars of the internal market and are derived from the general principle of non-discrimination formulated in the Treaty upon the establishment of the European Union (Art. 18 of the Treaty on the Functioning of the European Union, consolidated version: OJ C 83 of 30.3.2010, p. 47). The most significant freedoms with respect to taxing international holding companies' profits are freedom of establishment, the free movement of capital and freedom of rendering services. The Treaty freedoms protect international business activity, i.e. profits of international holding companies. Therefore, business activity by domestic entities that do not engage in cross-border activity is not subject to protection by the European Union freedoms, even if it is the subject of discrimination. Treaty freedoms affect only EU Member States and holding companies engaged in cross-border activity within the EU.

Furthermore, an important phenomenon that influences the taxation of international holding companies is the harmonisation of tax jurisdictions. Harmonisation is essentially aimed at bringing Member States' statutory regulations closer together. The TEC does not directly regulate issues related to taxing international holding companies, which lies within the domain of the Member States. However, Member States must remember that this right should be exercised in compliance with the European Union law, especially with its legal provisions on the internal market and the underlying fundamental freedoms, along with the non-discrimination principle. The taxation of international holding companies may not inhibit the fundamental freedoms and discriminatory tax events are not allowed on the internal market. The business activity of international holding companies should not be hindered or limited by tax barriers that strengthen or create either borders or divisions among EU Member States.

Nonetheless, there are numerous and serious fiscal barriers within the EU that hinder the operations of the internal market. Holding companies incur high compliance costs and encounter many other tax obstacles to their cross-border activity that are related to restructuring operations on an international scale, transferring of dividends, interest and royalty payments between subsidiaries in different Member States, cross-border losses, transfer pricing and Member State laws aimed at preventing tax avoidance and evasion.

Moreover, a vast number of adverse consequences arise from the existence of differences among the tax systems of Member States. These tax systems influence the investment decisions of holding companies, which is contradictory to the principle of tax neutrality and leads to ineffective choices of investment locations.

Another negative effect of the differences among the tax systems of Member States is the inability to compare the tax burdens of particular Member States, which means that at the European Union level, the principles of clarity and certainty in taxation are infringed. Furthermore, these differences lead to the emergence of the phenomena of tax avoidance and evasion, cause breaches of the principle of fair competition, and have a negative effect not only on the development of particular economies in an EU Member State but also on the EU economy as a whole.

These unfavourable phenomena and processes related to taxing international holding companies are not in line with the principles underlying the internal market. The reason is that these phenomena and processes emerge because of either differences among the tax systems of Member States or the national tax systems' inconsistent treatment of holding companies conducting exclusively domestic business activity versus companies conducting cross-border activity. To eliminate those inconsistencies, harmonisation of taxation is inevitable.

To date, harmonisation has clearly been insufficient, which is confirmed by the continued existence of many tax barriers that prevent the full exploitation of the internal market.

Negative consequences arising out of differences among tax systems, along with the nature of the tax barriers to cross-border activity, compel the conclusion that harmonisation aimed at the elimination of those differences and barriers should involve introducing common rules for calculating tax base, which should have the following beneficial consequences:

- the minimisation of the influence of tax considerations on business decisions made by holding companies;
- the elimination of the influence of taxes on differences in economic effectiveness and thus on the competitiveness of holding companies;
- the facilitation of comparing the tax burdens imposed in various Member States;
- the prevention of tax avoidance and evasion; and
- the elimination of compliance costs related to cross-border activity.

Simultaneously, despite the introduction of common rules for calculating a tax base, the following issues, which are problematic for holding companies with cross-border activity, might remain unresolved:
- no or limited possibility to offset cross-border losses;
- burdensome obligations related to transfer pricing;
- the double taxation of foreign income; and
- disadvantageous treatment of restructuring transactions.

To solve these problems, the harmonisation of the taxation of holding companies in the EU should be carried out on a larger scale than simply introducing common rules for calculating a tax base.

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Cryptocurrencies from the Perspective of the EU Financial Market Regulation

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Abstract

During the last two years, cryptocurrencies became a new social, economic, as well as legal phenomenon. In this context, many open questions arise. The paper deals with the issue how cryptocurrencies interact with the current European financial market regulatory framework. The following key issues will be particularly mentioned: cryptocurrency derivatives, ICO's and investment services regulation under MiFID II and possible relation of an ICO to the regulation of collective investment undertakings/investment funds under UCITS/AIFMD.

Keywords

cryptocurrencies; financial market regulation; MiFID II; ICO, financial instrument

1 Introduction[2]

During the last two years, cryptocurrencies became a new social, economic, as well as legal phenomenon. In this context, many open questions, including the legal ones, arise. These questions are often related to the very nature of cryptocurrencies from a legal perspective. It seems evident that it is the somewhat unclear nature of cryptocurrencies which presents a huge challenge not only for civil law, but also for financial law, including financial market regulation.

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The present paper deals with one of these questions, namely, how cryptocurrencies interact with the current European financial market regulation, especially concerning cryptocurrency derivatives and the so called Initial Coin Offering process (hereinafter: ICO). Thus, the research purpose of the paper is to address particularly the following issues.

Firstly, the question whether cryptocurrencies could be considered eligible underlying assets of financial instruments under MiFID II will be examined. Secondly, the relation of ICOs and investment services regulation under MiFID II, especially the possible classification of cryptocurrencies/tokens as a financial instrument will be analysed. Finally, possible regulatory aspects of ICOs under collective investment undertakings under UCITS or investment funds regulation under AIFMD will be shortly mentioned.

As a hypothesis, the authors would like to prove the fact that although regulatory aspects of cryptocurrencies are still not very clear in some respects, it seems that in many cases ICOs, tokens, financial instruments and services related to cryptocurrencies/tokens could fall into the scope of the actual European financial market regulation. To verify the above hypothesis, the analytic and comparative scientific method will be used.

Despite the overall recency and due to the dynamic development of the present issue, several resources has been available across Europe so far. In addition to regulatory notices of the ESMA (European Securities and Markets Authority[1] and certain national supervisory authorities, particularly BaFin,[2] AMF[3] and FINMA,[4] the research from the other EU member states scholars, especially the German ones, and preceding research of one of the co-authors (Vondráčková, 2016) could be used.

2 Cryptocurrencies and General Legal Issues

Regulatory issues arising from the interaction of cryptocurrencies and the financial market regulatory framework are by far not the first legal questions discussed regarding cryptocurrencies. The first wave of attention was brought to the question by the general legal classification of cryptocurrencies. In the field of financial law, the related issues included anti-money-laundering measures and evaluation of cryptocurrencies, namely Bitcoin, from the perspective of monetary law, especially payment services regulation.

As a general outcome of the above-mentioned discussions and with respect to the scope of the present paper, it could be just shortly advised, that although a certain level of legal uncertainty regarding classification of cryptocurrencies remains, within

1 European Securities and Markets Authority.

2 Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority) as a supervisory authority of Germany.

3 Autorité des Marchés Financiers (Financial Markets Regulator) as a supervisory authority of France.

4 Eidgenössische Finanzmarktaufsicht FINMA (Swiss Financial Market Supervisory Authority FINMA).

the EU, cryptocurrencies are generally being considered as intangible movable property[5] possessing neither the status of currency nor money (including electronic money)[6] under the monetary law. With regard to the increasing use of cryptocurrencies as an investment or speculation opportunity on the one hand, or as a means of raising capital through ICO process on the other, issues related to financial market regulation are becoming more and more important.

3 Cryptocurrency Derivatives

The first question relates not directly to the cryptocurrencies itself, but to the increasing use of cryptocurrencies as an underlying asset of derivatives in the meaning of MiFID II [Art. 4 par. 1 (49) of the Directive 2014/65/EU], for example contracts for difference. In order to determine whether such cryptocurrency derivative could be considered a financial instrument under Annex I Section C MiFID II, it is necessary to clarify whether cryptocurrency is or is not one of the eligible underlying assets under MiFID II, i.e. financial underlying [Derivatives under Annex I Section C (4) MiFID II] or non-financial underlying [Derivatives under Annex I Section C (5) – (7), (10) MiFID II].

Since the issue has already been dealt with in detail elsewhere,[7] only brief theses follow. In case of contract for differences, MiFID II lays down no requirements on the underlying assets.[8] Hence it seems that cryptocurrency contract for differences may fall within the definition of financial instruments under MiFID II.[9] In case of other categories of derivatives, a further determination is necessary. It seems to be clear that cryptocurrencies will not fall within the category of financial underlying in most cases but can fall into the category of non-financial underlying as indices and measures not otherwise mentioned in Section C Annex I MiFID II. If it is the case and if the derivative contract has the characteristics of other derivative financial instruments, namely, if the contract (the price difference) is settled in cash or may be settled in cash, that means in another way than physical delivery of the underlying asset, such a cryptocurrency derivative can be considered a derivate and consequently a financial instrument under MiFID II.[10] Providing services to such a cryptocurrency derivative, such as for example investment advice, would be subject to regulatory measures under MiFID II.

5 Cf. e.g. AMF, 2018.
6 Cf. e.g. ESMA, 2018.
7 In detail Cf. e.g. AMF, 2018.
8 Cf. Annex I Section C (9) MiFID II.
9 Cf. AMF, 2018.
10 Cf. Annex I Section C (10) MiFID II in connection with Art. 7 par. 3 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

4 ICOs and Its Regulatory Aspects: Tokens as Securities?

The issue of classification of cryptocurrencies under the financial market regulation became crucial namely in relation to ICOs. An ICO is a process of raising capital (typically in form of cryptocurrencies) from investors through blockchain-based units, usually called tokens. Not only the shortcut ICO, but the process itself shows parallels to the initial public offering (IPO) process. While IPO relates to standard transferable securities, namely shares, in an ICO, a business or individual searching for capital needed for its economic activities issues tokens and puts them for sale in exchange of traditional currencies, or more often cryptocurrencies.[11]

The tokens issued by the ICO organiser can possess different economic purposes, features or transferability. Although no generally recognised economic or legal categorisation of tokens is available yet, whether in the EU, or worldwide, the tokens can be divided into the following groups based on their economical essence.[12] Furthermore, some tokens may share characteristics of more groups mentioned below, others may not.

The most straightforward group of tokens are the payment or currency tokens. Currency tokens have typically no further functions than means of payment (now or in the future) for acquiring goods or services or as a means of value transfer and are in fact synonymous with cryptocurrencies. Then, there are the utility tokens that provide digital access to a product (usually an application) or service, developed by the issuer using the capital acquired by the ICO. In such a case, the investor buys a right to use a product or service in the form of token issued during ICO. Finally, the asset or investment tokens represent an asset such as participations in physical underlying, shares on companies and related obligations and rights, including voting rights, entitlement to dividends or interest payments, or participation on earnings streams. Such tokens are analogous to shares, bonds or derivatives in terms of their economic purpose.[13]

The analogy of investment tokens to existing financial instruments gives rise to question, whether under the European law, at least some of the tokens could be regarded as financial instrument under Annex I Section C MiFID II. Due to individual specifics of the ICOs and issued tokens, no over-all answer can be given, and a case-by-case analysis should be undertaken. As follows from the EMSA statement[14] as well as available academic research,[15] it seems clear that at least some of the tokens might fulfil the criteria of financial instrument under MiFID II. Such an opinion was recently supported by the statement of the German BaFin (BaFin, 2018) and, among the non-EU countries, Swiss FINMA (FINMA, 2018).

11 Cf. ESMA, 2017.
12 In detail cf. Zickgraf, 2018.
13 Cf. ESMA, 2017b and FINMA 2018.
14 Cf. ESMA, 2017a.
15 Namely Hacker and Thomale, 2017: 37 or Zickgraf, 2018: 307.

Since BaFin classifies the tokens not only under the German law, but in relation to MiFID II as well, its view could be inspiring in the context of the whole EU financial market regulation. According to BaFin (BaFin, 2018: 2), besides the role of cryptocurrencies or tokens as underlying asset of a derivative mentioned in Chapter 3 above, based on a case-by-case analysis of the token's specific design and features, it can be classified as (transferable) security[16] or a unit in a collective investment undertaking[17] under MiFID II.

In order to classify tokens as a security under the EU law, the following criteria need to be fulfilled:

1. Transferability.
2. Negotiability/tradability on the financial or capital market. According to BaFin, cryptocurrency trading platforms might be in principle considered financial or capital markets in terms of the definition of a security.
3. The rights embodied in the token, in particular shareholder or other equity rights or debt claims.
4. The token is not an instrument of payment under Art. 4 par. 1 (44) of MiFID II.

The identified decisive factor is the specific structure of the rights embodied in the token, irrespective of the labelling of the token as for instance utility token. Apparently, the token should be materially assessed according to its economical purpose and in case the investment purpose prevails, such a token should be considered a security under the EU financial market regulation. This applies in case of hybrid tokens or utility tokens with prevailing investment element, as well.[18]

If a token presents a financial instrument under MiFID II, the related regulation, in particular provisions governing investment services will apply. Nevertheless, it is important to stress that there is no explicit ESMA statement yet and therefore it is possible that national regulators will not follow the example of BaFin, partly because of the differences of national legislation regarding securities.[19] In order to avoid regulatory arbitrage, it seems necessary for ESMA to take initiative and come out with a clarification of the legal nature of the tokens in relation to the European financial market regulatory framework.

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16 Under Art. 4 par. 1 (44) MiFID II. Transferable securities mean those classes of securities which are negotiable on the capital market, with the exception of instruments of payment.

17 Under point (3) Section C of Annex I MiFID II.

18 For the same conclusion, cf. Zickgraf, 2018: 304.

19 For example, the Czech national bank stated, that Bitcoins are neither securities, nor derivatives under the Czech legislature. It is important to mention though, that the statement of the Czech national bank relates exclusively to Bitcoins and was published in 2014 (ČNB, 2014).

5 Conclusion

The above-mentioned issues are just a brief introduction to and an example of how cryptocurrencies might interact with the current financial services regulatory framework. Further research is needed. For instance, regarding the relation of cryptocurrencies and collective investment undertakings/investment funds regulation, it seems that under certain circumstances, ICOs, tokens and issuers might be subject to the respective regulation. In short, if the material essence of the activities of an issuer is further investing of funds (irrespective of its form, whether cryptocurrencies or "standard" currencies) acquired by means of ICO from the public or a limited number of investors and further criteria are met, such an issuer could be, with respect to the activity deemed in an analogous position, a collective investment undertaking/investment fund manager under UCITS/AIFMD. In such a case, the tokens issued in the ICO could be classified as units in a collective investment undertaking under Annex I Section C (3) MiFID II and therefore financial instruments[20] and the UCITS/AIFMD rules will also apply.[21]

With regard to the above analysed issues it could be concluded, that the research purpose of the paper was reached, and that the hypothesis was confirmed. In other words, it is apparent that although regulatory aspects of cryptocurrencies are still not clear in some respects, in many cases ICOs, tokens, financial instruments and services related to cryptocurrencies/tokens could fall and will fall into the scope of the actual European financial market regulation.

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20 Cf. BaFin, 2018: 3, and Hacker and Thomale, 2017: 15.

21 The Czech supervisory authority, the Czech National Bank, draws attention specifically to the possible use of the investment fund regulation. Cf. ČNB 2018.

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Economic and Legal Aspects of the Healthcare Financing System in Poland

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Abstract
Health is one of the most important human values and can be a factor affecting the quality of life. The need for healthcare is one of the basic individual rights of the citizen. A specific sector in any national economy is the healthcare sector, which, as every created system, is subject to permanent changes. The author will present factors influencing the financial aspect of the healthcare system and its legal basis, especially in the light of recent modifications of the system.

Keywords
healthcare financing; healthcare system

1 Introduction

Each healthcare system experiences a constant process of reforming, adjusting to changing economic and political conditions, however, in varying degrees responding to the needs of patients. For many years, the Polish healthcare system has been subjected to numerous analyses and researches conducted by representatives of different fields of science – not only law, but also economics, sociology and psychology. As a complex issue, the Polish healthcare system has undergone large-scale and highly dynamic changes in the recent years. Before the collapse of communism, the healthcare systems in those countries were highly centralised and based on Soviet-designed Semashko

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model. It is said that healthcare in communist countries was ineffective and chronically underfunded (Marrée, 1997).

Currently, the Polish healthcare system has to cope with several features of both economic, sociological and legal basis. The aging of the population is a challenge. The Polish society is one of the fastest-growing in the entire European Union – over the next 20 years, the number of people aged 65+ will increase in Poland by about 3 million, up to 8.5 million people. This means raising costs. At the same time, the average life expectancy in Poland increased between 1970 and 2015 from 70.0 to 77.6 years (Central Statistical Office of Poland, 2017).

In this article, elements of the statistical method (in the area of statistical data analysis of the Central Statistical Office, OECD, National Health Fund and the Ministry of Health in Poland) were used to describe economic and legal factors of the healthcare system in Poland. The validity of the paper is also confirmed by the descriptive evaluation of the latest modifications, especially "hospital network" (Dz.U. 2017 poz. 844).

The aim of this study is to analyse current economic and legal factors of the healthcare system in Poland, as well as to evaluate the directions of recently implemented modifications. The following article uses the following research questions to explore the subject:

1. How does the government, in the position of the legislator, tend to challenge the negative factors of the healthcare system?
2. What are the economic and legal capabilities which could possibly improve the functioning of the healthcare system in Poland?

For the purpose of the paper, the hypothesis was created: The legislator's approach to block the entry of private capital is destructive to the healthcare system.

In the first part of the article, the current situation of the healthcare system in Poland is presented, with its specific characteristics. Whereas in the second part of the paper, the author analyses economic and legal factors, which influence its financial situation, as well as evaluates the government's approach towards the negative features of the healthcare system in Poland.

Since 1989, the most influential factor is the spiral of debts accumulated by hospitals. In spite of several debt-backing operations, their debt has remained for several years above the level of 10 billion PLN. The debt of public hospitals is currently one of the most important problems of the Polish healthcare. It also has a socio-political dimension. The failure of thorough reforms introducing new financing sources intensified three main negative factors of the healthcare system in Poland:

- First, after years of exploiting free medical care, the society is negatively oriented to any financial participation in the use of medical services (Holecki et al., 2016), which impedes any development of co-payments of medical services;
- secondly, the increasing costs of the healthcare system seems out of control, as every new government does not aim at a deep reform of the system, but

continuously implements superficial modifications or misguided solutions in fear of a possible political price;

- thirdly, the prognosis of the aging population in Europe means not only the need to adapt to the evolving nature of demand for medical services, but also securing additional funds for an increase of demand in the group of people at post-working age (Sójka et al., 2015).

2 The Characteristics of the Healthcare System in Poland

The Polish model of healthcare is based on the administration of existing resources and structures, with an undeveloped analytics procedure of the Ministry of Health. In addition, the operational IT system is unable to support the Ministry of Health in terms of monitoring and costs analysis. It results in a poor quality of collected data and misjudged decisions (Goryński and Wojtyniak, 2008).

Currently, health insurance premiums in Poland are collected by two institutions: the Zaklad Ubezpieczen Spolecznych (Social Insurance Institution, ZUS) and the Kasa Rolniczego Ubezpieczenia Spolecznego (Agricultural Social Insurance Fund, KRUS). Subsequently, collected funds are transferred to the central account called the Narodowy Fundusz Zdrowia (National Health Fund, NFZ). The NFZ is then responsible for contracting healthcare services with regional institutions and providers within the acquired budget. Ministerstwo Zdrowia (the Ministry of Health, MZ) is the policy maker and regulator in the healthcare system.

The main source of financing healthcare in Poland originates from health insurance funds.

The second equally important source of financing healthcare are the national budget resources. Specialised medical procedures, policy programs, emergency medical services, public blood service, sanitary inspection and health insurance for people without income are covered by the state.

On the other hand, private financing sources include primarily the resources of households and private health insurance funds and charities. In case of Poland, private expenditure in total health care costs has to be noted, as it amounts to 2.1% of GDP, which means that the society, from private resources, is covering almost one-third of the overall healthcare expenditures in Poland (Szetela, 2016).

As Table 1 presents, Poland has one of the lowest relation of healthcare expenditures in total (public and private) to Gross Domestic Product in the whole European Union. It is worth stating, that all countries of Central and Eastern Europe started at a similar level of healthcare system's progress, but the Czech Republic and Slovakia succeeded with deep reforms of the system, while endless debates on healthcare system were in fact postponing required operations in Poland.

Table 1. Healthcare expenditures in particular countries

Country	Health expenditure as % of GDP	Health expenditure per capita
Poland	6.4	1,798
Lithuania	6.5	1,970
Estonia	6.7	1,989
The Slovak Republic	6.9	2,150
The Czech Republic	7.3	2,544
Hungary	7.6	2,101
Ireland	7.8	5,528
Greece	8.3	2,223
Slovenia	8.6	2,835
Iceland	8.6	4,376
Italy	8.9	3,391
Portugal	8.9	2,734
Spain	9.0	3,248
Finland	9.3	4,033
The United Kingdom	9.7	4,192
Austria	10.4	5,227
Denmark	10.4	5,205
Belgium	10.4	4,840
Netherlands	10.5	5,385
Norway	10.5	6,647
Sweden	11.0	5,488
France	11.0	4,600
Germany	11.3	5,551

Source: OECD Health Statistics 2017, WHO Global Health Expenditure Database

The distinguished reformed systems in Slovakia (referred to as the "star" of Central and Eastern Europe) and the Czech Republic (13th and 16th place accordingly) are also confirmed by the latest edition of the Euro Health Consumer Index. The same reports also emphasise the abandonment of reforms of national healthcare systems in Hungary and Poland (29th ex aequo in the ranking, which consists of evaluation of 35 national healthcare systems), which results in low efficiency of the system as a whole (Health Consumer Powerhouse, 2018).

Table 2 features the division of expenditures in the healthcare system in Poland between the years 2016 and 2018. It clearly evidences, that hospital treatment costs constitute the main group of expenditures with the highest share in the system. Moreover, this category is rapidly increasing (17.92% between 2017 and 2018), which affects the stability of the annual budget.

Table 2. Division of expenditures in the Polish healthcare system

Category of healthcare expenditure	2016	2017	2018
Basic health care	9,465,686	9,925,337	10,557,295
Outpatient specialist care	5,749,505	5,838,998	4,737,203
Hospital treatment	34,379,582	34,971,552	41,241,342
Psychiatric care	2,494,456	2,693,174	2,917,407
Rehabilitation	2,222,847	2,263,143	2,628,069
Conditioning care services	1,291,868	1,390,657	1,582,519
Palliative care	455,583	653,019	715,035
Dental treatment	1,820,715	1,849,336	1,881,946
Health resort treatment	648,357	656,991	687,019
Emergency assistance	46,699	48,665	51,259
Reimbursement	8,181,865	8,167,116	8,432,076
Healthcare services contracted separately	1,935,478	2,017,948	2,071,105
Reserve	920,939	1,163,749	769,232
TOTAL	73,702,419	73,199,781	80,059,868

Source: Plan finansowy NFZ 2017 i 2018

Since 1989, Poland has pursued to reform the public sector, particularly public expenses. Inflation (in January 1991 amounted to 75%) caused swift growth in prices, which caused financing of medical services in a period longer than 1 month practically unmanageable (Kulak, 1999). This resulted in a situation, where hospitals were not able to pay for previously ordered products.

Consequently, the inevitable happened and debts began to accumulate. In 1991 the overall amount of debts reached a sum of 250 million PLN, but in 1998 – debts amassed to 750 billion PLN. On the basis of the presented data, it can be marked, that hospitals form the most influential element, which should be the aim of additional focus and analysis.

The current debts of hospitals include commitment to public institutions, e.g. ZUS, and the State Fund for Rehabilitation of Disabled People or Treasury (public-legal), then arrears towards suppliers of medicines and materials, equipment and apparatus medication, as well as arrears related to costs administrative, i.e. for energy suppliers. The increase in the indebtedness of hospitals was not affected only by limiting benefits, but also by the wage demands of medical staff.

Table 3. Total liabilities of public healthcare institutions in the years 2014–2017

	2014	2015	2016	2017
Total liabilities (mil. PLN)	10,345.79	10,812.63	11,249.53	11,614.07

Source: Data of the Ministry of Health.

Detailed characteristics of hospital conditions in Poland include:

- Excessively thick network of hospitals (which leads to fragmentation of contracts and the competing of facilities for patients and doctors) and excessive use of hospital treatment;
- rising costs of medical care;
- lack of professional process of debt management;
- between 2007 and 2014 the number of hospital beds (per 100,000 citizens) in Poland has increased from 642.38 to 662.70. Further stagnation in the number of hospital beds and maintaining the patient in the hospital (high level of an average period of hospitalisation) will affect the high share of expenditures on hospital treatment – on which other groups of recipients of medical services will lose; the consequence of those systemic errors in the functioning of healthcare is forcing the expected period for payment transferred by hospitals to amount to 230 days (Eurostat database);
- the inspection carried out by NIK showed that in some hospitals the queues of patients to specialist doctors cover several thousand people (up to 3,000), and the anticipated longest waiting period for the service was 1,824 days, or 5 years (Supreme Audit Office of Poland, 2010).

2.1 Assumptions of the recent healthcare reform in Poland

The Law and Justice party, which has won elections in 2015, began to implement its own vision of the healthcare system's reform, which focused mainly on the introduction of "hospital network" and "pharmacies for pharmacists".

Firstly, the "hospital network" ought to be examined. The "hospital network" introduces a division into three levels of hospital units and qualifying for a higher category enables a wider range of financing for benefits and departments. The main presumptions of the hospital network are:

- Improvement of the relations between the payer and contractors for hospital services;
- guaranteeing the continuity and stability of financing for medical entities;
- reform of the hospital management and optimising the cost structure of treatment;
- coordination of hospital (inpatient) and outpatient services.

Another significant change is the financial settlement in the form of a lump sum calculated per year (by category). It should be noted, that the Act guarantees funding for all the affiliated entities. This means the devastation of any elements of competition on the market. 355 healthcare entities outside the network are forced to compete for 7% of the overall accessible funds.

Moreover, the purpose of the reform is to increase the motivation of the hospital staff to perform more treatments and consultations, but with constant contribution. However, transferring money without any competition for the whole year in advance is devoid of any motivating factors – the guaranteed financial situation does not lead to an increased efficiency, which is confirmed by many public sector companies (Mihaiu et al., 2010).

The implementation of this project concerns the supply side of the healthcare system and coincides with the lowering retirement age threshold (which impacts the healthcare system in the form of a decrease of labour power and taxes). In this manner, the Ministry of Health seeks to eliminate surpluses of medical services by hospitals, which is still the main reason for the spiral of indebtedness of medical entities. In addition, the updates on the valuation of individual medical services are projected, which will reduce the number of departments created due to profitable medical treatments, and not the actual needs of the regional community.

The government, as a legislator, tends to decrease the level of private capital participation in the healthcare market. International experience proves, that implemented and supervised by the state free of charge healthcare services are ineffective and inappropriate to the real requirements of citizens (Hsiao, 2007). An important argument is the fact, that the market mechanisms provide products and services, that are more efficient and of higher quality than the free services offered by public authorities. Therefore, open market competition should promote the efficiency of the functioning of the national healthcare system through the existence of competing entities. The role of the states should secure citizens' right to benefit from medical services of guaranteed medical benefits cart.

The second modification, "pharmacies for pharmacists" Act, is similar to the "hospital network" in its assumptions. The Act, recently passed in the Polish Parliament, is set to essentially block the pharmacy chain market, prevent any expansion – as it even defines the number of citizens per one registered pharmacy or a minimal distance between two registered pharmacies. The significant ownership regulations would lead to declines in valuations of foreign-owned corporations. Subsequently, the number of pharmacies is forecasted to decline. Yet, a more affecting outcome is the increase of prices for non-refundable drugs (PEX PharmaSequence, 2018).

This summarises the government's view of the reform of healthcare and answers the first research question: "How does the government, in the position of the legislator, tend to challenge the negative factors of the healthcare system?"

2.2 Economic and legal analysis of the current situation

As mentioned before, the debts of hospitals are one of the most significant problems of the healthcare system in Poland. Undoubtedly, the advantage of the Act of "hospital network" is an attempt to stabilise the growth of hospitals in the country. The eligibility criteria for the "hospital network" were met by 516 public and 78 private hospitals out of total 949 registered entities. But, from an economic point of view, a single factor does not shape the current situation of the system. There are far more economic factors, which influence negatively the healthcare system and need to be challenged.

First of all, expenditures in the healthcare system in Poland are based on an obsolete system forecasting the amount of benefits due to its weak link with real-time demand. The valuation of benefits is based on a given rate of closed healthcare per point, which is determined on the basis of all summarised expenditures on a national scale in the previous year. High demand and limited resources lead each year to the low valuation of points and the necessity to establish limits of healthcare benefits. This, in turn, forms continuous debts of healthcare entities.

A solution to the overloading demand seems quite plain. A combination of promoting the use of outpatient care, rather than hospitalisation and the decrease of the number of hospitals is projected to be sufficient in the opinion of the author. In addition, the Act omits the possibility of integrated orders for hospital units, that would gain a stronger negotiating position in the group and, as a result, a more effective pricing policy. The American Healthcare Supply Chain Association estimates, that about 72% of all hospital purchases in the USA is being done using GPO contracts, allowing the hospitals to save 10–15% of their purchasing costs (blackpartners.pl).

Secondly, a shift of management approach is necessary. Hospitals have never been considered an enterprise, rather a public unit, with all characteristics of ineffective management and unsuccessful investments. The relation between medical services and their costs was not noted. Second of all, the transformation process of hospitals into units with the status of an entrepreneur (commercial law companies) should be advanced (Kubow, 2013).

Thirdly, the liquidation of a part of the hospital beds is required. Some regions in Poland are characterised with an overload density of hospitals, which were created in the 1960s and 1970s. In this period, the healthcare need of the society was different (due to the development of coal mining), but nowadays this is no longer valid. The introduction of the "hospital network" will undoubtedly support this decline, but mainly within hospitals, that were not registered for the project. Public-owned entities, those generating debts, will unfortunately be protected by the Act with guaranteed support and decreased competition.

Fourthly, the demand side of the system should also be included in the reform's assumptions. Medical expenditures are increasing, every year a new medical technology arises, which generates additional costs; therefore, increasing the rules of rationing in the healthcare system is required. The introduction of minimum fees for basic medical appointments would enable the elimination of both overproduction on the supply side and a reduction of the growth in demand (i.e. excessive use of medical services). It should be noted, that Poland is one of the seven member states that have not introduced fees for the use of medical treatments (Hnatyszyn-Dzikowska, 2013).

It has to be noted, that the legal foundations of the healthcare system in Poland also undermine its development.

Recent reforms in the healthcare system will not satisfy the financial needs of the system (Busse, 2016) – in this case, in the author's opinion, it is indispensable to introduce private health insurers to the market. The abolition of the state monopoly in Poland on the mandatory health insurance market will lead not only to an increase of the quality of customer service, but also to an improvement of financial and organisational efficiency of the system (Jaworzyńska, 2012). The most important organisational problem of the Polish health care system seems to be the existence of the central and highly monopolistic insurance market of the public purse, namely the NHF. The existence of one institution that finances health care services, which requires extensive knowledge on the scope of health needs of communities from various regions of the country and also the knowledge on the supply capacity of the health care sector, appears to be a utopian idea to implement if the system is organised in this way (Nieszporska, 2016). The solutions to this matter is to enable private entities to enter the market of health insurance. Every citizen would then be able to choose his/her own insurer, private or public. The less attractive groups of society (elderly, youth, people of lower income) could be covered by a public insurer.

In a debate of healthcare development, the matter of private capital in healthcare often appears. Legal aspects concerning the healthcare system should adopt market elements, regarding experience of other European Union countries, i.e. introduction of public-private partnership. This way, private entities would perform commercial benefits in public entities, which would also prevent the pathological nature of exploitation of hospital equipment through private medical practices. Legal regulations would supply public entities with additional resources for the use of medical equipment.

An evidence of private entities operating non-medical functions is already visible in the form of outsourcing. Its introduction affects the increase of the efficiency of hospitals and simultaneous reduction of costs administration. With implemented outsourcing, the public hospital can concentrate solely on medical services (Kolwitz, 2010).

The former proposals constitute an answer to the second research question: "What are the economic and legal capabilities, which could possibly improve the functioning of the healthcare system in Poland?"

3 Conclusion

The conclusion is a mandatory part of the paper. Please, keep in mind how the research purpose was reached and whether the hypothesis was confirmed or disproved.

There are several proposals for the future of national healthcare systems. Expenditures will grow, not only because of the effects of inflation, but because of the growing recognition, that the improvement of the healthcare of the society is linked with an increase of national wealth. Maintaining a universal healthcare model requires rationality and consolidation of institutions. Interestingly, OECD experts' study shows that the cost-free reorganisation can affect in a non-invasive way the average life expectancy of the statistical citizen in Poland – it can be extended up to 2 years. Governments will have to face bureaucracy and liberalisation of regulations, that restrict the role of health professionals and artificially raise the cost of medical research.

The expenditures of healthcare systems continue to grow in relation to the ongoing effect of the aging of societies. A clear increase in the index of life expectancy on the one hand and a low level of expenditure on the healthcare system on the other hand constitute the main negative factors of the healthcare system in Poland (Polish Healthcare Industry Report, 2016), which in the long term is not projected to withstand the growing needs of the society.

This paper focuses on presenting the current state of the healthcare system in Poland. Two research questions in the paper have been answered, supported by statistical data and scientific literature. The hypothesis: "The legislator's approach to block the entry of private capital is destructive to the healthcare system" has been confirmed by economic and legal analysis of the current situation of the healthcare system and submitted proposals of its reform.

In conclusion, the limitation of the paper ought to be mentioned. As the Act of the "hospital network" has been recently introduced, the impact of the reform is still expected. The other limitation is the foundation of the National Fund "Health" as an institution, which will finance the healthcare reform. Any modifications in this aspect may differently influence the healthcare system in Poland and change the assumptions of the "hospital network".

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100 Years of Changes in the Czech System of Taxation

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JEL Classification: K34

Abstract

The article deals with the changes in the system of taxation since the establishment of the independent Czech state in 1918 until the present. In particular, the author focuses on the period of fundamental tax reforms that have occurred as a result of society changes in this state. The main aim of the contribution is to confirm or disprove the hypothesis that, the system of taxation was changed during the period of the existence of the separate Czech state. The author used the following scientific methods: comparison, description and analysis.

Keywords

tax; tax law; system of taxation; tax reform

1 Introduction

The independent Czech State was founded on the 28th of October 1918. This year we celebrate the 100th anniversary of its creation.

During the existence of the independent state, there have been changes not only in political, social, but also legislative fields. The author focuses on systems of taxation *stricto sensu* during the period of the first republic (1918–1938), during the period of the centrally planned economy (1953–1989) and the period (1993–2018). For better clarity, the applicable systems of taxation are displayed according to the author's own processing.

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The aim of the article is to answer the question of how and why the systems of taxation have changed. From the point of view of the processing space, the author focused on examining the development of the systems of taxation in individual periods due to the fundamental tax reforms in 1927, 1952 and 1993. The period 1918–2018 was examined chronologically. The subject of this study is the territory of the Czech Republic.

There are partial studies dealing with the development of systems of taxation and taxes in a certain period or its particular problems in terms of history and legislation.[2] However, a comprehensive and complex processing is still lacking.

The author relies mainly on historical sources.

From the methodological point of view, the following methods were used: comparative, descriptive and legal analysis.

As a starting point, it is necessary to define the subject of research, which is the system of taxation consisting of the basic elements – taxes.

The state does not use one type of tax to earn revenue, but several types of taxes that have different ties between them. In this context, we are talking about the system of taxation. The system of taxation consists of all taxes (*stricto sensu* or *largo sensu*), which are selected at a given time in the territory of the state.[3]

In the current legislation of the Czech Republic, "tax" is governed by the Tax Code, Act No. 280/2009 Coll., as amended, § 2. Tax is defined here as a generic term for several categories of public revenue are labelled as tax not only in economic but also legal terms. Tax is here understood as *largo sensu.* According to the current legislative definition, the term "tax" includes not only taxes *stricto sensu* but also customs, fees and other duties.

Tax *stricto sensu* is a public income characterised by a certain cyclicality and the absence of a direct equivalent counterpart. The payment of the tax does not give rise to a direct obligation of the tax administrator or the recipient of the tax according to the budget destination. In addition, tax *largo sensu* also means public revenue with an equivalent, in particular fees. The direct activity of the "tax" beneficiary is linked to the taxable person with reimbursement.

The system of taxation as part of the tax system from the point of view of the subject of research is a tax law that is subject to its economic development and political influence. From the point of view of theoretical law disciplines, the tax system, the system of taxation and tax law are part of the financial law, which regulates, inter alia, relations arising from the process of creation and use of state and other money funds.[4]

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2 Especially Girášek, 1981: 224; Grúň, 2009: 335; Skřejpek, 2009: 207; Picmaus, 1985: 208; Janák et al., 2005: 568; Jánošíková and Mrkývka, 2016: 492; Široký, 2008: 301.

3 See also Babčák, 2012: 670; Grúň, 2009: 335; Jánošíková and Mrkývka, 2016: 492; Jánošíková, 2018: 156; Karfíková et al., 2018: 356; Outlá, 2012: 114; Radvan et al., 2008: 512; Sidak and Duračinská, 2014: 528.

4 Further reading in Jánošíková and Mrkývka, 2016: 492; Mrkývka et al., 2004: 404; Bakeš et al., 2012: 549.

2 The Period of the First Republic (1918–1938)

The Czechoslovak state was founded on the 28th of October 1918 on the ruins of Austria–Hungary by Act No. 11/1918 Coll., on the establishment of an independent state of Czechoslovakia. This Act also adopted a valid tax adjustment, including the organisation of the financial administration.

In the area of direct taxation, it was a direct personal tax: the general tax on production; the tax on production of publicly-funded enterprises; the income tax; the tax on royalties and the higher service, and direct real taxes: land and house tax. In the area of indirect taxes, it was mainly: the sugar tax; the alcohol tax; the wine tax; the beer tax and the mineral oil tax.[5]

Efforts for a new and uniform adjustment of tax relations throughout the country began to emerge very soon, as the adopted legislation was obsolete and unsuitable.

In 1927, on the basis of the tax reform initiated by the Minister of Finance Karel English, the so-called English Tax Reform, a new law on direct taxes (Act No. 76/1927 Coll.) was adopted, which with partial amendments or supplements was valid until the 31st of December 1952. Besides the law on direct taxes, other laws were included in this tax reform, namely Act No. 77/1927 Coll., on the new regulation of the financial economy of the territorial self-government and Act No. 78/1927 Coll., on the stabilisation balances.

The basis of the system of taxation in the Czechoslovak Republic was direct taxes. According to Act No. 76/1927 Coll., on direct taxes, these taxes are divided into pension taxes and yield taxes. The pension tax affected the entire household income. It was subjected to natural persons who received income from various sources, mainly from land and buildings; from various production activities: from service, from capital gains and other sources (lotteries, prizes, speculative profits, writer's fees etc.).

In 1934, in addition to the pension tax payers, the military contribution was introduced (Act No. 266/1934 Coll.) and the state defence contribution and the extraordinary income tax (Act No. 247/1937 Coll.) in 1937.

Unlike a pension tax that taxed the income of a natural person oriented to the household as a whole, yield taxes were objective and real, because they were purely factual and did not take into account the relationship of yield to the person, who received it. Yield taxes included: general income tax, personal income tax, land tax, house tax, rent tax, royalty and higher service tax.

The system of indirect taxes was more rugged than direct taxes and its legislation was divided into more legislative acts.

The group of indirect taxes included: turnover tax, luxury tax,[6] sugar tax, alcohol tax, mineral oil tax, general beverage tax, beer tax, lemonade tax, mineral water and soda water tax, sparkling wine tax, meat tax, lighters tax, coal tax, water force tax, electrical radiation sources tax, food tax on a line, yeast tax, dough tax, acetic acid tax and artificial edible fats tax.

5 More in Jánošíková, 2015: 388.
6 More in Jánošíková, 2013: 81–87.

Table 1. System of taxation in Czechoslovakia after 1927

Direct taxes
▪ Act No. 76/1927 Coll., on direct taxes: Pension Tax General Income Tax Special Income Tax Land Tax House Tax Rent Tax Royalty Tax and Higher Service Tax ▪ Enrichment Tax (Act No. 337/1921 Coll.) ▪ Military Contribution (Act No. 266/1934 Coll.) ▪ Extraordinary Income Tax (Act No. 247/1937 Coll., abrogated Act No. 393/1938 Coll.)
Indirect taxes
▪ Mineral Oils Tax (Act No. 55/1882 Coll.) ▪ Lighters Tax (Act No. 278/1916 Coll.) ▪ Sparkling Wine Tax (Act No. 219/1919 Coll.) ▪ General Beverage Tax (Act No. 533/1919 Coll.) replaced by Lemonade, Mineral Water and Soda Water Tax (Act No. 248/1937 Coll.) ▪ Alcohol Tax (Act No. 643/1919 Coll.) ▪ Meat Tax (Act No. 262/1920 Coll.) ▪ Foot Tax on a line (Act No. 264/1920 Coll.) ▪ Water Power Tax (Act No. 338/1921 Coll., abrogated Act No. 70/1939 Coll.) ▪ Turnover Tax (Act No. 268/1923 Coll.) ▪ Luxury Tax (Act No. 268/1923 Coll.) ▪ Coal Tax (Act No. 1/1924 Coll.) ▪ Sugar Tax (Act No. 98/1926 Coll.) ▪ Bear Tax (Act No. 168/1930 Coll.) ▪ Yeast Tax (Act No. 123/1932 Coll.) ▪ Electrical Radiation Sources Tax (Act No. 38/1933Coll.) ▪ Dough Tax (Act No. 40/1936 Coll.) ▪ Acetic Acid Tax (Act No. 41/1936 Coll.) ▪ Artificial Edible Fats Tax (Act No. 180/1936 Coll.)

Source: www.aspi.cz

Turnover tax was originally only a temporary financial measure to overcome post-war monetary and financial problems. However, it turned out that both in terms of tax technology and yield, it is the most appropriate form of shifting the tax burden on consumers and therefore it became a permanent part of the system of taxation. Turnover tax was adjusted along with the luxury tax by Act No. 268/1923 Coll., on turnover tax and luxury tax.

Turnover tax has affected the product's turnover in all its stages (at the manufacturer, in the wholesale and retail). The tax was also levied on the sale of the product among private persons and also subject to performances and services of all kinds (e.g. repairs, professions, barber's activities, organisation of performances and safekeeping of things). Own consumption, as well as products imported from abroad, were subject to this tax. Constructively, it was a chain tax that affected every turn of the product, starting with the manufacturer and the consumer. The tax was calculated and deducted from the actual sales. The company could ask for the tax to be calculated and paid on the invoices issued. In the context of the simplification of the tax collection technique for turnover tax, some types of products were gradually introduced to the flat-rate. The tax was not collected from each product turnover, but at a higher rate, usually at the manufacturer, and other turnover was no longer taxed.

In the area of indirect taxes, unification efforts have not been so successful. The unification was rare, usually by an amendment to the legal regulations then, in particular the beer tax in 1930, lemonade, mineral and soda water tax in 1937, or the introduction of other indirect taxes, in particular the yeast tax in 1932 and the artificial edible fats tax in 1936.

The English tax reform has radically changed the structure and construction of direct taxes. The existing system of taxation taken over from Austria–Hungary was already obsolete and heavily fragmented. For example in Slovakia and in Carpathian Ruthenia other legislation was applied. A thorough reform has been underway since 1922 with the primary objective being to unify the system and ultimately to complete modernisation. The reform also introduced a new system of self-governing allowances, adjusted the subsidy policy for municipalities, districts and countries. Its result was both to make the system of taxation more transparent and to ensure a uniform tax burden throughout the country.

3 The Period of 1953–1989

On the 1st of January 1953 a fundamental tax reform was carried out. All previous taxes have been cancelled except for taxes on literary and artistic activities. The reform introduced new taxes: turnover tax (Act No. 73/1952 Coll.), which was replaced only in 1993 with the value added tax (Act No. 588/1992 Coll.); wage tax (Act No. 76/1952 Coll.), which was also replaced by income tax in 1993 (Act No. 586/1992 Coll.); agricultural tax (Act No. 77/1952 Coll.), newly amended by Act No. 50/1959 Coll.; income population tax (Act No. 78/1952 Coll.), newly modified by Act No. 145/1961 Coll.; trade tax (Act No. 79/1952 Coll.), abolished by Act No. 145/1961 Coll.; pension tax of cooperatives and other organisations (Act No. 75/1952 Coll.), and house tax (Act No. 80/1952 Coll.), which was subject to all buildings irrespective of the form of ownership, newly regulated by Act No. 143/1961 Coll.

The turnover tax (Act No. 73/1952 Coll.) replaced the previous general tax. A system of two state wholesale and retail prices was created. Tax has become a part of the price and has ceased to be just a surcharge for production costs.

Performance tax (Act No. 74/1952 Coll.) meant the splitting of the accumulation in enterprises carrying out various work from the current general tax.

The new regulation on the taxation of the cooperative sector was reflected in Act No. 75/1952 Coll., on the pension tax of cooperatives and other organisations. Cooperative ownership was one of the kinds of socialist property.

The introduction of the wage tax (Act No. 76/1952 Coll.) publicly proclaimed interest in liquidating the private sector. The determination of the amount was influenced by a number of factors (social and personal factors).

The new agricultural tax (Act No. 77/1952 Coll.) preferred the single agricultural cooperatives.

Income population tax (Act No. 78/1952 Coll.) expressed the differentiation between individual classes of the liberal professions (craft small-scale production and remnants of private retailing). The law on direct taxes dating back to 1927 was finally abolished.

Trade tax (Act No. 79/1952 Coll.) replaced the general tax. The law differentiated the payment of this tax by the type of trade from the viewpoint of their expected extinction. In contrast to the previous adjustment of the income tax, the new trade tax has a registration character.

The new house tax (Act No. 80/1952 Coll.) severely affected the owners of the rental houses. The taxation of homeowners did not change in principle.

The show tax (Act No. 81/1952 Coll.) replaced the general benefit from entertainment. Together with the house tax, it formed the basis of local taxes.

The only tax which was still in force was income tax on literary and artistic activities regulated by Act No. 59/1950 Coll.

Table 2. The system of taxation in Czechoslovakia after 1953

Direct taxes
▪ Pension Tax on Cooperatives and others Organisations (Act No. 75/1952 Coll.) ▪ Wage Tax (Act No. 76/1952 Coll.) ▪ Agricultural Tax (Act No. 77/1952 Coll., replaced Act No. 50/1959 Coll.) ▪ Income Population Tax (Act No. 78/1952 Coll., replaced Act No. 145/1961 Coll.) ▪ Trade Tax (Act No. 79/1952 Coll., replaced Act No. 145/1961 Coll.) ▪ House Tax (Act No. 80/1952 Coll., replaced Act No. 143/1961 Coll.) ▪ Tax on Literary and Artistic Activities (Act No. 59/1950 Coll., replaced Act No. 36/1965 Coll.)
Indirect taxes
▪ Turnover Tax (Act No. 73/1952 Coll.) ▪ Performance Tax (Act No. 74/1952 Coll.) ▪ Show Tax (Act No. 81/1952 Coll.) ▪ Motor Vehicles Tax (Act No. 98/1964 Coll.)

Source: www.aspi.cz

The tax reform was to deal with tax regulations from the pre-Munich Czechoslovak period and expressed a new socialist form of the system of taxation consisting of taxes deducing the accumulation of the socialist sector of the economy, taxes levied on the population and local taxes flowing to local budgets.

As a result of the adoption of the new Constitution in 1960, there have been some changes in the tax area, namely the adoption of a new income tax (Act No. 145/1961 Coll.), taxes on literary and artistic activities (Act No. 36/1965 Coll.) and motor vehicles tax (Act No. 98/1964 Coll.).

The system of taxation in the 1960s included taxes payable by socialist organisations (turnover tax, pension tax on cooperatives and other organisations, agricultural tax), taxes paid by the population (wage tax, special pension tax, tax on literary and artistic activities, income population tax, house tax and motor vehicle tax).

Another change in the system of taxation was due to the adoption of Act No. 143/1968 Coll., on the Czechoslovak Federation. The so-called corporate taxes have been introduced. With effect from 1 January 1970, the corporate tax system was a tax on profits, property taxes and wage taxes. There has been a replacement of current contributions from the gross national income of the enterprises. In addition to these taxes, a separate social security contribution was introduced.

At the end of 1971, with effect from 1 January 1972, the stabilised normalisation regime introduced a new system of deductions into the federal budget pursuant to Act No. 111/1971 Coll., on contributions to the state budget and social security contribution, to the budgets of both national republics pursuant to Act No. 117/1971 Coll. and pursuant to Act No. 122/1971 Coll. In accordance with § 1, the system consisted of a tax on profits, a deduction from capital, a wage bill, a social security contribution, a deduction from the depreciation of basic resources, additional contributions and direct payments to selected economic organisations according to the financial plan.

In the 1980s, the corporate taxation concept was re-evaluated and Act No. 16/1982 Coll., introduced: profit, free profit balance, social security contribution, depreciation of basic funds and additional payments.

4 The Period of 1989–2018

The other political situation and social orientation of Czechoslovakia after November 1989 necessitated changes in the tax area. The economy shifted from planned to market. The new system of taxation was established by Act No. 212/1992 Coll., on the system of taxation. It has dropped the existing tax breaks on taxes paid by socialist organisations and taxes paid by the population. Taxes are divided into direct (property and pension) and indirect (general excise tax and selective excise taxes). The breakdown of the system of taxation was based on the criterion of their subject.

Pursuant to Act No. 212/1992 Coll. the system of taxation consisted of the following taxes: value added tax; excise taxes (hydrocarbon fuels and lubricants, alcohol and spirits tax, beer tax, wine tax, tobacco and tobacco products tax); income tax (personal income tax and corporate income tax); property tax (land and buildings); road tax; inheritance tax; gift tax, real estate transfer tax and environmental taxes. The individual taxes, except for taxes on environmental protection, which have not been introduced, have been regulated by individual tax laws, namely: Act No. 586/1992 Coll., on Income Tax of Natural and Legal Persons; Act No. 338/1992 Coll., on real estate tax; Act No. 357/1992 Coll., on inheritance, gift and real estate transfer tax; Act No. 339/1992 Coll., later Act No. 16/1993 Coll., on Road Tax; Act No. 213/1992 Coll., later Act No. 587/1992 Coll., on Excise taxes and Act No. 222/1992 Coll., later Act No. 588/1992 Coll., on Value Added Tax.

Value added tax replaced turnover tax. The payer is only paying for the portion of the tax that adds value. It does not matter the number of steps or cycles through which the goods or service passes but the total added value.

Table 3. The system of taxation in the Czech Republic in 1993

Direct taxes
▪ Income Tax of Natural and Legal Persons (Act No. 586/1992 Coll.) ▪ Real Estate Tax (Act No. 338/1992 Coll.) ▪ Inheritance Tax, Gift Tax, Real Estate Transfer Tax (Act No. 357/1992 Coll.) ▪ Road Tax (Act No. 339/1992 Coll., later Act No. 16/1993 Coll.)
Indirect taxes
▪ Excise Taxes (Act No. 587/1992 Coll.) ▪ Added Value Tax (Act No. 588/1992 Coll.)

Source: www.aspi.cz

The main reason for the tax reform in 1993 was the unsatisfactory system of taxation, which was based on a planned, direct economy with a monopoly of foreign and domestic trade with state regulation of prices.

The aim of the reform, which has been achieved in its entirety, was to create a market tax system based on the principles of fairness, efficiency and simplicity, and a system that would reduce redistribution among operators, reduce the untenable tax quota, reduce corporate taxes and introduce new taxes.

In 2004, the Czech Republic became a member of the European Union. For this reason, the system of taxation has changed. Act No. 212/1992 Coll., on the system of taxation, was abolished. Individual tax laws remained in force only for indirect taxes. Act No. 588/1992 Coll., on excise taxes, was replaced by Act No. 353/2003 Coll., on Excise Taxes, and Act No. 585/1992 Coll., on value added tax was replaced by Act No. 235/2004 Coll., on value added tax.

Since January 1, 2008, the Czech system of taxation has added energy taxes (gas tax and some other gas taxes, solid fuel tax and electricity tax) on the basis of Act No. 261/2007 Coll., on the stabilisation of public budgets. These are taxes where their basis is a physical unit that is supposed to show a certain negative impact on the environment.

Table 4. The system of taxation in the Czech Republic 2004–2013

Direct taxes
▪ Income Tax of Natural and Legal Persons (Act No. 586/1992 Coll.) ▪ Real Estate Tax (Act No. 338/1992 Coll.) ▪ Inheritance Tax, Gift Tax, Real Estate Transfer Tax (Act No. 357/1992 Coll.) ▪ Road Tax (Act No. 16/1993 Coll.)
Indirect taxes
▪ Excise Taxes (Act No. 353/2003 Coll.) ▪ Added Value Tax (Act No. 235/2004 Coll.) ▪ Energy Taxes (Act No. 261/2007 Coll.)

Source: www.aspi.cz

The recodification of the Civil Law embodied in Act No. 89/2012 Coll., Civil Code, entered into force on 1 January 2014. As a result of the adoption of the Civil Code, it was necessary to issue a number of implementing regulations. For that reason, since January 1, 2014, the system of taxation has undergone the following changes. Act No. 357/1992 Coll., on Inheritance, Gift and Real Estate Transfer Tax was abolished. Inheritance and gift tax was incorporated into income tax (Act No. 586/1992 Coll.). The real estate transfer tax was replaced by the Tax on the Acquisition of Immovable Property and is regulated by Act No. 340/2013 Coll. The Real Estate Tax (Act No. 338/1992 Coll.) was renamed to Tax on Immovable Property. The other taxes on the title have been preserved, even though their substantive legal regulation was amended by Act No. 344/2013 Coll.

In 2017, the system of taxation was enriched with a new tax, a gambling tax (Act No. 187/2016 Coll.), which replaced the earlier levy on lotteries and other similar games. Including this, there is a direct tax where the profit from the gambling operation is taxed in the territory of the Czech Republic.

Table 5. The system of taxation in the Czech Republic 2014–2018

Direct taxes
▪ Income Tax of Natural and Legal Persons (Act No. 586/1992 Coll.) ▪ Gambling Tax (Act No. 187/2016 Coll.) ▪ Tax on Immovable Property (Act No. 338/1992 Coll.) ▪ Tax on the Acquisition of Immovable Property (Act No. 340/2013 Coll.) ▪ Road Tax (Act No. 16/1993 Coll.)
Indirect taxes
▪ Excise Taxes (Act No. 353/2003 Coll.) ▪ Added Value Tax (Act No. 235/2004 Coll.) ▪ Energy Taxes (Act No. 261/2007Coll.)

Source: www.aspi.cz

5 Conclusion

During the existence of an independent Czechoslovak or Czech state, there have been changes not only in political, social, but also legislative terms. The following events constituted the important historical and political milestones: the creation of a separate Czechoslovak state, the occupation, February 1948, the establishment of a federation, the dissolution of the Czechoslovak state and the creation of an independent Czech Republic and the accession of the Czech Republic to the European Union and the recodification of private law. These events have significantly affected tax law and the development of the system of taxation.

A number of factors contributed to the creation and organisation of the system of taxation in the Czech Republic at different times. These factors included mainly demographic and technological changes or a change in the political perception of some tax functions and public finances as a result of the outcome of the elections, war or change in the political regime.

The system of taxation changed in the period of time (1918–2018) as it was a product of political, economic and cultural development. A milestone has always been the implementation of a fundamental tax reform, here in 1927, 1953 and 1993, which separated the previous state establishment from the new one. The changes did not consist only of a change in the name of taxes, but throughout the tax system. They can simply be tracked using overview tables. These changes were logically related to the economic and social ideas of the state, which adapted them to the purpose of the system of taxation and the resulting relations, whose implementation was then in line with the actual effects of individual taxes.

History can be taught and is predictable for future developments. The system of taxation should therefore be fair, simple, comprehensible, consistent, effective, comfortable, stimulating and, above all, motivating for *futuro*.

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The EU Bank Resolution Framework: Institutional Changes of the Financial Safety Net in Poland and the Czech Republic

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Abstract

In response to the global financial crisis, fundamental changes have been made at the European level to the legal framework of single financial market regulation and supervision. One of the significant legal steps was the establishment of a common system of recovery and resolution of failing banks. Within the framework of a systemic approach to the EU financial market, the article illustrates the steps taken towards the implementation of the resolution framework into domestic financial markets of Poland and the Czech Republic. The core content of the article is comparison of the role and location of the Polish and Czech resolution authorities in the architecture of the national safety net. The main aim of the contribution is to confirm or disprove a hypothesis that the legal framework of the resolution is a complementary element of financial safety net at

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the financial market, making it necessary to redefine the role of individual institutions that form the current system of ensuring financial stability in Poland and the Czech Republic. The scientific methods of analysis, synthesis, and comparison have been employed.

Keywords
financial crisis; financial market regulation; financial market law; financial safety net; bank recovery and resolution

1 Introduction

During the recent financial crisis, a number of banks were bailed out with public funds because they were considered "too big to fail". The level of state support was unprecedented[3] (European Commission, 2013). The crisis also highlighted the lack of arrangements to deal effectively with failing banks that operated in more than one Member State. Therefore, there was a need for fundamental changes in the financial safety net, aimed at creating efficient legal instruments enabling the restructuring and liquidation of banks with no need to involve public funds, while taking into account the cross-border activity of large banks.

The financial stability and safety of the financial market are currently acknowledged as the core aims of financial market regulation and supervision (Jurkowska-Zeidler, 2017: 379–393). The security of the financial market is subject to normative protection within the framework of the financial safety net[4] (Jurkowska-Zeidler, 2016: 39–45). Undoubtedly, the establishment of regulations aimed at preventing a shift of the risks of banking activity onto the shoulders of taxpayers and public finance is a necessary complement to the existing mechanisms for the prevention and management of financial crises, allowing a better control of systemic risks. The legitimacy of legislative changes enabling the liquidation of an entity, while maintaining the continuity of its critical functions, results primarily from the specificity of financial services. The operation of financial entities is based on trust, the loss of which may lead to panic and so-called bank run, with loss of bank liquidity and unavailability of depositor funds as the immediate consequence.

It should not be neglected, either, that the scope of mutual dependencies between entities providing financial services, the banking sector entities in particular, generates the risk of a systemic crisis, as problems of one entity may be transferred onto other institutions (the "contagion effect").

The implementation of the European legal framework for bank recovery and resolution in the legal systems of Member States resulted in changes within the national

3 Between October 2008 and 31 December 2012 Member States provided €591.9 billion (4.6% of EU 2012 GDP) in capital support (recapitalisation and asset relief measures) to the financial sector.

4 The financial safety net is meant to serve to limit the occurrence and scale of financial crises (crises prevention) and to mitigate their results and effects if they should happen (crises resolution).

structure of financial safety nets, since each country was obliged to indicate the authority entrusted with the execution of tasks related to the forced restructuring of banks. Coherence of the changes is particularly important, especially from the point of view of micro- and macro-prudential supervision, mandatory deposit guarantee system and central bank's role in ensuring financial stability on the financial market, for the financial stability and protection of depositors are values that should be protected in the interest of the public.

The core content of the article is comparison of the role and location of the Polish and Czech resolution authorities in the architecture of the respective domestic safety nets. The main aim of the contribution is to confirm or disprove the hypothesis that the legal framework of the resolution is a complementary element of a financial safety net at the financial market, making it necessary to redefine the role of individual institutions that form the current system of ensuring financial stability in Poland and the Czech Republic. The scientific methods of analysis, synthesis, and comparison are employed.

2 The EU Legal Framework for Bank Resolution

Directive 2014/59/EU,[5] (hereinafter: BRRD) established a harmonised legal framework for resolution in the Member States of the EU[6] (Jurkowska-Zeidler, 2015: 130–147). The framework will enable Member States to protect taxpayers by taking actions in the event of banking crises more timely and in a more structured manner. The institutional scope of forced restructuring includes institutions understood as credit institutions and investment companies.

The process of resolution[7] is a comprehensive legal and operational mechanism consisting in restructuring or liquidation of the bank, while maintaining the latter's critical functions and protecting the guaranteed deposits (European Commission, 2014). The EU Bank Recovery and Resolution Directive provides authorities with more

[5] The BRRD implementation deadline expired on 31 December 2014, with the exception of certain provisions, including *inter alia* bail-in entries, that became effective as of 1 January 2016.

[6] The Bank Recovery and Resolution Directive was adopted at EU level together with Regulation (EU) No. 806/2014 on Single Resolution Mechanism (SRM) and the new Directive 2014/49/EU on Deposit Guarantee Schemes (DGSD) to complete the legislative work underpinning the European Banking Union. Those three new regulations are interconnected. The BRRD provides a complete framework for the crisis management of banks, while the DGSD strengthens the protection of citizens' deposits in case of bank failures. The adoption of those directives contributes to making the Single Rulebook for the banks of the 28 Member States a reality and paves the way to its centralised implementation. The Single Resolution Mechanism, on the other hand, is directly responsible for the resolution of all banks in Member States participating in the European Banking Union. Its structure reflects the division of tasks under the Single Supervisory Mechanism.

[7] "Resolution" means the restructuring of a bank by a resolution authority, through the use of resolution tools, to ensure the continuity of its critical functions, preservation of financial stability and restoration of the viability of all or part of that institution, while the remaining parts are put into normal insolvency proceedings.

comprehensive and effective arrangements to deal with failing banks at the national level, as well as cooperation arrangements to tackle cross-border banking failures.

The resolution procedure should be launched when the bank is either on the verge of bankruptcy or is realistically in danger of a failure. Therefore, if the financial situation of an institution deteriorates, the adoption of early intervention measures is considered. If no supervisory measures or actions financed from private funds lead to an improvement, a decision may be taken to declare the institution "failing or likely to fail".[8]

The EU Bank Recovery and Resolution Directive provides for four main instruments that can be applied under the scheme of resolution, the respective tools being:

- asset separation;
- sale of business;
- bridge bank; and
- the bail-in tool.

The last option, i.e. bail-in (the recapitalisation of a falling bank through a write-down and conversion to equity of some of its liability), is the most controversial of all, as it deeply interferes with the proprietary rights (Schillig, 2016: 279–310).

In accordance with the BRRD, the restructuring and orderly liquidation of banks is to be financed from the private sector funds.[9] If the financial situation of a bank were to deteriorate beyond repair, the new EU crisis management framework ensures that banks' shareholders and creditors would have to pay their share of the costs through a "bail-in" mechanism. Thus, the bail-out principle, transferring the costs of bank bankruptcy to the taxpayers, was replaced by the bail-in principle, shifting a relevant part of losses and costs resulting from the restructuring or bankruptcy to the shareholders and creditors of the institution on the verge of bankruptcy. This means a transfer of risk between the taxpayer based public finances sector and the private sector, especially bondholders and depositors (Mroczkowski, 2015: 86–97).

The Directive also lays down a requirement for the establishment of resolution financing mechanisms, according to which scheme each Member State sets up a fund at the national level to finance this process. Contributions to the fund are differentiated considering the bank's risk and are collected on an *ex-ante* basis.[10]

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8 The guidelines on the circumstances under which an institution shall be considered "failing or likely to fail" were published by the European Banking Authority, EBA, in 2015.

9 Nevertheless, the BRRD allows government involvement and budgetary means as the last resort only in extraordinary situations, when the stability of the entire financial system is at stake (Art. 56 BRRD). The aid may take the shape of recapitalisation (public equity support tool, Art. 57 BBRD) or temporary nationalisation (temporary public ownership tool, Art. 58).

10 The target level of the fund, set as a minimum, was defined at 1% of the guaranteed deposits, which the Member States should reach by 2024 (in 2012, the amount was close to €65 billion). Should the resources accumulated in the fund prove, in practice, insufficient, the resolution authority may impose additional *ex-post* contribution on credit institutions.

Under the BRRD, each Member State is required to designate one or, exceptionally, a greater number of resolution authorities empowered to apply resolution instruments and exercise powers in this field. The Directive leaves with Member States the choice of the authority entrusted with the execution of the forced restructuring tasks (recital 15): "Member States should therefore be free to choose which authorities should be responsible for applying the resolution tools and exercising the powers laid down in this Directive." The provision of Art. 3 para. 3 of the BRRD clarifies that the resolution authorities may be national central banks, competent ministries or other public administrative authorities or authorities entrusted with public administrative powers.[11] Simultaneously, in the same provision, due to the aforementioned requirement that a conflict of interest should be avoided, the BRRD allows to entrust the role of a forced restructuring body to the supervisory authorities only in emergency, and the supervisors and resolution bodies should be required to cooperate closely in the preparation, planning and implementation of resolution-related decisions. The supervisory process may seamlessly proceed to crisis management and resolution (Schillig, 2016: 137).

3 Bank Guarantee Fund: The Polish Resolution Authority

On June 10, 2016, a new Act on the Bank Guarantee Fund, Deposit Guarantee System and Forced Restructuring (hereinafter: BFG Act) was passed in Poland. Under the law, the role of a forced restructuring authority was entrusted to the Bank Guarantee Fund, which, until that time, within the financial safety network had been responsible for guaranteeing bank deposits.[12] The Fund is a separate, independent body governed by public law, performing public tasks and vested in a legal personality. We have to mention, that it is not a (so-called) state legal person, nor an entity of the public finance sector.

[11] In 2009 the International Monetary Fund and the World Bank prepared An Overview of the Legal, Institutional, and Regulatory Framework for Bank Insolvency. The study discusses the principal features of the legal, institutional, and regulatory framework that a country may put in place in order to deal effectively with cases of bank insolvency in its own jurisdiction (IMF and the World Bank, 2009).

[12] The Bank Guarantee Fund was designated as a recommended body of forced restructuring as early as at the stage of preparing the concept of a legal framework for the forced restructuring in Poland, even before the publication of the BRRD at the European level. In addition to the Bank Guarantee Fund, among potential entities analysed for their capacity to play the function of a forced restructuring body, the following institutions were identified: the Polish Financial Supervision Authority, the National Bank of Poland and a new entity to be set up at the Ministry of Finance. According to the explanatory notes to the draft BFG Act, one of the key issues in the selection of the resolution authority was to ensure coherence between the possibility of using the funds accumulated in the BFG to finance forced restructuring and the payment of guaranteed deposits. Splitting the functions of the deposit guarantor and the forced restructuring authority between different institutions would lead to a situation where decisions and their financial consequences would be assigned to different institutions, which would weaken the role of the economic efficiency criterion in the decision-making process. And thus, finally, a combination of the deposit guarantee function and the conduct of forced restructuring in one entity

The Bank Guarantee Fund, as the entity responsible for payment of the protected financial resources, has particular predispositions to play the role of a resolution authority, as the explanatory notes to the drafted Act indicated. As a guarantor of deposits, it should naturally take part in the process of making decisions to initiate forced restructuring proceedings and authorise the use of funds from the deposit guarantee system. Proceedings of forced restructuring, one of the basic aims of which is to maintain the performance of critical functions, including access to funds accumulated in the accounts, and to protect the guaranteed deposits, provide an alternative to the payment of guaranteed funds, and the entrusting of the role to the Bank Guarantee Fund allows to avoid the risk of forbearance, which could occur in the case of the right to conduct forced restructuring proceedings being assigned to the supervisory body.

On the Polish financial market, the implementation of the BRRD has fundamentally changed the role of the BFG in the financial security network. The Fund got significantly involved in macroprudential supervision and ensuring financial stability in the financial market (Fedorowicz, 2017: 405–416). The new objective of the BFG, indicated in Art. 4 of the BFG Act, is to take actions for the stability of the national financial system, in particular by ensuring the functioning of the deposit guarantee scheme, but also by conducting the forced restructuring. It should be also stressed that the BFG is, at the same time, one of the links of the national macroprudential supervision framework, creating (together with the Polish Financial Supervision Authority, or PFSA, the National Bank of Poland and the Minister of Finance), the Financial Stability Committee – a macroprudential oversight authority in Poland; a major objective of the Committee's operation is to strengthen the resilience of the financial system in the event of systemic risk materialisation and thus to support long-term, sustainable economic growth.

The BFG implements the new restructuring goals through the development of forced restructuring plans and group plans of forced restructuring (including the determination of the minimum level of own funds and liabilities subject to redemption or conversion); through redemption or conversion of equity instruments; and through conducting forced restructuring and granting loans from the forced restructuring fund (the BFG also determines the amount of mandatory and extra contributions to it). It is well-worth pointing out that covered by the BFG restructuring powers are not only banks and investment companies, but also credit unions.

As regards the BRRD implementation, the Fund, as a resolution authority, was granted a competence to issue administrative decisions regarding the effective implementation and use of forced restructuring tools, the solution being a fulfilment of the Financial Stability Board recommendation *Key Attributes of Effective Resolution*

was considered to be the most efficient solution. The synergy between resolution activities and deposit guarantee with the existing infrastructure base also meant that entrusting the functions of a forced restructuring authority to the BFG was considered a cost-effective arrangement, taking into account the outlays necessary to establish and finance the operation of a forced restructuring body.

Regimes;[13] the latter points out that the body of enforced restructuring should be an authority vested in administrative powers (Financial Stability Board, 2014). The purpose of the implemented solution is to meet the requirement that prompt action should be taken towards the entity at risk of insolvency. The Fund's decisions in the area of forced restructuring proceedings are final and are immediately enforceable, which does ensure the efficiency and speed of action.

When analysing new tasks and competences in the field of resolution, granted to the Bank Guarantee Fund, it should be noted that the Fund was strengthened both as regards its role in protection of financial institutions threatened with insolvency, and as a body providing guarantee payments to depositors. The most important challenge, however, is to ensure consistency and proportionality of the BFG operation as a resolution body with the activity of other national safety net institutions. Undoubtedly, it is the BFG that has gained the widest access to data on the financial situation of banks, investment companies and credit unions. The challenge lies in the correct identification of risks by the BFG and PFSA and the use of restructuring instruments in time to achieve the objectives of the Act and to protect financial stability and the public finance.

4 The Czech National Bank: Resolution Authority

The Czech Republic, like other EU Member States, was obliged to transpose the BRRD. Implemented late, the Directive was transposed by Act No. 374/2015 Coll. on recovery and resolution in the financial market (hereinafter: ARRFM). This act, together with amendments to other acts adopted in connection with this legislation and in connection with new regulations brought by the BRRD and the resolution mechanism in general introduces into the Czech law a completely new concept and new institutes related to the resolution of the financial institutions.[14]

Given that the BRRD does not specify exactly who is to be entrusted with the competences under the national regulation, it is up to each State to implement the resolution authority and its powers in an existing institution and/or establish a specialised body as the resolution authority. The Czech Republic has chosen the first option, and implemented the competences of the resolution authority into a specialised unit (an independent Restructuring Department) within the Czech National Bank. The institution is therefore the Czech National Bank (hereinafter: CNB). The fact that the CNB was selected as the resolution authority is not surprising, given that it is an institution that has been entrusted with the supervision of the entire financial

[13] The FSB adopted the *Key Attributes of Effective Resolution Regimes* at its Plenary meeting in October 2011. The G20 Heads of States and Government subsequently endorsed this Guidelines at the Cannes Summit in November 2011 as "a new international standard for resolution regimes".

[14] The financial institutions subject to BRRD/ARRFM include all banks in the Czech Republic, as well as credit unions and some securities traders. Their list is kept updated by the resolution authority to make it clear who is subject to this legislation.

market since 2006.[15] On the other hand, its position is quite unique (the supervisory power is fully concentrated in the hands of the central bank), as compared e.g. with the central bank of Poland or most other EU Member States, where the central bank is not the financial supervisor.

The main function of supervision, the same as the resolution, is to use its public law bodies to intervene in case there are some imperfections – it can impose receivership or revoke the licence. Above all, it offers protection of the system of financial institutions and the financial market in its entirety, as well as prevention of future failures or illegal conduct (Janovec, 2017: 144).

4.1 Resolution authority

The organisational classification and arrangement of the resolution authority is governed by Act No. 6/1993 Coll., on the CNB, (the CNB Act), Act No. 21/1992 Coll., on banks (the Banks Act) and ARRFM. All of these laws include the transposition of the BRRD and DGSD. Internally, the organisational structure of the CNB is laid down by its Organisational Rules, whose relevant part relating to the resolution authority and the resolution mechanism is published, in accordance with the ARRFM.

The Restructuring Department constitutes the third branch of the CNB's core functions and powers, the other two being the care of monetary stability and the supervision of financial markets. In its essence, it is an administrative authority, which will decide in the first instance; the second-instance authority is the CNB Bank Board.

Given that the organisational structure of the CNB is quite broad, the only option was to establish a separate department with its own independent organisational structure and management. Regardless of a certain autonomy of the Department within the CNB, one must not disregard the overall internal and external policies of the CNB and all its departments, which means that the Restructuring Department is not unrelated to the CNB and must respect, for example, media compliance, ways of conduct and everything that follows from the Organisational Rules of the CNB.

This includes the decision-making in administrative proceedings with financial market entities in connection with resolution and issuing measures of a general nature. Other functions include the performance of resolution-related activities in the relevant financial market entities separately from the supervision carried out in other CNB departments. This also involves the preparation of and regular updates to individual or group resolution plans and their involvement in the preparation of group resolution plans, cooperation with the European supervisory authorities and resolution authorities abroad. This Department also determines the use of appropriate resolution tools and procedures. If the Czech Republic joins the Banking Union, the vast majority of

[15] The model of the central bank as the resolution authority was chosen in another 14 EU countries. See Resolution Authorities, s. a.

the critical resolution powers will be transferred to a central authority, i.e. the Single Resolution Board (SRB).

In general, the tasks for each resolution authority fall within four groups, and the same applies to the Czech Republic:

a) the creation of resolution and recovery plans – as a preventive tool in the financial market crisis;
b) early intervention and achievement of recovery in the case of a troubled bank;
c) crisis resolution – a resolution when a bank is already insolvent; and
d) determining the contribution to the resolution financing arrangement.

Any method of resolution using specific tools must always aim at minimising the use of public funds while ensuring that the resolution objectives are achieved.

The CNB states that in case of a failing institution, institutes such as liquidation or insolvency should always be chosen first before potentially using resolution tools. Resolution measures are therefore limited only to cases of public interest, a very broad term that can be applied and interpreted practically always as needed (CNB, 2017: 118). In other words, if the resolution authority does not want to, the resolution will never happen and vice versa.

Public interest should be specified, for example, by market share, i.e. the size of the financial institution. When a given financial institution has a certain market share and it is "big", it is always in the public interest to take resolution measures. I am convinced that the determination of an institution's size is the fundamental prerequisite and the reason why such a regulation was created through the BRRD. The CNB has also issued a table setting the thresholds for determining the basic approach and resolution strategy. This table divides financial institutions into 3 categories, where liquidation approach is assigned to the smallest, systemically insignificant ones. Resolution mechanism is assigned to significant institutions, either using the transfer of part of the activities to a private acquirer, while the bail-in tool is preferred in big and critical financial institutions (depreciation or conversion of depreciable liabilities) (CNB, 2017: 119).

If there is even the slightest chance, the resolution mechanism should have priority over liquidation/insolvency for one single reason. The regulation in this area is unified, while the same does not apply to liquidation and insolvency law.

The resolution authority cooperates with foreign resolution authorities within resolution colleges, in particular with the Single Resolution Board, given that systemically important financial institutions come from countries belonging to the banking union (according to the place where the licence/authorisation was granted). Here we can see a certain advantage of conferring the resolution powers on the supervisory authority, because the supervisory authority also cooperates with other supervisory authorities in other countries within the supervisory colleges, and therefore the representative of the resolution authority can also cooperate fully with these supervisory colleges as it is still part of the CNB.

Under the law, the resolution authority uses some regulatory tools to achieve the objectives entrusted to it.

- Methodological and interpretative materials
  - official communication
  - guidelines of the European Supervisory Authorities
  - answers to questions
  - other materials
- Consultation materials and proposals

The set of tools above is from the "soft law" category, but the question is how much such soft law tools are really real soft law, and to what extent some of them are practically mandatory for all obliged entities. In the financial market, more than elsewhere, the softest law tools must be respected, although they are not legally enforceable, they specify and supplement grey areas in hard law. Their violation or non-compliance may constitute a breach of obligations within the limits of administrative law with potential sanctions.

For example, the CNB's Restructuring Department is responsible for the following (CNB, 2018: 4–5):

- preparation of and regular updates to resolution plans;
- minimum requirement for own funds and eligible liabilities ("MREL");
- prescription and collection of contributions to the Resolution Fund;
- cooperation with European resolution authorities, or other relevant resolution actors;
- deciding on the use of appropriate resolution tools and procedures;
- decision-making in administrative proceedings with financial market entities in connection with resolution and issuing measures of a general nature.

4.2 National Resolution Fund

The Resolution Authority, i.e. the Restructuring Department of the CNB, is also in charge of the National Resolution Fund, which receives the contributions of individual credit institutions from 1 January 2016, i.e. from the effectiveness of the ARRFM which transposed the BRRD. The amount of the institution's individual contribution to the NRF depends on its size and risk profile.[16] The calculation, prescription and possible recovery of these contributions falls within the competence of the CNB.[17]

[16] This is further specified in the Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements.

[17] In 2016, the total amount of the contribution was CZK 3,024,946,568; in 2017, it was CZK 2,958,854,930. Source: www.cnb.cz.

Funds in the National Resolution Fund are administered by the Financial Market Guarantee System (it is an independent body, which also manages deposit insurance contributions of banks), and these funds can be used to finance resolution of a failing financial institution (infusion of capital in the financial institution, purchase of its assets, provision of credit). These funds can also be used to match financial income for financial institution owners if resolution tools are used, but income for the owner would be lower compared to liquidation or insolvency. Any use of these funds, given that they are public funds, is subject to the approval by the European Commission under the State Aid Rules (CNB, 2017).

NRF funds should be at least 1% of the covered deposits until 2024 (approx. CZK 27 billion). This level is to be achieved through regular contributions from the institutions. The amount of an institution's individual contribution to the NRF is dependent on its size and risk profile and is further specified in the Commission Delegated Regulation (EU) 2015/63. The calculation, prescription and possible recovery of these contributions falls within the competence of the CNB, namely the Restructuring Department (CNB, 2018).

5 Conclusion

There is no doubt that a comprehensive analysis of the new objectives, tasks and competences of the national resolution bodies has to be made against the European regulatory background, duly taken into account in that respect. As part of the transfer of crisis management to the level of the EU, national resolution authorities are strengthened or created. Strong in terms of regulatory powers and capital, they are capable of rapid intervention and their position necessitates redefinition of the role of individual public institutions forming the financial safety net in each of the Member States. Thus, the research hypothesis formulated by the Authors has been positively verified.

The analysis of new goals, tasks and competences of BFG as a body of forced restructuring on the Polish financial market reveals a fundamental strengthening of the protective and stability role of the Fund in the financial safety net. The functions of resolution entrusted to the BFG subscribe to a group of macro-prudential tasks, functionally related to one another, that serve the purpose of counteracting the systemic risk and destabilisation of the national financial system.

When we compare the resolution authorities in Poland and the Czech Republic, we are convinced, that both authorities will perform more or less in the same way as expected by the BRRD. The Czech National Bank is the standard resolution authority and there should not be any doubts or problems with it. The Polish resolution authority is very unique and might be quite questioned regarding conflicts of interest for the mission of the Bank Guarantee Fund. On the other hand, when there is the strict border between different quests, goals and human resources of one authority, there should not be any real problem for all the different activities performed by the same body.

In a way, every financial crisis (or even an unpleasant situation) purifies the system from undesirable features. How negative the impact of a crisis seems to be a question of legislation, preventive measures and public attitude towards it. What it surely brings about is a reaction in the form of new instruments and measures that aim to cushion the damage that has been already caused and to prevent such a crisis in the future. This chapter on the European integration of regulation and supervision leading to the foundation of the banking union with resolution mechanism describes processes that clearly exemplify it. The banking union especially with resolution mechanism is by far the deepest and most comprehensive legal framework of the entire financial market, not only in terms of regulation and supervision (Janovec, 2018: 14).

The problem of the resolution mechanism is currently not so much its regulation (if we disregard the ambiguity of some terms such as public interest), but paradoxically insolvency law, which is yet to be harmonised. Generally, resolution should be the exception to the rule of national insolvency and the question of whether there is a public interest in applying that exception.

Liquidation is the default solution to the problem of any financial institution, which is due, to a certain extent, to the generality and vagueness of the two important terms (conditions) that must be met in order to implement resolution – the financial institution provides for critical functions and there is public interest. However, neither of the terms is precisely defined and there is a lot of scope for their interpretation. Two crucial questions arise – it is necessary to clarify the meaning of the critical functions of the financial institution and the public interest. The second question is whether the same conditions and course are ensured for the same banks within the entire banking union, or whether there is a need for statutory or harmonisation clarification (Magnus, 2017: 6).

The reason is quite simple and can be shown on the example of liquidation with bail-out of two Italian banks, Veneto Banca and Banca Popolare di Vicenza.

The resolution mechanism and the functioning of the resolution authorities across the EU needs two crucial things. First, it is necessary to clarify the interpretation of public interest and provision for critical functions, because until they are clarified, their interpretation is always in the hands of the interpreter at his discretion, i.e. there are and will be striking differences between the interpretation of the BRRD provisions and the subsequent application of the resolution mechanism in individual Member States.[18] Second, there is no harmonisation of insolvency law, which leads to differences in the individual EU countries when choosing between resolution and liquidation/insolvency. Irrespective of the resolution mechanism, the harmonisation of insolvency law is necessary, even inevitable, but in successive steps.

[18] Cf. e.g. the resolution of the Danish Andelskassen J.A.K. as a very small financial institution, and the liquidation of much larger Italian banks.

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Ex Ante "Regulation"? The Legal Nature of the Regulatory Sandboxes or How to "Regulate" Before Regulation Even Exists

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Abstract

Prior to the Global Financial Crisis, financial innovation was driven by so many factors, but the Global Financial Crisis changed the regulatory pendulum, which has swung to deeper regulation and also changed the way we think about financial innovation. The financial innovation – with its bright and destructive outcomes – is an integral part of the competition in the financial market. But the race is such that the regulatory authorities are in a rather disadvantaged position if we just think of the old fashioned regulatory paradigm. In this context, the question is what – new – legal institutions – such as the regulatory sandbox – could provide financial stability and a proper legal regulation to unregulated financial products and services.

Keywords

financial regulation and supervision; financial stability; FinTech; regulatory sandbox

1 Introduction

Prior to the Global Financial Crisis (hereinafter: GFC), financial innovation was driven by so many factors, such as rapid economic growth, a growing reliance on financial intermediation, the improving well-being of the population, trade and capital account liberalisation, changes in international monetary regimes, financial deregulation in most

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countries, globalisation, and of course technical innovation. The common understanding of the impacts of the financial innovations was very positive, *resulting in a deregulatory approach to financial regulation*. The GFC changed the regulatory pendulum, which has turned to a more detailed and systemic risk-based – macroprudential (Mérő, 2017) – regulation, and also changed the way we think about – the possible risks of – financial innovation.

Financial innovation – with its bright[2] and destructive outcomes[3] – and financial technology is an integral part of the competition in the financial market. But the need to balance between preserving financial stability, protecting consumers and promoting innovation is such that the regulatory authorities are in a rather disadvantaged position if we just think of the traditional regulatory paradigm. In this context, the question is how to "regulate" the financial innovation, in preserving financial stability, protecting consumers and promoting innovation, before the appropriate legal regulation even exists. The new "buzzword" is the regulatory sandbox, which is now a wide spreading framework set up by the financial sector regulators (hereinafter: regulatory authority or competent authority) across Europe and the world.

In this study, we assess the new regulatory tool's – *the regulatory sandbox* – legal basics. To achieve this aim, the study is divided into two main chapters. The first chapter, *FinTech* defines the term of financial technology, sets up its classification, summarises its benefits and treats, and overlooks the types of regulatory approaches to FinTech. The second chapter, *Regulatory Sandbox* includes the definition of regulatory sandbox and analyses the introduced or proposed regulatory sandbox's legal attributes within the context of European Union members.

2 FinTech

2.1 Term and classification

Financial technology (hereinafter: FinTech) does not have a commonly accepted academic definition (Rácz, 2018), but in the literature, it generally or broadly means the exploitation of *innovative technology* in the framework of financial services, especially internet- and smartphone-enabled financial innovations (Nicoletti, 2017). FinTech refers to – also broadly speaking – technology-enabled financial solutions, which is often seen today as the new marriage of financial services and information technology (Arner et

2 See for example the ATMs, credit cards, e-bank, mobile banking which are based on digitalisation in the banking sector.

3 See for example the financial derivatives (asset-backed securities, mortgage-backed securities, collateralised debt obligations) which had a major role in the outbreak of the GFC.

al., 2015).[4] Or just shortly, FinTech is a new industry that applies technology to improve financial – front, middle and back-office (Eszes et al., 2018) – activities (Schueffel, 2016).

Expressis verbis FinTech also does not have a legal definition, but, we can find legal definitions of *"innovative financial product or service"*. According to the Arizona *House Bill 2434* (legiscan.com, 2018) "innovative financial product or service" means a financial product or service that includes an innovation. "Innovation" means the use or incorporation of new or emerging technology or the reimagination of uses for existing technology to address a problem, provide a benefit or otherwise offer a product, service, business model or delivery mechanism that is not known by the attorney general to have a comparable widespread offering in this state. New York *Assembly Bill 9899* (legiscan.com, 2017) – which is not a past act, but an introduced one – uses the term of "financial technology products or services" but with the same meaning as the aforementioned bill.

To define the term of FinTech, the aforementioned legal definitions are useful. In my opinion – and in the context of this paper – *financial technology means the use or incorporation of new or emerging technology or the reimagination of uses for existing technology to address a market failure, provide a benefit or otherwise offer a financial product, service, business model or delivery mechanism that is not known by the financial regulation.*

After we approximately define the term of FinTech, it is necessary to take a survey of the *current products and services* which fill the criteria of the previously defined term. There cannot be an exhaustive list of the products and services that do and do not include the scope of FinTech, but the literature has identified different innovations as surely fitting under the FinTech umbrella: for example, crowdfunding, P2P (peer-to-peer) lending, robo-advisory services, artificial intelligence and machine learning, new digital advisory and trading systems, internet and mobile communications payments, infrastructure for derivatives and securities trading and settlement, innovative digital currencies, cryptocurrencies and the blockchain, finance and investment platforms, big data analytics.[5]

While the broad term FinTech can be useful to describe a wide range of innovations, *to draw the legal conclusions,* we have to further specify the individual innovations. In view of the above, it is useful to classify FinTech developments by the main existing economic functions they provide. According to the Financial Stability Board, *FinTech activities can be organised into five categories of financial services:*

a) *payments, clearing, and settlement* (e.g. Alipay, PayPal, blockchain and cryptocurrencies, infrastructure for derivatives and securities trading and settlement)
b) *deposits, lending and capital raising* (e.g. crowdfunding; P2P lending)
c) *insurance* (e.g. mobile and web-based financial services)
d) *investment management* (e.g. e-trading, robo-advice, digital ID verification), and
e) *market support* (e.g. robo advice, smart contracts, big data analysis)

4 Nonetheless, innovation in financial services is not a new "revolution", but an evolution. After the GFC the third stage of FinTech, FinTech 3.0 has begun. See for details Arner et al., 2017.

5 See Arner et al., 2015 and Brummer and Gorfine, 2014.

It is important to highlight, that there has been the rapid growth of global investment[6] in FinTech, and also the rapid growth of innovations touching more of or all of these categories of financial services.[7] Because of the high importance of financial innovations to the competition in the financial market and to the stability of the whole financial market, it is necessary to sum up in a nutshell its benefits and threats.

2.2 Benefits and threats

In theory, technology-based innovation in financial services yields benefits for economic growth and financial stability through many transmission channels, including by reducing some of the failures of the financial market (e.g. information asymmetries, incomplete markets, negative externalities). On the other hand, the potential for FinTech to undermine financial stability throughout micro- and macro-financial risks is also quite impressive. So following the conceptual basics, it is necessary to summarise the *benefits and the threats of the FinTech* innovations.

The FinTech innovations have the potential to improve the level of decentralisation and diversification, efficiency, transparency of the financial system, furthermore could improve the access to and confidence in financial services. The new FinTech products, services, and business models may lead to more decentralisation and diversification, which may reduce market concentration and could mitigate the impact of future financial shocks (FSB, 2017). The decrease of market concentration also adheres to the "too big" problem. FinTech innovations could induce meaningful efficiency improvement in the financial system with the rationalisation of back office functions, optimisation of decision-making processes, reduction of the branch network and searching costs and faster completion of transactions (Fáykiss et al., 2018: 48). Higher transparency reduces information asymmetries and enables risks to be more accurately assessed and better priced, also improving the ability of market participants to manage risk. Access to and convenience of financial services affects the financial inclusion of households and businesses, which is important for supporting sustainable economic growth.

Taking into account the above-mentioned benefits, according to Christensen's well-known theory,[8] it is clear that FinTech innovation can be assigned to the categories

6 According to the FinTech Global, global FinTech investments increased steadily between 2014 and 2017 from $19.9bn to $39.4bn at a CAGR of 18.5%. This trend accelerated in the first half of 2018 when $41.7bn was invested across 789 deals (fintech.global, 2018).

7 See for example the use of blockchain technology in different financial services (Király, s. a.).

8 For the term disruptive technology introduced in the article "Disruptive Technologies: Catching the Wave", see Bower and Christensen, 1995. Later Christensen replaced the term disruptive technology with disruptive innovation, see Christensen, 1997.

of *efficiency innovation* and *sustaining innovation*.[9] FinTech innovation is capable of fundamentally changing existing business models, make financial products and services more accessible and of course affordable. This specialty in the context of the European Union is also supported by the legislation, especially the PSD2 [Directive (EU) 2015/2366]. For this reason, FinTech could also belong to Christensen's third category, i.e. *disruptive innovations.*[10] FinTech innovations could cause serious – micro and systemic – risks, which *could harm financial stability.* From a legal perspective, it is primarily the latter innovations – so this specialty of FinTech – that merit special attention, since the market actors applying this kind of innovations are partially or fully outside the control of the regulatory and supervisory authorities, while they may have a significant influence on the financial stability of the entire financial intermediary system (Hungarian National Bank, 2017).

The negative impact of the FinTech innovation of the financial intermediary system may appear at the individual level of the financial institution *(micro financial risks or micro-prudential risks)* or at the systemic level of the financial system as a whole *(macro-financial risks or macroprudential risks).*

The micro-prudential risks are divided into two broad categories: financial risks and non-financial or operational risks. FinTech firms may develop without the necessary risk management expertise and under-estimate the level of risk they are taking on and may be vulnerable to different forms of *financial risks* (leverage, liquidity mismatch, maturity mismatch). As all businesses, so FinTech firms are subject to *operational risks* (data quality and data protection, cyber risks, third-party reliance, legal/regulatory risks). *Macroprudential risks* – depends on the type of financial innovation – could arise from intensifying procyclicality (with effects that could even spill-over to other sectors), contagion (algorithmic trading, social trading, etc. may lead to new and unexpected sources of contagion), appearance of new institutions and services with systemic significance (monopolies or oligopolies), intensifying opportunity of regulatory arbitrage, and excess volatility (FSB, 2017; BIS, 2018).

2.3 Regulatory responses to FinTech

According to the literature, *four main approaches* have emerged to balance support for innovation with the core mandates – financial stability and consumer protection – of financial regulators. Overall, it may have a meaningful effect on the long-term performance and competitiveness of the economy, how a given regulatory system

9 *Sustaining innovations* are the ones that replace old products with newer models. *Efficiency innovations* – the ones most common in our current economy – are the ones that reduce or simplify the processes in the creation and delivery of an existing service or product.

10 *Disruptive innovations* are not – essentially – breakthrough technologies that make good products better; rather they are innovations that make products and services more accessible and affordable, thereby making them available to a larger population. See www.christenseninstitute.org/disruptive-innovations/ [Accessed 13 Sept. 2019].

addresses the advent of FinTech innovations and how it can appropriately encourage their spread, while addressing the – systemic – risks efficiently (Fáykiss et al., 2018: 52). It is necessary to point out, that a few FinTech innovations, have been expressly designed to operate in the interstices of the law and avoid regulation, many other FinTech entrepreneurs are instead designing their businesses to operate within the regulated environment (Allen, 2019).

The first approach involves doing nothing or laissez-faire. This approach basically means not regulating FinTech or the FinTech firms just simply have to comply with the traditional financial regulation, often with highly restrictive results. *The second approach* provides the regulators a certain amount of flexibility on a case-by-case basis. The regulators equipped by the legislature with a mandate to grant no-action letters, restricted licenses, special charters or partial exemptions for FinTech firms. In *the third approach* – the structured experimentalism – regulators can provide a structured piloting exercise, a regulatory "safe space" for experimentation with new approaches involving the application of technology to finance. *The fourth approach* reforms the existing regulations or new regulations are developed (Zetzsche et al., 2017: 11–14).

In my view, the first approach – with the exception of some cases – is not the proper form to handle the aforementioned risks that FinTech creates. It is necessary to underline that according to the principle of legality, and rule of law, of course, finance is legally constructed and does not stand outside the law, the existing legal environment will shape – and often form a constitutive part of – the FinTech products and services that can be offered. The second approach is based on the regulator's case-by-case discretion – legally granted forbearances such as no-action letters, restricted licenses, or legally not necessarily granted special charters – but this comes with the difficulties of ensuring the equal treatment, also comes with the risks of errors, which could distort competition or the permitted conduct may prove harmful to clients or the financial system as a whole. Moreover, the second approach's case-by-case nature is not suitable for market-wide use and fails to provide long-term legal certainty for FinTech businesses and also cannot be used for international standardisation (Zetzsche et al., 2017: 11–14). The third approach, the structured experimentalism is *a new and innovative approach to test* a product, a service or business models in a "real" but "created" legal framework with the possibility to get to the market after the test period. This approach allows FinTech to step in the – restricted – market with its innovative service, product or business model, without any sanctions, in return they incorporate appropriate safeguards to reduce the risk of their innovative business and also the regulatory authority gets important information, *ex ante* the special legal regulation even exists. The regulatory sandbox is not a typical legal institution, but an innovation in legal regulation as FinTech in the financial industry. Finally, *the fourth approach* emphasises the existing regulations or new regulations are developed. If the third and the fourth approach follows one another, it could be called the *smart regulation*.

3 Regulatory Sandbox

3.1 The concept and term

Concepts like sandboxes come from the computer industry where sandboxes are created to test new developments interacting with a mirrored copy of the whole operative system, including databases and other software programs but without being able to affect any elements already running. First – in 2015 – the U.K. Financial Conduct Authority used the term "regulatory sandbox" when it introduced its own one (FCA, 2015; Bromberg et al., 2017: 314–336).

Since then, the concept spread across more than 20 countries from Europe to Asia.[11] Among the members of the European Union, the *Netherlands* (dnb.nl) and *UK* (fca.org.uk) are operating their regulatory sandbox, *Hungary* (mnb.hu), *Spain* (s03.s3c.es) and *Lithuania* (lb.lt) already made a proposal to set up their own ones. The paper only analyses the previously mentioned five countries' legally relevant regulations and proposals.

According to the literature and the regulatory practice, in a finance regulatory sandbox there is a "safe space" for experimentation with new approaches involving the application of technology to finance.[12] More accurately, a regulatory sandbox is a framework set up by a financial sector regulator to allow small-scale, live testing of innovations by private firms in a controlled environment (operating under a special exemption, allowance, or other limited, time-bound exception) under the regulator's supervision (Jenik and Lauer, 2017). In other words, the regulatory sandbox enables innovators to assess the viability of their financial product, a business model in a "test environment" controlled by the regulatory authority, while enjoying exemption from certain regulatory obligations for a specific period of time (Fáykiss et al., 2018: 54).

Taking into account the abovementioned criteria, we attempt to define the term of *regulatory sandbox as a program established by the law or set up by the competent authority that allows a person to temporarily test innovative financial technology products, services or business models on a limited basis under the laws of the European Union and the member state.*

Despite the attempt to define the term of the regulatory sandbox, the immanent legal nature of this legal institution is *difficult to summarise,* mainly because of the differences between the jurisdiction's legal thinking. Furthermore, *there is no specific legal regulation – in force* – of a regulatory sandbox, the competent authorities who have already implemented a regulatory sandbox, use only the existing discretions they have. The first jurisdiction could be Spain who legally regulates the details of the regulatory sandbox. Nevertheless, *the paper attempts to collect the legal – not necessary based on a legal norm – attributes of the regulatory sandbox in the aforementioned European Union member states.*

11 For example Abu Dhabi, Hong Kong, Malaysia, Netherlands, Switzerland and the U.K.
12 See Zetzsche et al., 2017: 13 and also FCA, 2015.

3.2 Legal attributes of the Regulatory Sandboxes in the member states of the European Union

According to the research, the legal attributes which are necessary to be analysed are:

a) the *objective of the regulatory sandbox*
b) the *conditions of the regulatory sandbox* (participants, eligibility criteria, test period, protection of service users) and
c) special tools of the regulatory authority

The first is to review *the objectives* of the regulatory sandbox, in which there are not any major differences. The basic objectives of the regulatory sandboxes in the analysed member states of the European Union – in the operating and the proposed ones – are better access to finance, foster competition and growth, better understanding of financial innovations.

The second is to review *the conditions* of the regulatory sandbox. In this context the paper analysed:

a) who could participate in the regulatory sandbox
b) what are the eligibility criteria
c) how long is the test period, and
d) what are the special demands to protect the users of the service?

Basically, the analysed member states of the European Union follow the same rules, both *authorised or supervised financial market participants and FinTech start-ups* could enter in the regulatory sandbox, so the participants are not restricted.

The core eligibility criteria are the *innovative nature* of the FinTech product, service or business model. Innovative nature means the use or incorporation of new or emerging technology or the reimagination of uses for existing technology to address a problem, provide a benefit or otherwise offer a product, service, business model or delivery mechanism that is not known by the regulatory authority.[13] The *benefit of the public,* which contains the promotion of financial stability and effective market competition, and *the benefits of the consumer and investor* (safer and cheaper financial services) are also essential criteria. The *necessity of and preparation for testing in a real environment* is also important. Reasoned arguments must be presented about the existence of barriers related to legal regulation (soft and hard law), which prevent achieving the objectives, and without testing in real environment and assistance from the financial market supervisory authority, such barriers are impossible or very difficult to eliminate.

The test period is generally *up to 6 months with the possibility of extension to 12 months.* The quite long period of testing promotes the gathering of a large user base, which may even lay the foundation for longer-term operation, and this horizon also provides an opportunity for exploring and managing potential operational anomalies.

13 See the term FinTech.

The regulatory sandbox as a legal institution of structured experimentalism requires real consumers and real market participation. In order to work, there must be *rules to protect service users.* In most regulatory sandboxes, there are some limitations to the number of customers and capital, also the regulatory authorities require some financial safeguards (bank guarantee, insurance, etc.).

The aforementioned legal attributes are quite similar in the analysed jurisdictions, but the legal tools are different and also crucial to the effectiveness of the regulatory sandbox. The cause is the Union legislation which does not allow the performance of financial activities without a license, and there are no exceptions. It is the competence of national law to grant the regulatory authority, the competence to issue a temporary licence or restricted operating licence. These legal institutions are necessary to set up a regulatory sandbox with the participation of FinTech firms.

According to the national law or the proposals, there are – and could be – differences in the entrance to the regulatory sandbox. The first model is based on an *administrative decision* (temporary licence, restricted authorisation, no-action letter) if it is granted by the national law. The other model is based on an *arrangement* or a *contract* between the regulatory authority and the participant. The effectiveness of the regulatory sandbox is based on how flexible – *ex ante* – the legal "regulation" or legal environment can be set up by the regulatory authority's administrative decision or administrative contract within the regulatory sandbox. This is verifiable with regards to interpreting national laws and rules, but there is almost no flexibility to the national and no flexibilities to the laws of the European Union. The regulatory sandbox *alone* – in the context of the European Union law – is typically too limited in scope and scale to promote meaningful innovation.

After a participant efficiently finished the testing in the regulatory sandbox, the crucial thing is its legal effects. How can the FinTech firm get a *special authorisation* (restricted or full license) to provide the product or service and in what – not anymore ex ante – legal conditions. This requires a detailed legal regulation *which is currently not provided either by the national law or the European law* to the regulatory authorities – generally and not just by specific sectors – in the analysed countries.

4 Conclusion

The paper highlighted the term of financial technology, set up its classification, summarised its benefits and threats, and reviewed the types of regulatory approaches to FinTech. The paper also defined the term of the regulatory sandbox and analysed the introduced or proposed legal attributes of the regulatory sandbox within the context of European Union members. The regulatory sandbox is a new and innovative legal institution to handle the threats and utilise the benefits of financial innovation. The regulatory sandbox allows the regulatory authority to create a special legal environment – ex ante the real legal regulation – for the FinTech firms to test, along with the protection of the users. But in the context of the European Union law, the effectiveness of national regulatory sandboxes is quite limited. The regulatory sandbox is a reasonable and useful regulatory approach, which can also be effective, if the regulatory authorities receive the competence to build on the regulatory sandbox and step to the next stage of the so-called *smart regulation,* and have the competence to reshape the regulation with the balance of public interest and financial innovation and give the competence to issue restricted or full licences, *by the law.*

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100 Years of Taxes as a Means of State Functioning

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Abstract

The article[2] is prepared for the International Scientific Conference "Currency, Taxes and Other Institutes of Financial Law in the Year of the 100th Anniversary of the Founding of Czechoslovakia". The chosen topic is up-to-date from the point of view of ongoing discussions on the tax obligations of both natural and legal persons. Taxes are accepted by law in the Parliament of the Czech Republic, but they are also the subject of decisions of the Supreme Administrative Court and the Constitutional Court. Especially, taxes are also a scientific and pedagogical subject at the Faculty of Law of the Charles University. In today's socio-economic and social order, in a society where there is no planned economy, taxes are significant in terms of their status as one of the few tools and instruments of managing and influencing the whole economy and the standard of living of the population. The aim of my article is to focus in detail on the provisions of constitutions related to taxes and finally on the subsection 11(5) of the Charter of Fundamental Rights and Liberties, especially in the context of its 100 years of historical development.

The framework for examination is the current concept of the rule of law and the concept of tax law as a tax law in a broad sense (not only taxes, but also fees and other similar payments). The interpretation of the text is complemented by a historical excursion. Finally, I deal with the future of tax laws. In conclusion, I try to evaluate the current tax legislation in the constitutional order of the Czech Republic.

Keywords

Charter of Fundamental Rights and Freedoms; tax law; budget; taxes, fees and other similar payments

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1 Introduction

The stems for this article are historical, general legal-theoretical and general economic foundations for imposing taxes and for legal regulation in the Czech Republic.

The original concept of a ruler functioning both as a governor and an owner of a whole state has evolved during the medieval era. In conclusion, the conflict between the ruler and his vassals lead to the distinguishing of property rights and state power. As early as this moment, the difficult process of the forming of terms of possible state interventions into private property ownership arose. The tax duty of the owner in a form of restraining of his ownership rights lead to the legitimisation of the first assemblies which constrained the ruler. This is not only the case of the "no taxation without representation" principle in the Magna Charta Libertatum. For example, the same principle was contained in the Great Privilege issued by the Bohemian King John the Blind in 1310. Even now, this principle is incorporated into the constitutional principle allowing to stipulate taxes only by an act of parliament. John Locke built his contractual concept of a state on the ownership liberty: *"From all which it is evident, that though the things of nature are given in common, yet man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniencies of life, was perfectly his own, and did not belong in common to others"* (Locke, 1764). The Declaration of the Rights of the Man and of the Citizen of 1789 (in French: *Déclaration des droits de l'homme et du citoyen de 1789*) was enacted by France's National Constituent Assembly on the 26th of August 1789. It was the first step towards the creation of the first constitution of France. The declaration consisted of 17 articles, which deeply influenced the concept of European thinking on these rights. According to Art. 17 of the declaration, the property is *"inviolable and sacred right, [and] no one can be deprived of [its] private usage"*.

Philosophers, lawyers, economists and politicians were concerned with the development, forming and effectiveness of taxes and taxation throughout the whole history of their respective fields.[3] The formation of taxation is influenced by existing conditions and it always arises from political decisions approved by a legislative body. This fact holds both in history and today. Naturally, history has certain development and its specifics. Historically, one can observe the development of taxes, such as transformation from tax in kind to tax in money, stipulation of new types of taxes or new approaches to assess and collect taxes.[4]

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3 For example, during Diocletian's reforms (3rd century AD), the following taxes were enacted: land tax (based on land value), poll tax, labour force tax and cattle tax.

4 To demonstrate, during the reign of Elizabeth I of England, taxes had the lowest rate in Europe, since the upper class laid down tax rates for themselves. In the 1330s, Edward III of England stipulated a new tax on movables which evolved to property tax. In 2011, 500 years elapsed since the first publishing of the book *Stultitiae Laus* [In Praise of Folly] by the Dutch philosopher and theologist

In the 16th century, most probably for the first time in history, the Italian economist Guetti Lodovico (Zubaľová, 2008) came with an idea and a proposition on the righteousness of tax collection. He claimed, that collection of taxes can be understood as a certain counter value of services which are provided by the state to its citizens, such as security or protection of private property. On the other hand, according to R. Pipes (Pipes, 2000), in the medieval era, the duty to regularly pay taxes is perceived as a loss of personal freedom.

In general, it can be documented that the stipulation of taxes, or their increase, was related in the past with an increased military danger or with a state of war. For instance, the enacting of direct income taxation[5] in the United States of America was historically related to financing of war, and the tax was revoked in 1872.[6]

Concepts explaining the substantial essence of taxes and taxation related to the functioning of the economy, but also to critical views on their existence and application, can be found in the works of famous classic economists, such as A. Smith,[7] D. Ricardo,[8] as well as in the works of other famous authors, including J. M. Keynes,[9] A. Laffer,[10] M. Friedman[11] and W. Eucken.[12] The abovementioned short historical excursus leads us to an opinion, that the perception of taxes developed in the past. However, this development is still an open issue (Bujňáková et al., 2015). In the perspective of the abovementioned facts, it can be concluded, that taxes and tax systems in their current form are the invention of the 19th century. In addition, I would like to mention here important domestic theorists, namely J. Kaizl (Kaizl, 1892), V. Funk[13] and his

Desiderius Erasmus of Rotterdam, who claimed, that not the tax rate, but the tax optimisation is what matters.

5 The tax was stipulated in 1861 with a progressive tax rate ranging from 3% to 10%.

6 The Supreme Court of the United States ruled in 1895, that an act stipulating a regular income tax is unconstitutional. However, this tax was afterwards reinstated in a permanent form under the 16th Amendment to the United States Constitution in 1913.

7 Adam Smith proposed, that state expenditures should be paid using exclusively tax revenues. Moreover, he formulated four principles, which should be applied to any tax: 1. equality – everybody should only pay taxes proportionate to their income; 2. certainty – taxes should be estimated precisely; 3. convenience – taxes should be collected in a time and manner, which is convenient to taxpayers; and 4. economy – costs related to the collection of taxes should be minimised (cf. Smith, 1958).

8 According to David Ricardo the fundamental task of economic theory is the formulation of rules which governs distribution in economics.

9 See Keynes, 1936.

10 A. Laffer is a supporter of tax reforms and lowering of taxes, which should endorse motivation to labour, to invest to save money. As a result, it should lead to the increase of work productivity and consecutive economic growth.

11 M. Friedman proposed the negative income tax, which should replace social security benefits and other similar state subsidies. The purpose of this tax is to eliminate costs related to the existence of the social welfare programs, which could be replaced by the reformed tax system.

12 According to W. Eucken, on the competitive market, the progressive tax has a social sense. Consequently, he found essential to set the limit for tax rate which will not lower the interest in investing.

13 V. Funk differentiated between a tax in objective sense and a tax in subjective sense. In the objective sense, tax is the right of a public body to a payment laid down and delimited by a legal norm. In the subjective sense, tax is a legal relation consisting in the state's objective legal claim to demand certain payment as a result of the emergence of particular facts.

work (Funk, 1934: 36) and K. Engliš (Engliš, 1929: 82), who defined tax as a subsidiary payment of public administration pursuant to the capability of taxpayers. In this context, it is worth reminding a theoretical conception of K. Engliš, who claimed, that individualistically managed state-owned enterprises are operating in accordance with the principles of private management – their profits are transferred to the state and their eventual losses are paid by the state as well. From all of the state revenues, taxes correspond to solidaristic principles of economy. K. Engliš characterises taxes as a price for certain state activity. This theoretical construction was novum in the then financial science. It was, in fact, a new formulation of the German school base, where this symbiosis lasted throughout the interwar period. Today's state budget revenues take the form of irreversible levying of a certain proportion of the income created by the entities involved in the process of social reproduction.

The textbook of Financial Law, namely the 6th revised edition (Bakeš et al., 2012: 88), summarises the remarks on the origin of taxes and fees, so that the name of the payment, whether it was a tax, fee or other similar payment, played only a secondary role. The decisive factor for the construction of state incomes is the choice of such a tool that would bring the necessary revenues to the fiscus and at the same time minimise the resistance of the obligated entities. The theory of financial law and financial science (Karfíková et al., 2018: 142) could not avoid the questions of tax law, which it defines as a set of legal norms and other rules governing taxes. Taxes are defined as irrecoverable, involuntary, non-equivalent, and non-sanctionary payments imposed by law and administered by the state or by other persons performing financial public administration, which are public revenues of public budgets, which are generally non-purposeful, proper, regular and planned.

The state needs enough resources to be functional and to fulfil all the functions that society expects from it. A tax is therefore a legitimate and necessary measure. Original "ad hoc" taxation has been gradually replaced by regular taxation, which we can perceive as "confiscation without cause" as a fair compensation for the services that citizens provide to the state, or as a contribution to those who are more capable of solidarity or fulfilment of social commitment to others. The modern democratic state should ensure not only equality before the law but also a more even distribution of material resources so that life aspirations can be fulfilled.

2 The Historical Excursus into Tax Stipulation

In this part of the article, I will focus on the 100 years long history of the existence of an independent Czechoslovak state. For the legal order of the newly established republic, the act of the National Committee of the Czechoslovak Republic of October 28, 1918 (Act No. 11/1918 Sb.) was fundamental, which stipulated in its Art. 2: *"All existing provincial and imperial laws and regulations remain* pro tempore *valid."* Surely, this proposition applied on tax rules as well, such as on Act No. 220/1896 ř. z., on personal direct taxes, which was derogated during the tax reform in 1927, namely by Act No. 76/1927 Sb. z. a n., on direct taxes. It is clear from the above that taxes have always been imposed by law. The Czechoslovak state was founded on October 28, 1918 and the necessary laws were adopted by the so-called National Committee, which later became the National Assembly. Officially, the state became a republic on November 14, 1918, based on the adoption of the Provisional Constitution (Act No. 37/1918 Sb.), which established the powers of the President, and established the powers of the executive and executive power. Legislation in the field of tax law has changed after the tax reform, whose mastermind was Karel Engliš. However, the tax reform was already based on the constitutional principle enshrined in the Constitutional Charter of the Czechoslovak Republic (Act No. 121/1920 Sb.), with subsection 111(1), which stated: *"Taxes and other public levies [dávky]*[14] *may be imposed only by an act of parliament".* Basically, this text blended to other constitutions of our republic. Concerning financial theory, it is interesting that the concepts of "taxes" and "public levies [dávky]" are set equal (Funk, 1934: 37). The last day of February 1920 was a historical moment due to the passing of the first definitive Czechoslovakian Constitution. It has become another milestone in our history, as it has made a symbolic constitutional full-stop of the transition from the Austrian Monarchy to the First Republic of Czechoslovakia. The work can be evaluated positively, under the supervision of professor Jiří Hoetzel and Alfréd Maissner it was elaborated by a number of outstanding lawyers, such as František Weyr, Professor of Masaryk University in Brno. The Constitution was valid in Czechoslovakia until 1948, when the Constitution of 9 May was enacted. It is obvious that the Constitution of the First Republic, which has been published 98 years ago, has become an inspirational source for the authors of the current Czech Constitution.

The next constitution, the Constitution of 9 May (Constitutional Act No. 150/1948 Sb.) enacted in 1948, incorporated the principles of taxation in its section 33, the principle of taxation as follows: *"Taxes and public levies [dávky] may be imposed only by an act of parliament".* By comparing the above texts, the text of 1948 is clearly more concise. The equality of the terms "taxes" and "public levies" [dávky] remained. However, the provision does not contain the word "other" anymore. In my opinion, the deletion of the word "other" leads to a substantial impact. Using the grammatical interpretation of the Constitutional Charter of 1920, it is possible to assert that taxes are one of the public levies [dávky]. On the contrary, it can be concluded, that taxes and public levies [dávky] are two different categories in the Constitution of 1948. It is interesting to compare these two constitutions regarding the systematic inclusion of the constitutional rules concerning the stipulation of taxes, fees and other similar payment. In the Constitutional Charter of 1920, the abovementioned provision is included under title V – Personal and Property Liberty. Thus, the stipulation of taxes was perceived as a restriction of property liberty regarding systematic interpretation.

[14] In this article, I differentiate between the Czech terms of "dávky" and "odvody". Unfortunately, both should be translated into English as "public levies". Therefore, I use for both the term public levies followed with a Czech term in square brackets.

On the other hand, in the Constitution of 1948, the provisions concerning taxation were in the first chapter Rights and Obligations of Citizens under the group title Basic Obligations of the Citizen to the State and to the Society. Therefore, direct correspondence of imposition of taxes and the restrictions of property liberty cannot be concluded (Boháč, 2015: 4–5).

The Constitution of the Czechoslovak Socialist Republic, which came into force on July 11, 1960, did not contain the provisions on taxation similarly to the provisions of the abovementioned constitutions. The term "tax and fees" is mentioned in the third sentence of subsection 86(2): *"The act of parliament determines which taxes and fees are the income of the municipality"*. Despite this absence, the principle that the taxes were imposed only by an act of parliament was still followed. However, the absence of a constitutional provision had its consequences. The tax procedure was enacted in Decree No. 16/1962 Sb., on tax and fees. Despite the fact, that the decree is a subordinate act, it regulated not only the procedural aspect of tax administration, but also, of course, lots of obligations of natural and legal persons. It is interesting to note that, according to the available decisions of the courts after 1960, no one referred to the absence of constitutional provisions limiting imposing taxes only to acts of parliament. The Decree was then derogated by Act No. 337/1992 Sb., on the administration of taxes and fees. Thus, the procedural regulation in the decretal form was valid for 30 years, without a single amendment.

In the next constitutional act, Constitutional Act on the Czechoslovak Federation (Constitutional Act No. 143/1968 Sb.), the cited principle was reinstated in subsection 12(1), which reads: *"Taxes and fees may be imposed only by an act of parliament"*. In this context, I point out that the term "public levies" [dávky] used by the Constitutional Charter of 1920 as well as the Constitution of 1948 has been replaced by the term "fees", which is narrower. Interestingly, subsection 2 introduces a new term "public levies" [odvody] which could be imposed by the Federal Assembly, while according to subsection 3, taxes and fees not mentioned in subsection 2 could be imposed by the national councils, i.e. the Czech National Council and the Slovak National Council. However, there was no constitutional rule stating, that public levies [odvody] can be imposed only by an act of parliament.

The issue of the above provisions in the current Constitution will be described in the following chapter, also because it is not a historical but a currently valid legal state.

3 The Constitutional Foundations of Taxes, Fees and Other Similar Payments

Taxes are constitutionally based in subsection 11(5) of The Charter of Fundamental Rights and Liberties (hereinafter: the Charter) (Resolution of the Presidium of the Czech National Council No. 2/1993 Sb.), which states: *"Taxes and charges may be imposed only by an act of parliament". Nullum tributum sine lege* as a rule of law principle. Historically, the principle of nulum tributum sine lege is related to the emergence of English parliamentarism, when one of the first prerogatives of parliament vis-à-vis the sovereign was approving of taxes (Svatoň, 1997: 10). This is the source of the English proverb "no taxation without representation".[15] With the rule of law principle, requirements for the quality of tax laws, regarding their certainty and predictability, are added to the requirement of representation, which are currently ensured with the democratically legitimate, directly elected legislative body. The same holds for the long time economic theory, as well.[16] The abovementioned is reflected in the constitutional order of the Czech Republic.

Subsection 11(5) of the Charter – a formal reservation of the law – is on the other hand primarily a formal reservation of the law (Filip, 2011: 181). The institute of the formal reservation of the law is linked to the protection of certain institutes from the intervention of the executive power, and thus also relates to the division of power. Imposing of taxes is constitutionally entrusted to the Parliament of the Czech Republic which is the exclusive holder of legislative power (Gerloch and Maršálek, 2005: 153–170; Kysela, 2006), which is not entitled to transfer this power to another component of state power. The legislator is therefore required to set directly in the tax law a specific arrangement, which enables to reconstruct the entire content of the tax liability. In decision ref. no. Pl. ÚS 3/95, the Constitutional Court ruled that it is against subsection 79(3) Act No. 1/1993 Sb., (hereinafter: the Constitution) of the Constitution, if a term which delimits an object of protection is determined in a legal act with lower legislative power. This ruling is reflected in the theory of financial law as a requirement, to set all basic elements of a tax in an act of parliament. However, other aspects of the tax can be set in an act with lower power (Bakeš and Boháč, 2009: 257). The tax object, which is a subjective obligation of a person to the state, is an action, an activity or a behaviour set by a legal norm. The legal reason (title) of the tax is determined by a special law, which is a base for the person's obligation to the state. The tax (charge) obligation arises from the fulfilment of certain statutory legal conditions, conditions which on the part of the state (municipalities) create a legal right to tax (a fee) and a tax (fee) obligation on the part of the person.

The tax has an enforceable character (collection of taxes is based on a law), the law precisely defines the facts establishing the tax liability, the amount and the due date. In contrast to a fee, a tax is a payment which is not collected as compensation for an individual advantage (Decision of the Constitutional Court ref no. Pl. ÚS 14/2000). The Supreme Administrative Court ruled: *"Taxes can be determined only by an act of parliament under the procedure set by an act of parliament. Only after the conditions set by the law are met, the determination of a tax object can be found as legitimate. Therefore, it is completely unacceptable to set the object of taxation, that is, what is to be taxed and withdrawn from the individual's sphere of property, in any other way, moreover not by legislative power but by executive power (i.e. by an implementation decree or*

[15] For fiscal context see Antoš, 2013: 94.
[16] The so-called second canon of taxation by Adam Smith is well known in this context.

'Accounting procedures' issued by an administrative body, here by the Ministry of Finance). In such a case, there is a violation of the constitutional principle of the division of power" (Judgement of the Supreme Administrative Court ref. no. 5 Afs 45/2011-94). In this context, I note that the tax system is an essential mean of material existence of the state, but also a test of the legitimacy of the institution of the state. The tax scheme must be transparent, predictable and proportionate in terms of its design and application. Otherwise, the legitimation function mentioned cannot be fulfilled and, in the end, it casts doubt on the very meaning and function of the state (Judgement of the Supreme Administrative Court ref. no. 2 Afs 62/2004).

4 The Future of Tax Laws

In the Czech Republic, it holds *de constitutione lata* that taxes can be set by an act of parliament, as I have stated several times before. At the constitutional level, it is not only the requirement of legality (emphasising the necessity of rules that will be general, accessible and predictable), but also the requirement of legitimacy, which is fulfilled by the decision of the democratically elected and thus legitimate legislator on the distribution of the tax burden. The Constitutional Court is, during the constitutional review of taxes, bounded with the principle stating that taxation is primarily a political issue and the Constitutional Court can interfere to taxation only if it is extremely disproportional. That means, that apart extreme moments, taxation is a matter of political consensus or discretion of the legislator. In this context, it is impossible not to mention a somewhat "sarcastic" comment by the Constitutional Court, which stated that a concept of taxable income consisting of taxes, fees or other mandatory payment is original, but according to the majority of the members of the Constitutional Court it is constitutionally conforming (Decision of the Constitutional Court ref no. Pl. ÚS 24/07).

However, this so-called domination of the legislator over the content of tax laws must have an opposite side as well, which is a legitimate expectation of a taxpayer that the legislator enacted a law, which he actually wanted to enact, and that his intention is thus covered by the words of the law. In other words, if a taxpayer acts in accordance with the law, he must not be disappointed in his trust and exposed to the situation in which the state authorities will tell him, that he could assume that his actions would have tax consequences, so he should accordingly quantify his tax liability, even if it is not clearly stated in the law.

Tax laws have internally encoded a certain degree of effort by their recipients to bypass the rules. This stems from the very phenomenon of tax optimisation, i.e. the planning of business transactions in a way, which leads to the lowest possible burden on the taxpayer. Thus, the principles of tax justice and equality, on the one hand, and the predictability of law and legal certainty, on the other, come to a state of constant tension. Already this conflict itself is a serious problem. Nothing but updating of this tension is the concrete manifestation of the undesirable behaviour that the present state has to deal with. There may be more and more frequent use of tax havens that threaten the budget resources of many European states, as well as carousel frauds, which are criminal actions, that exploit the specificities of the European value added tax system.

Therefore, the tendency to weaken the status of the law in favour of other legal regulation techniques that are more resilient to circumvention is not surprising. In general, a higher probability of circumvention lies in casuistic laws, i.e. one that describes the individual predicted situations and then assigns a solution to them. It is obvious that sooner or later a situation will be identified that was not intended. We see a lower risk in this respect in a general law, while defining in a sufficiently understandable way the purpose – thus opens the possibility of filling the gap with completion of the law, in a reviewable process.

It is necessary to warn against the effort to replace the unambiguous provisions of a law with the internal instructions of the tax administration bodies. Although they have the potential to provide law enforcement recipients with information on how tax administration will interpret adopted tax laws, this does not mean that these instructions can operate in a normative way, as is the case law.

Subsection 11(5) of the Charter can be read not only as the constitutional power of the legislator to enact tax law (and thus interfere with the right to property protection), but also as the constitutionally guaranteed right of an individual to the existence of known tax rules accepted by a body of political legitimacy.

If the assumption that the distribution of the tax burden is primarily a political issue that the Constitutional Court has little to say holds, it is necessary to add that democratic legitimacy cannot be replaced by case law or normative acts of executive bodies. If taxes are to continue to be the subject of political struggle, it is imperative that the political representation be aware of this responsibility during the legislative process, and not only from the moment, when the minority files an action to the Constitutional Court. The primary objective of tax administration is not an easily manageable tax, but a distribution of the tax burden corresponding to the social consensus. The analysed case law suggests that abuses of normative activities are turning against public budgets.

Currently, an act of parliament enacted by a democratically legitimised legislator is irreplaceable, as it is the determination of rules based on political will and not based on a technocratic discussion of finding objectively correct solutions. Replacing the law with other sources of law would mean nothing less than abandoning the principle of "no taxation without representation".

5 Conclusion

As the past one hundred years of the existence of the Czechoslovak state have shown us, the tax policy pursued by the tax policy plays a significant role because it can motivate individuals to make their financial decisions, both natural persons and legal entities. Regarding the reasonable objectives to which these tax incentives are directed, the legislators usually state them. However, if the objective is only increasing of revenues, the legislators usually do not state this objective. Tax incentives are combined with many other factors, especially motivational and dissuasive ones. In any case, tax policy is not just an economic policy but is also a hidden social policy. Progressive tax is an economic factor with a strong egalitarian effect, as it eliminates many unpleasant consequences of stratification. For example, in the field of inheritance taxation, radical solutions have already been applied several times. Extremely high taxation of inheritance may, for example, imply that the legislature favours wealth earned rather than inherited. However, defining a policy on tax policy is by no means a simple and straightforward decision-making process. This policy is part of the whole set of economic decisions, largely based on the redistribution of resources, that is, the social order of society.

The complexity and the lack of clarity of the legal system becomes an obstacle to its applicability, and tax laws are becoming one of the examples of regulation so complicated that the legal practice gradually creates some strange fiction of alternate laws. Especially in the field of tax law, these phenomena are particularly numerous and, in addition to the written legislation, not used by both taxpayers and tax administrators, there is a kind of parallel and unwritten customary law. I am not able to judge this situation from the point of view of legal sociology and it is not something that could attract readers. From the point of view of legal practice, these phenomena, where both tax administrators and tax subjects have for years a different course of action than the law, seem to indicate a mutual (up to touching) agreement, can be pointed out in the relevant administrative (tax) or court proceedings, and claimed to be used as valid rules and wait for the final decision to be made by the higher courts and the Constitutional Court.

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The Legal Classification of Bitcoin and other Cryptocurrencies

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Abstract
Cryptocurrencies are digital assets designed to work as a medium of exchange that uses cryptography to secure its transactions, to control the creation of additional units, and to verify the transfer of assets. In the past few years there is a growing number of cryptocurrencies like Bitcoin, Ethereum, Ripple, etc. In my paper and presentation I would like to present the difficulties of the legal classification of cryptocurrencies. Countries all over the world have different solutions to this question. It is not written in stone whether cryptocurrencies should be considered a currency, a commodity, or an investment. In my study I examine each of these possibilities.

Keywords
Bitcoin; cryptocurrencies; blockchain

1 Introduction: What is Bitcoin and Blockchain?

Bitcoin is a cryptocurrency, which means it is a digital or virtual currency that uses cryptography for security. Bitcoin uses the so-called blockchain technology, which is a peer-to-peer protocol, a network to which anyone can join, can initiate transactions and authenticate them by creating so-called blocks (De Filippi and Wright, 2018: 13–14). The purpose of creating Bitcoin was to create a virtual currency which functions like real money, with the difference that in case of Bitcoin there is no need for an intermediary institution (e.g. bank) for the execution of transactions. The system thus provides direct (peer-to-peer), faster, cheaper and safer financial transactions. The traditional bank transfer is slow (especially if we want to transfer money to a foreign bank account)

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and comes with a lot of administrative tasks. In addition, the contribution of a third party's financial institution is necessary, who monitors and executes the transfers, which will incur additional costs. The banking system is vulnerable to fraud and cyberattacks, and the possibility of human error cannot be excluded. Bitcoin addresses these problems with the introduction of the blockchain technology, which many consider to be the most important innovation of Bitcoin (Tapscott and Tapscott, 2016: 55–59).

Blockchain is essentially a distributed or decentralised ledger, which is public and due to cryptographic procedures, it proves the transactions that have been carried out without any intermediary. Blockchain systems would not work without consensus mechanisms. The essence of each blockchain system is to create a consensus between the nodes when registering transactions (creating a new block), so that the new block attached to the blockchain is the only true and verified version of the transaction (De Filippi and Wright, 2018: 13–14).

There are several methods for achieving this consensus. Because of the limited length of the paper, I only introduce the Proof of Work method, which is used by Bitcoin. In this system, when a transaction is made, we find the information about it included in a block to be accepted (Mukhopadhyay, 2018: 15–18). This block is protected by cryptographic methods. The block is then sent to the so-called miners who use the computing powers of their computers, and compete to solve a complex mathematical puzzle in order to verify the details of the transaction (e.g. whether the money in question is actually available) included in the block (Drescher, 2017: 23). The miner who first solves the puzzle receives Bitcoins as a payment in return for their computer capacity being available. This process is called "mining" in the internet slang and this is the way to get Bitcoin without real money (Hayes, 2015: 2). (Nowadays you can buy Bitcoin for real money in a way similar to currency exchange. In addition, Bitcoin and other cryptocurrencies are also listed on the stock market [Chiu and Koeppl 2017: 1–5].)

The verified new block will be proof of work. The thus-authenticated block is then provided with a time stamp and then added to the blockchain's previous blocks in a chronological order. The blockchain therefore contains all transactions that have ever been executed by using it. The entire blockchain is constantly updated, and it can be found on all participating computers. Thus, all computers are capable of proving that a certain transaction is completed, and who is the current and former owner of a particular product or money (Kakavand et al., 2016: 4–5).

Blockchain technology can be used to manage and administer asset movements, contracts, and their fulfilments, and other data using cryptographic methods (Tapscott and Tapscott, 2016: 55–59). All this allows us to trust in third parties who we do not know and therefore do not have any information about them. Earlier, in order for this trust to exist, we needed an intermediary in which both parties were entrusted, and thus we were sure the other party would not deceive us. For example, financial institutions were needed to verify, that the other party had the money necessary for the transaction. Blockchain systems allow you to skip the third party with which you can save time and money, plus transaction operations through the blockchain network can be accessed and verified by everyone.

It is also safe because the transactions are practically unchangeable and unhackable after being added to the blockchain. In order for a hacker to change a transaction, it is necessary to modify not only the block of the transaction in question, but also the data of the preceding and subsequent blocks, as they are all linked together. In addition, they need to hack all of (up to millions) the nodes of the computers, because all of them store the whole blockchain. Due to consensus models, nodes benefit more if they are involved in the operation of the system, in maintaining its safety and reliability, than hacking the blockchain (Wurfel, 2018).

2 The Legal Classification of Bitcoin

But what is the legal classification of Bitcoin? Is it money, or investment, or commodity? Or all three at once? It would also be important that all states reach the same conclusion, otherwise it would give space to the so-called forum shopping phenomenon, which means that the parties would choose an application of the law of the state which provides them with more favourable rules (Ec.europa.eu, 2010). However, examining the practice of several countries, it is not possible to answer this question clearly. Because they categorise Bitcoin and other cryptocurrencies in a variety of ways, e.g. commodity in Australia, virtual currency in Croatia, service in Singapore, property in France (Cryptocompare.com, 2018). It also happens that different authorities in a given state interpret cryptocurrencies differently. For instance, in the United States, the guidelines of the Internal Revenue Service (IRS) state, that cryptocurrencies are considered to be property in case of tax law (Cpapracticeadvisor.com, 2017), but that does not mean that it must be considered the same way when other acts are applied to them. For example, in 2014 Ross Ulbricht in the criminal proceedings against him brought as a defence that his transactions in Bitcoin are not considered to be money laundering, because Bitcoin is property according to the IRS, and not money. However, in its judgment, the court rejected the defence on the ground that, the IRS's guideline only applies to tax related cases, and not to all types of cases (Mandjee, 2015: 172–178).

In the following I will examine three classification options: currency, commodity and investment.

2.1 Bitcoin as currency

In the economic sense, money has the following three functions: a) a store of value; b) a means of exchange; and c) a unit of account.

The store of value function is met if the thing can reliably keep its purchasing power for a long period of time. Some authors say that due to frequent changes in the value of Bitcoin compared to other currencies, it is unable to function as a store of value. However, according to the European Central Bank, the frequent and significant changes in value does not affect the ability to preserve the value, since all legal tenders are subject to such changes (Madeira, 2015).

The medium of exchange function is fulfilled if something that "passes freely from hand to hand throughout the community in final discharge of debts and full payment of commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge or debts or payment for commodities" (Krohn-Grimberghe, 2013). Bitcoin complies with this condition, since it was originally created for this purpose, plus they are actually being accepted as counterparties for various transactions in increasing numbers (Luther and White, 2014: 1–6).

The unit of account function means that the value of goods and services can be expressed in the subject matter. This may actually be true of anything as is shown in history (e.g. gold, shells, etc. were used as money). Bitcoin is in principle capable of fulfilling this function, but most of the time we see that the price of products is determined in dollars, euros or other currencies in addition to Bitcoin (Lo and Wang, 2014: 3–4).

Bitcoin meets the requirements to be considered money in the economic sense. In a legal sense, however, we can only speak of legal tender, if the money was issued by a central bank or other monetary authority of a State (Ametrano, 2016), so it is necessary to have a state issuer responsible for its operation. However, in case of Bitcoin, we do not see a central bank of a state behind it, it is not issued by a state, but is essentially created by individuals (the miners) (Luther and White, 2014: 1–6). Therefore, it cannot be considered electronic money in the EU either. According to Directive 2009/110 /EC of the European Parliament and of the Council, electronic money "means electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions [...] and which is accepted by a natural or legal person other than the electronic money issuer". (Directive 2009/110/EC) Although Bitcoin has electronically stored monetary value, however, as has just been mentioned, there is no specific issuer.

Based on the experience of recent years, Bitcoin meets economic requirements of money, since they are increasingly accepted in commerce as payment, and determine the price of products in it, in addition, the number of people who keep their money in Bitcoin is growing. However, according to the law, these will not make Bitcoin a legal tender.

2.2 Bitcoin as investment

Some say that Bitcoin does not meet the requirements of currencies; because of its constant and large changes in its value it cannot fulfil the store of value, and unit of account functions. Changes in the exchange rate of Bitcoin are not related to the changes in the value of real currencies, it is not suitable for the management of risks. Moreover, it is highly probable that the whole cryptocurrency hype is just a bubble that can collapse any time. Consequently, it is more like a speculative investment instrument, especially if we add that there are some who just buy Bitcoin in order to later sell it, and thus gain profit. However, high volatility can easily discourage investors (Mandjee, 2015: 172–178).

Here I have to mention the so-called ICOs, which is essentially a form of fund raising, when we create a new cryptocurrency, and the amount of money needed to set up the system associated with it is offered to us by others usually in other cryptocurrencies like Bitcoin or Ether. In this respect, it is similar to the Initial Public Offering (IPO). The question is whether this way of financing can be considered a security? According to the U.S. Securities and Exchange Commission (SEC): "The federal securities laws apply to those who offer and sell securities in the United States, regardless whether the issuing entity is a traditional company or a decentralized autonomous organization, regardless whether those securities are purchased using U.S. dollars or virtual currencies, and regardless whether they are distributed in certificated form or through distributed ledger technology" (SEC, 2017).

The SEC based its decision on the Howey test, according to which a contract is qualified as investment contract, if there is an investment of money, there is an expectation of profits from the investment, the investment of money is in a common enterprise, and any profit comes from the efforts of a promoter or third party (SEC, 2017). If someone buys cryptocurrency for the purpose of gaining profit later on by selling them, then the first two conditions are fulfilled (however it is still a question whether somebody bought the Bitcoin in order to sell them later). The joint venture element is also accomplished as the transaction executed through the blockchain network contributes to the investor's growth, and the position of investors is affected by the appreciation or depreciation of the cryptocurrency. The last condition is also met if miners are considered to be third parties or promoters and the invertor's profit is a consequence of the miners' activity (Mandjee, 2015: 172–178). Interestingly, according to the same statement of the SEC, Ether is not qualified as an ICO, but as virtual currency, from which it follows that the authority makes a distinction between investment-like cryptocurrencies and money-like cryptocurrencies. Therefore, if a cryptocurrency can prove that when at least one of the conditions is not met, then it will not qualify as a security (SEC, 2017). However, it should be noted that not all cryptocurrencies are based on mining (e.g. the ones that use the Proof of Stake consensus method).

Bitcoin can therefore be seen as an investment, and many people are mining or receiving Bitcoin for that purpose, but it is important to see that cryptocurrencies work differently, and so maybe not all of them can be considered an investment. Plus, Bitcoin has other uses, and not everyone wants to buy them for investing purposes. That is why the classification as an investment can also be problematic.

2.3 Bitcoin as commodity

Bitcoin, on the one hand, can be regarded as a commodity, because – as has been mentioned earlier – its value is not stable. Secondly, because it resembles gold in many respects: both have infinite supply, none of them is supervised by a single government, and the value of both are determined by demand and supply, which is the reason of its high volatility. The protocol currently used by Bitcoin allows the mining of 21 million Bitcoin in total (Faggart, 2015), and according to some calculations they will be all mined by 2040 (Faggart, 2015), others say that by 2100, unless they change the protocol. (It should be noted here that this only applies to Bitcoin, since there are some other cryptocurrencies, from which unlimited quantities can be mined [e.g. Dogecoin], or those that already have a predetermined amount available since the beginning and you cannot create more [e.g. Ether].) The less available from the given cryptocurrency, the more expensive it will be (although, of course, other factors also influence the price of cryptocurrencies, which may interfere with this relation) (Bitnewstoday.com, 2017).

Once all Bitcoin is mined, it basically terminates the motivation of the miners to make their computer capacity available to the system, since they would no longer receive new Bitcoins in return for their activity. Of course, you can introduce a new method, where in return for making their computing power available, the miners receive a part of the transaction fees, but some sceptics say this is a less profitable method and therefore the number of nodes will drop, which may even lead to the collapse of the system. Here, I would like to add that cryptocurrencies, that use the Proof of Stake consensus method already work this way. The only question is for how long there will be enough transactions made through the system, in order to make it worth for the users to give their computer capacity to maintain the cryptocurrency.

Returning to the gold comparison, as long as the value of money was calculated based on the gold standard, and the value of money was backed up with real gold, the banks were limited in issuing money, since at any point the banks could be forced to redeem the money in gold. Theoretically, Bitcoin can do the same, in addition to being more reliable than gold, since it cannot be manipulated (such as the gold content of a gold bullion). Furthermore, it is not possible for the bank to issue bigger amounts of fiduciary media than their Bitcoin reserve would allow, because there is no need for paper money to be issued in the first place, as Bitcoin is accessible for anyone, anywhere through the internet. Moreover, with Bitcoin being digital, it is much cheaper to store compared to gold (Danielstrading.com, 2017). In time of the instability of the market, it is often heard that we should return to the gold standard. Can the Bitcoin standard be the new gold standard? History, however, shows that the gold standard was only suitable for maintaining financial stability only during the period of peace and prosperity, but it was not able to cope with the outbreak of world wars, the indebtedness of states and the onset of globalisation. The core of the gold standard was to avoid inflation and deflation, but excessive insistence to it may even lead to a crisis (Investopedia.com, 2018). That is why this is probably not the right path for Bitcoin and cryptocurrencies.

3 Conclusion

In my opinion there are two preliminary questions that need to be clarified before we can categorise cryptocurrencies.

1. Can we list every cryptocurrency into the same category? As we saw earlier, Bitcoin is considered a commodity because it resembles gold, because each is finite in number, and demand and supply affect their value. However, this argument is not true for all cryptocurrencies, since, as I have already mentioned, some of them have unlimited amounts available, and there are those that already have a limited amount in the system from the beginning.

2. Can we list a single cryptocurrency, e.g. Bitcoin into only one category? As I already mentioned above, Bitcoin can be used as money, as an investment, and as a commodity as well. But if that is the case, then legal acts for all the three categories should be applied, which can very easily lead to over-regulation, which would hinder the development and use of cryptocurrencies, although it is an extremely useful and versatile invention.

It is likely that in the near future Bitcoin and other cryptocurrencies will not be accepted as legal tenders by most countries, because – among other reasons – it would jeopardise the money-issuing monopoly of states. Moreover, their interpretation as an investment and a commodity is also not certain, as it was explained above. The legal consequences (such as taxation, consumer protection, etc.) are based on the classification, so it should be the priority of legislation to answer this question. Bitcoin and other cryptocurrencies cannot remain unregulated due to their growing importance, therefore, it is much more likely that states will regulate them in some way. The question is merely this: what regulation will it be. In my view, the most important thing to do is to create a uniform regulation. This would be extremely beneficial because Bitcoin is a virtual asset that is available through the internet anywhere and anytime around the world, and it can be exchanged regardless of borders. In my opinion, the process launched by Bitcoin and other cryptocurrencies is irreversible. That is why it would be necessary to agree whether Bitcoin is a money, a means of payment, a commodity or an investment, since a single regulation would ensure that we can take advantage of the economic opportunities inherent in Bitcoin much more easily.

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Local Taxes in the Russian Federation in the Context of the Analysis of the Powers of Local Self-Government Bodies

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Abstract
In this contribution the author presents the results of the analysis of legislation as well as monitoring the official web sites of the Ministry of Finance of the Russian Federation concerning local taxes. On the basis of methods of systematic, comparative legal analysis, monitoring and the study of normative regulation of local taxes in the Russian Federation, some conclusions are made about the ability of local governments to implement the functions assigned to them.

Keywords
local taxes; local self-government bodies; financial law; municipal law

1 Introduction

Part 2 Art. 9 of the European Charter of Local Self-government of 15.10.1985 that regulates financial resources of local authorities prescribes that financial resources of local authorities shall be proportionate to the powers provided by the Constitution and by law.

Part 3 of the given article determines that "at least a part of the local authorities' financial resources shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate" (Collected Acts of the Russian Federation, 7 September 1998, No. 36. Art. 4466).

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Thus, in Russia and in the majority of European countries local taxes are the object of legal regulation at the level of the Constitution and the law on taxes and charges.

The European Charter establishes certain requirements for the financial systems that local financial resources are based on: to be sufficiently diverse and flexible for the local authorities to be able – to the extent possible – to keep up with real costs fluctuations in the course of executing their powers.

As part of the given contribution, we will analyse the way local taxes are regulated in the Russian Federation and Eastern Europe and then see how proportionate the financial resources of the local authorities are to their powers and if they provide for the real expenditure of municipal units.

2 International Legal Approaches to the Regulation of Local Taxes in the Post-Soviet Countries

As the Russian Federation is a member of the CIS, a number of model acts of the CIS have become the basis of financial relations regulation in the sphere of local government.

According to Part 2 Art. 9 of the sample law "On the General Principles of Local Self-Government (as amended)[2] local authorities are assigned the following issues of local significance:

- formation, approval and execution of the local budget and control of its execution;
- introduction, changing and abolition of local taxes and charges.

Similar provisions are included in the list of issues of local significance of municipal units of different levels in Arts. 10–12.

The execution of the given power is an exclusive competence of the representative body of the local self-government (Part 6 Art. 15).

Art. 37 of the model law is devoted to local taxes and charges and duplicates the provision that local taxes and duties, as well as any tax incentives are established by the representative bodies of local authorities independently.

The list of local taxes and charges is determined in the national legislation. Representative bodies of local authorities are entitled to establish local taxes and charges not provided by law, in case the given payment is not assigned to a different level of taxation and not prohibited to be introduced at the municipal level.

Local taxes and charges rates are determined by the representative bodies of local authorities independently within the limits set by the national legislation.

[2] Adopted in Saint Petersburg on 27.11.2015 with Ruling 43-11 at the 43rd Plenary Meeting of the Interparliamentary Assembly of Member States of the CIS. The paper was not published.

In the Commonwealth of Independent States there is also a model act "On the General Principles of Local Finances Organization",[3] which regulates the budgetary process in municipal units and reproduces the norms of the previously mentioned law in terms of functions and powers of municipal bodies in the sphere of taxes and charges (Art. 8).

Art. 7 of the given Act assigns tax and non-tax revenues, established by the legislation of the member states of the CIS, to the local budgets' own revenues.

Among the principles of inter-budgetary relations there are the following:

- distribution of taxes on a permanent (or long-term) basis (fully or as a fixed share) among the branches of the budgetary system, which provides the minimal necessary level of local budgets' own revenues in case of sufficient tax potential;
- bringing up the per capita budget revenues to the minimal necessary level in the municipal units that do not possess sufficient tax potential by means of budget regulation (Art. 10).

An increase in the normative standards of contributions made from the regulating sources of income, as well as different kinds of financial aid is an important guarantee of the realisation of the European Charter provisions, in case the fixed taxes and revenues cannot provide the municipal units with the minimal local budget (Art. 12).

3 Constitutional Approaches to the Regulation of Local Taxes and Charges

As it has already been mentioned, local taxes regulation is a subject of constitutional regulation. Let us consider which of the constitutional provisions refer to the given sphere.

Part 1 Art. 132 of the Constitution (Constitution of the Russian Federation) enshrines that "local self-government in the Russian Federation shall ensure the independent solution by the population of the issues of local importance, of possession, use and disposal of municipal property".

As a development of the given constitutional provision, the Federal Law of 06.10.2003 No. 131-FZ (ed. on 03.08.2018) "On the General Principles of Local Self-Government Organization in the Russian Federation" (Collected Acts of the Russian Federation, 2003, No. 40, Art. 3822) regulates a whole complex of issues related to local taxes:

1. it assigns adoption, modification and abolition of local taxes and charges to the sphere of issues of local significance of different municipal units (Art. 14–16);

[3] Adopted in Saint Petersburg on 08.12.1998 with Ruling 12-10 at the 12th Plenary Sitting of the International Assembly of Member States of the CIS. Interparliamentary Assembly of Member States of the CIS Information Bulletin, 1999, No. 20.

2. it enshrines local authorities' exclusive competence to introduce, change and abolish local taxes and charges in accordance with the law of the Russian Federation on taxes and charges (Item 3 Part 10 Art. 35);
3. it enshrines the right of the head of the local administration to make proposals regarding the drafts of legal acts of the municipalities, stipulating the introduction, modification and abolition of local taxes and charges, spending the funds of the local budget and giving the opinion of the head of local administration on such projects.

4 Legal and Financial Regulation of Local Taxes in the Russian Federation

The tax law of the Russian Federation provides more details on the regulation of local taxes. The given issue is highlighted in Part X "Local Taxes and Charges" of the Tax Code of Russia (Part 2) of 05.08.2000 №117-FZ (ed. on 03.08.2018) (Collected Acts of the Russian Federation, 2000, № 32, Art. 3340).

At present local taxes include the land tax (Chapter 31) and the individual property tax (Chapter 32).

The budget law of Russia also stipulates the norms of other taxes and contributions to the budgets of municipalities, differentiated by the type of municipal units.

For the land tax the rates (Art. 394 of the Tax Code of Russia, Part 2) shall be established by the normative legal acts of representative bodies of municipal formations (by the laws of the cities of federal importance: Moscow, Saint Petersburg and Sebastopol) and may not exceed:

1. 0.3% in respect of land plots:
   - referred to agricultural lands or to land forming a part of the zones of agricultural use in inhabited localities and used by the farming industry;
   - occupied by housing stock and by units of plumbing infrastructure of the housing and communal complex (except for a share in the ownership of a land plot falling to a unit that does not pertain to the housing stock or to units of plumbing infrastructure of the housing and communal complex) or acquired (allotted) for house building;
   - acquired (allotted) as personal subsidiary plots, for gardening, truck farming or cattle breeding, as well as of the country cottage economy;
2. 1.5% in respect of other land plots.

According to Art. 406 of the Tax Code of Russia, individual property tax rates are set by the legal acts of the representative bodies of municipal units (laws of the cities of federal importance: Moscow, Saint Petersburg and Sebastopol) depending on the accepted method for determining the tax base.

In case the tax base is determined based on the cadastral value of the taxed item, the tax rates are set in the amount no higher than the following:

1. 0.1% for:
   - residential houses, parts of residential houses, flats, parts of flats, rooms;
   - incomplete construction projects in case the intended purpose of the project is a residential house;
   - real estate compounds, part of which is at least one residential house;
   - garages and parking slots, including the ones that are located in the territory of the taxable items mentioned in p. 2;
   - maintenance buildings or constructions with the area not exceeding 50 square meters, which are located in the land plots provided for private plot activities, dachas, gardening or individual housing construction;
2. 2% for the taxable items that are included in the list determined by Item 7 Art. 378.2 of the Tax Code of Russia, as well as the taxable items the cost of which is over 300 million roubles;
3. 0.5% for other taxable items.

As it is difficult to estimate the amount by percentage, here is an example from the author's personal experience. The tax for a flat with an area of 60 square meters in Krasnodar region is about 350 roubles a year (about 5 Euro); the tax for a flat of 50 square meters in outer Moscow is 650 roubles (about 8 Euro); the non-residential property of 35 square meters in Rostov region is 220 roubles (about 2.5 Euro).

With this level of rates, local budget revenues cannot cover their needs, so the budget law stipulates tax contributions from other levels of public power.

Thus, revenues from the following federal taxes and charges shall be received by the budgets of urban settlements, including the taxes subject to special treatment:

- individual income tax at the norm of 10%;
- uniform agricultural tax at the norm of 50% (Art. 60 of the Budget Code of Russia).

The budgets of municipal districts shall receive:

- individual income tax collected in the territory of urban settlements at the norm of 5%;
- individual income tax collected in the territory of rural settlements at the norm of 13%;
- individual income tax collected in the inter-settlement territories at the norm of 15%;
- unified tax on imputed income for certain kinds of activities at the norm of 100%;
- unified agricultural tax collected in the territory of urban settlements at the norm of 50%;

- unified agricultural tax collected in the territory of rural settlements at the norm of 70%;
- unified agricultural tax collected in the inter-settlement territories at the norm of 100%. (Art. 61.1 of the Budget Code of Russia).

According to the data from the Ministry of Finance of the Russian Federation, the following trend in the local budget revenues dynamics can be identified (Table 1).

Table 1. Key parameters of the revenues of local budgets
(based on the data from the Ministry of Finance of Russia)

	As of 1 January 2010*	**As of 1 January 2018**
Total amount of revenues received by local budgets	2388.0 bln RUR	3845.7 bln RUR
Own revenues of local budgets, including	1805.3 bln RUR (75.6%)	2504.8 bln RUR (65.1%)
Tax and non-tax revenues	963.3 bln RUR (53.4%)	1392.8 bln RUR (55.6%)
Tax revenues	39.9%	44.8%
Inter-budgetary transfers excluding subventions	842.0 bln RUR (46.6%)	1112.0 bln RUR (44.4%)
For reference:		
Allowances	21.2%	342.3 bln RUR (14.0%)
Subsidies	29.4%	594.7 bln RUR (24.2%)
Subventions	40.9%	1340.9 bln RUR (54.7%)
Other inter-budgetary transfers	8.5%	173.6 bln RUR (7.1%)

Note: * In 2009, the Federal Law №131-FZ entered into full effect.

Source: www.minfin.ru/ru/perfomance/regions/monitoring_results/Monitoring_local/results

The analysis of the data presented in the table shows that in absolute terms, local budget revenues are growing, while in percentage terms the share of own revenues has decreased (from 75.6 to 65.1%). The share of tax and non-tax revenues in the revenues of local budgets has not changed considerably. The proportion of different types of inter-budgetary transfers has undergone considerable changes: the number of allowances has decreased, and the number of subventions has increased, which means that delegated powers execution has become more active (as a rule it has to do with state powers, however, there might be other variants).

When characterising tax revenues, experts normally mention the following peculiarities (Levina, 2018: 15–21):

- local tax revenues are not substantial for local budgets, but depend directly on the activity of local self-government bodies, including the measures taken to register the objects fully subject to taxation;
- federal tax incentives on the regional and local taxes decrease local budget revenues significantly and do not give local authorities any opportunity to regulate the development with the help of these incentives; tax incentives

become an efficient instrument only in case they are provided at the level where the tax is administered and settled; at the All-Russia Congress of Municipalities, it was even suggested that more attention should be paid to the assessment of the efficiency of tax incentives on local taxes taking into account budgetary and social efficiency indicators;

- passing tax norms to local budgets is an effective mechanism of municipal development; according to the data from the Ministry of Finance of Russia, in 2017, in addition to individual income tax, uniform standard contributions were set for the following federal and regional taxes and charges on a permanent basis: property of an organization tax – 11 regions; corporate income tax – 4 regions; transport tax – 6 regions; tax on the extraction of commonly extracted minerals – 14 regions; gambling tax – 5 regions; use of simplified taxation system tax – 41 regions (an increase by 5 regions); other minerals extraction tax – 6 regions; particular excise taxes on excisable goods (excluding the oil products) – 4 regions.

5 Conclusions

The sources of revenue and expenditure of the local budgets are important not just as they are, but in proportion to the amount of powers that a local self-government body is granted. As it has already been mentioned, Part 2 Art. 9 of the European Charter of Local Self-Government points out that the financial resources of local authorities should be commensurate to the powers granted to them by the Constitution and by law.

Table 2 presents the data on the dynamics in the number of issues of local significance depending on the kind of the municipal formation.

Table 2. Information on the number of issues of local significance

	28.08.1995	**06.10.2003**	**Before 27.05.2014**	**After 27.05.2014**	**01.08.2018**
Municipal formation	30	–		–	
Urban settlement	–	22	39	39	38
Rural settlement		22	39	13	13
municipal district	–	20	37	37	39
urban circuits	–	27	44	44	44
intra-city district	–	–	–	13	13

Source: For the purpose of monitoring, the following dates are used in the table: 28.08.1995 as the date of adoption of the Federal Law № 154-FZ in its first version; 06.10.2003 is the date of adoption of the Federal Law № 131-FZ in its first version; 27.05.2014 is the date of adoption of the Federal Law № 136-FZ in its first version; 01.08.2018 is the date of current monitoring.

The analysis of the quantity of issues of local significance shows it quite clearly that there is a tendency to grow. In practice the given situation gives rise to a lot of criticism both from the experts, as well as the municipal communities. It seems reasonable to impose a moratorium on making changes and amends to the list of issues of local significance for at least several years, so that local authorities could develop a system of their realisation based on the financial resources they have at their disposal.

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The Financial System as a New Theoretical and Legislative Term

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Abstract
The aim of this paper is to define the basic characteristics of the term of the financial system as a legal term. In the paper, the author finds the absence of a general or a legal definition of this term in both the Czech scientific and practical environment as essential, as this term is already used in the Czech positive law. At the same time, he briefly defines the terms of the financial markets and the capital market as terms different from the term of the financial system. This objective is fulfilled by the author with the aim of the use of the term financial system (but also the financial markets or the capital market) in a labelling of the financial law sub-branch.

Keywords
capital market; financial markets; financial system

1 Introduction

In the last several years, we can be witnesses of an evolution of financial law terminology in its sub-branch of legislation on financial markets and relevant areas that include legal regulation of financial institutions, financial markets and financial assets, as well as a supervision over these branches. For the last twenty years, from the political and subsequent changes that began in 1989 in the Czech Republic, the original and traditional financial science preferred the term of the financial market as the fundamental

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term for labelling of such sub-branch of the financial law – therefore the prevailing Czech terminology used for the sub-branch was the financial market law (Bakeš et al., 2012: 13).

Presently other opinions[2] occur that found this terminology outdated and not in conformity with the actual legislation, practice and even theory of scientific institutions abroad. The main aim of the paper is to arrange the terms of the financial system, the financial market (or better the financial markets) and the capital market into mutual relationships and a cohesive system.

The reasoning contained in this paper is important not only from a point of view of financial law. Nowadays, it is very often a habit to label sets of legal norms as a certain law. This leads to the unsystematic and utilitarian creation of legal (sub-)branches of law, to the atomisation of the existing legal branches and sub-branches, when the names appear as sport law, medical law or gender law. In such cases, they are just a group of legal norms which do not have to have their own principles, their internal system, etc., which are otherwise definitional characteristics of each legal branch. This conclusion should not be conceived negatively, as this legal and other practice does not mind this relative unsystematicity and ignorance. On the contrary, it facilitates its activity, since it is not unnecessarily burdened by legal norms which are not need in its area. Even the general legal theory admits that even the basic distinction between the legal subsystems – private law and public law – has very limited practical significance and has always been and is unclear (Knapp, 1995: 68). The same applies to the subsequent breakdown into legal branches within these two sub-systems of law.

On the contrary, legal theory should address these issues in more detail. The internal systematics of legal branches within the system of law is an important problem that must be investigated so that individual legal norms can be classified (ideally) into an intrinsically non-intrusive system that is arranged according to the degree of similarity in sets and subsets of legal norms contained in individual legislation or defined by an authority acting in the case law. Therefore, between the terms the financial system, the financial market(s) and the capital market, mutual relationships should be found.[3]

2 The Financial System as a Legal Term

The youngest of the analysed terms, as to the tradition of its use, is the term financial system. This term has come to the forefront of law in particular because of legislative work that has responded to the global financial crisis that began in 2008 in the United States of America. The term started to be used first in the European Union's legislation and subsequently in the legal systems of its member states.

[2] See Kohajda, 2016: 36–39.

[3] This paper has been elaborated within the project of the short-term international stays of academics which is realised in the year 2018 at the Faculty of Law of the Palacky University in Olomouc.

When looking for the meaning of the legal term of a financial system, it is necessary to look at economic works, as the law reacts to and follows economics. Rejnuš reacts partly on this issue, he generally states that a financial system is always an integral part of an economic system; however, such a broad economic concept is in this case unsystematic in a legal point of view, as the author further states in the footnote that the financial system may include, inter alia, social security institutions (Rejnuš, 2014: 41), but it is impossible to agree with this concrete addition from the point of view of legal branches system and it is necessary to be more precise in the legal definition of the term financial system.

A wider view on the term of a financial system is in place only if it is limited to the legal relationships that arise, change and disappear and their elements that are the object of financial regulation, both purely public and legal regulation of extended segments of financial law, which have an overlap in private law branches.

The financial system is the broadest in terms of content in the examined terms of this paper. To better understand its content, it is necessary to define at least briefly the functions that the financial system should fulfil in a functioning market economy. The primary purpose of the financial system is to enable the handling of financial funds in all different forms. It involves collecting and storing surplus financial assets through financial institutions so that they do not stay with people experiencing their relative surplus. These funds are retained in their original form or more often converted into accounting records while using identical funds in their original form for other purposes, in particular, their subsequent use for lending. These funds may be converted into financial or real investment instruments. This investing of relatively redundant money through the financial system should avoid devaluing them, or at best to let them appreciate over time. The financial system should also provide general protection against the risk of sudden depreciation by allowing money to be deployed at both the site and the subject.

However, the essential function of the financial system is also the mobilisation of money, especially the provision of payment, which is organised both by a public body, usually in the form of a central bank, and by private financial institutions. The organisation and implementation of the payment system is a very important function of the financial system that distinguishes it from financial markets, which focus on the functions of depositing or investing surplus financial assets with entities with their relative surplus and their use by entities feeling their lack.

All of these functions are important not only from the point of view of private persons, individuals of non-business and corporate and commercial corporations, but also from the point of view of public bodies, especially every state itself. The state is dependent on a properly functioning financial system, both in terms of its budget revenues, which flout through the financial system, it earns the revenue from the mandatory monetary fulfilment it authoritatively leverages, as well as the means of credit financing its deficit management and its budget expenditures, distributing money through the financial system to its employees and persons as retired people or people in social needs through the financial system, makes payments for purchased goods and services or distributes money to other public entities.

From a theoretical point of view, it is necessary to come out from the general understanding of any system as a set of individual elements and relations between them, which are realised through certain objects. Applied for the financial system: its components are individual entities, namely those from whom funds originate, those to whom financial funds are directed, and those who allow and organise the movement of those funds. All these entities are organised through smarter subsystems, which we usually refer to as individual types of financial markets (i.e. money, capital or foreign exchange).

Over all these entities there are entities that have the right to compare the concrete actions of all these entities with the actions required by the provisions of the applicable legal norms, or in the case of a discrepancy detected, to interfere with such situation, to enforce the correction of this negative state and the remedy or to impose a sanction, the resulting negative state was punished. Subjects through which the relationships in the financial system are made are not only the original form of money, but all money-back instruments that can be exchanged to better perform the functions of the financial system.

Finally, it is possible to define the financial system as a sum of all types of financial markets including those subjects who are confronted with the supply and demand for relatively disposable funds in such markets, as well as entities providing financial services, especially to those subjects that engage in the markets. These entities and the financial services provided by them together create an infrastructure enabling the establishment, modification and termination of legal relationships dealing with the handling of financial funds, in particular their deposit, exchange for other forms of instruments tradable on markets, even lending to other entities and transfers of such funds between entities, and the sum of these legal relationships should be included in the financial system. Subsequently, the financial system is complemented by secondary regulators and supervisors, mostly of a public law nature, exercising powers consisting in the creation of legal regulation, in authoritative decision making and comparing of the situation requested by law and actual behaviour of the entities involved in the financial system with possible consequential deduction of the implications of the envisaged legal regulations.

Given the novelty of the use of the term financial system in legal regulation, it is appropriate, without being a direct subject of this paper, to briefly define also the term of stability of the financial system, for example, in the abovementioned case, the provisions of the Act on the Czech National Bank. This term also does not have its legal definition and therefore needs to be defined by the doctrine, but there is so much agreement among the various authors that they do not agree on a uniform definition so far.[4]

[4] See Theissen, 2013: 1133.

The stability of the financial system should be seen as a state of the financial system where the financial system is free from serious disturbances and is resilient to current or future systemic fluctuations where the primary interest lies in the care of the stability of the local currency which is achieved through the proper fulfilment of monetary policy through monetary policy instruments and the stability of individual entities performing there, significant activities of the financial system, in particular financial institutions. A part of achieving the stability of the financial system is also preventive actions of the competent authority, which should prevent those situations that are likely to generate fluctuations that threaten financial stability in the future.

3 Financial Markets and Capital Market as Different Terms

Much more traditional terms in labelling of legal sub-branches are the terms of the financial market and the capital market. In the Czech legal theory, the financial market (but I consider the designation of financial markets more appropriate) is a concept that refers to a system of relationships, instruments, entities and institutions that allow collecting, concentrating, distributing and deploying temporarily free financial assets on the basis of supply and demand, the financial markets allow the redistribution of available financial assets resources on a voluntary, contractual principle. This definition includes the determination of the main purpose of the existence of the financial markets, which is the redistribution of disposable financial funds from entities experiencing their relative surplus to entities experiencing their relative deficiency. It is therefore allowed to use free financial funds for the activity of other persons than their current holders, with the supposed benefit to both sides of the relationship. The debtors of these relationships can be entrepreneurs who will use the financial funds obtained for the development of their business, but also non-entrepreneurs who use the obtained funds to meet their current needs, which are not currently available to be covered for them.

The defining characteristic of the financial markets is to enable indirect financing of business activities and the current needs of non-business entities. They are an alternative to direct financing where there is a direct relationship between the creditor and the debtor without the activity of any third party. On a broader scale, however, it is unrealistic that financing of business activities would be directly financed because the creation of a direct financing relationship is very difficult (finding the appropriate entities to enter into a specific contractual relationship, negotiating the terms of this relationship, reinsurance, etc.) and involves low liquidity. Therefore, the existence of a functioning environment for indirect financing is necessary for the proper functioning of the market economy. Financial markets are precisely those environments in which indirect funding can be effectively carried out.

Financial markets are further treated with financial funds that cannot be considered financing, such as the exchange of individual world currencies on the foreign exchange market. This function of the financial markets is essential for the proper functioning of international trade relations when it allows the goods or services supplied to be redeemed abroad.

These fundamental functions of the financial markets distinguish them from the financial system of which they are part (subset); the financial system, as mentioned above, has a broader function – it ensures the stability of local currency funds or the movement of funds not only for the purpose of indirect financing even for direct financing or for current payments for the provided services or delivered goods or for any other transfers of funds between entities, whether on an equivalent or non-equivalent basis.

The capital market is then one type of financial markets. The general theory is that the financial markets are divided according to the instruments traded in these markets (considering that the primary function of financial markets is the implementation of indirect financing – from the point of view of the lender of investment, it can be said of financial investment instruments). The usual division of markets is based on the maturity of the financial investment instruments when the relevant period of maturity is one year. The financial investment instruments with a maturity of one year or less (short-term loans or short-term securities such as bills of exchange or treasury bills) are traded on the money market, financial investment instruments with longer maturity are traded on the capital market (long-term loans or bonds, mortgage bonds, etc.) or equity securities (shares or stock certificates).

The capital market is therefore a market of medium-term or long-term loans, medium-term or long-term securities or equity securities that do not mature as a character of theirs.

The primary function of the capital market is to allow indirect long-term financing of entities wishing to develop their business activities, relatively surplus investors' money is the source of such financial funding. It is the primary market where newly issued financial investment instruments are exchanged for investors' money. However, the capital market also makes it possible to monetise purchased financial investment instruments as soon as their holders feel the need for more liquid money. Thus, the capital market provides for the desirable liquidity of financial investment instruments, when it organises contractual relationships, the subject of which is previously issued financial investment instruments, this part of the capital market is designated as the secondary market.

Thus, the capital market is one of the financial markets whose purpose is to organise and regulate the establishment of legal relationships whose primary objective is to obtain financial funds for the development of business activities on the one hand and to enable the available funds to be valued over time on the other, to allow the disposal of already held financial investment instruments by selling them to another investor. Thus, the capital market enables the activation of capital in favour of the economic development of individuals or, in the aggregate, the entire society, on the principle of long-term investment of funds.

4 Conclusion

The term of the financial system is recently a new term in legal terminology, both in theory and in the recent Czech legislation. Its most important legislative use is in defining the fundamental aims of the Czech National Bank in the Act on the Czech National Bank,[5] whereas this term also came into this act for reasons of harmonisation with the EU legislation. However, neither in the EU legislation nor in the Czech legal order there cannot be found a definition of what the financial system means (except for the general definition contained in the regulation which established the European Systemic Risk Board, which only defines the financial system for needs of this concrete regulation as all financial institutions, markets, products and market infrastructures). Because of the lack of a legal definition, the interpretation of this term is particularly important for legal science.

The author of this paper offered such definition to readers as a sum of all types of financial markets including those subjects who are confronted with the supply and demand for relatively disposable funds in such markets, as well as entities providing financial services, especially to those subjects that engage in the markets.

The author also justified the relationship between the terms of the financial system, the financial markets and the capital market. From the point of view of today's utilitarian labelling of sets of legal norms, the author does not consider it erroneous if the denomination of financial market law or capital market law is used, but he insists on the necessity to emphasise that precisely because of the content context among these different terms.

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5 More precisely, provision sec. 2 Art. 1 of Act No. 6/1993 Coll., on the Czech National Bank, according to which the Czech National Bank "[c]ares on financial stability and on the safe operation of the financial system in the Czech Republic".

Changes of Rules Applicable to Value Added Tax

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Abstract

Every year the state budget loses several dozen billions of zlotys. What provides the measure of the extent of this loss is "the tax gap" (although in fact it is not a gap) which shows the level of discrepancies between theoretical receipts due to the state budget and receipts actually collected in its fiscal function.

The paper therefore explores the analysis of selected changes which have been implemented and which are commonly referred to as "the tightening of the tax system". This is the reaction to those behaviours within legal and commercial exchanges which could be classified as a misuse of the tax system. The paper collates the most important, in the author's opinion, possible legal responses to exchange situations having as their consequence an impairment or threat to the financial interest of the state, including, in particular, the phenomenon for which the standard term in criminal law dogma is tax loss. In the paper, possible methods of countering tax losses in the tax system will be addressed, while identifying mechanisms which are relevant for the legal construction and specificities of the tax on goods and services. The existing legal regulations are not sufficient for preventing fiscal fraud; the structure of the tax itself and the rules on setting the tax rates are the source of the threats encountered, while the expectations placed upon the valued added tax by the EU and the Member States are not met.

Keywords

Value Added Tax; split payment; STIR; Standard Audit File

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1 Introduction

The situation in which the existing tax regulations ultimately lead to other goals than those envisaged by the legislator, in other words, the regulations in force fail to fulfil the dedicated roles or tasks, or their fulfilment is only partial, may form the basis for a finding that these legal regulations are dysfunctional. According to the definition in the Polish Dictionary (Sjp.pwn.pl, 2018), dysfunctional means: ill-suited or incorrectly suited for fulfilling specific functions, tasks, goals, expectations; non-workable.

The legal dogma does not construct the concept of a "tight" tax system. This is a common language term, a non-legal category referring to the tax system. The legal category describing the financial system is the concept of effectiveness, which the legislator, for instance, states in Art. 68 (1) of the Act of 27 August 2009 on Public Finances (Act of 27 August 2009 on Public Finances). The disposition of the norm inferred from the content of the provision stipulates the obligation to realise public goals and tasks – including collection of money – in a manner that is legal, economical, timely and effective.

One has to assume that "tightness" is a certain conceptual subcategory within the framework of a broader concept of effectiveness. For effectiveness can be considered in two aspects (Pyszka, 2015: 15): primo – as an organisational effectiveness, which expresses a qualitative approach, secondo – as an organisational performance which adopts quantitative reasoning. The qualitative approach to effectiveness focuses on the implementation of the goals set – in the organisation of a public levy system those goals are represented by fiscal and socio-economic goals. Effectiveness, according to a quantitative approach, is orientated towards measurable outcomes in relation to efforts made – it is centred around cash revenues received by the state budget while applying a specific organisation of the revenue collection scheme.

One should thus conclude that the "tightness" category bears the designata of the concept of effectiveness within the meaning indicated above, since it refers to the category of measurable outcomes of the process of tax revenue collection. The concept that is opposite to the term mentioned is the so called tax gap, which is the measure signifying "the lack of tightness" of a particular tax system. In arithmetic terms, this is the difference between the tax that is theoretically due (theoretical budget revenues) and the tax that is actually collected (actual revenues) (Sejm.gov.pl, 2016).

According to the estimates of the consultant company PwC (Pwc.pl, 2017), the tax gap within the tax on goods and services in Poland, owing to the employment of measures devised for countering the gap, could get reduced from 2.9% of GDP (PLN 52 billion) in 2016 to 2% of GDP (PLN 39 billion) in 2017, which means that it was smaller by PLN 13 billion compared to the last year.

In order to increase the effectiveness of the VAT collection, what was needed was the strengthening of analytical efforts on the part of the revenue apparatus, enhancing its capacity in terms of modelling, forecasting and identifying the economic trade phenomena whose negative effects exert impact on the effectiveness of the tax system.

To this end, the legislator took steps seeking to initiate, among other things, the following changes: the implementation of the system of taxpayer preliminary verification using the Standard Audit File, the implementation of the communication and information system STIR, as well as the split payment mechanism.

2 Standard Audit File – SAF

SAF was introduced into the Polish legal system by means of the Act of 10 September 2015 amending the Act on Tax Ordinance and other tax acts (hereinafter: TO).

The institution of the Standard Audit File was introduced in Art. 193 of the Tax Ordinance (TO), placed in chapter 11 "Evidence". In Art. 180 §1 of the Tax Ordinance the legislator states that "anything that may contribute to clarifying the case and that is not illegal may be admitted as evidence". Evidence may be classified based on a variety of criteria. The most popular is its breakdown into named and unnamed evidence. The named evidence is that which is mentioned directly in the TO, while the unnamed include all other evidence which may contribute to clarifying the case and it is not illegal (Pietrasz, 2013: 1088).

In Art. 181 of the TO, there is an illustrative catalogue of evidence in tax proceedings, including such items as, for example, tax accounts and tax information. The evidence cited in this article is classified as the named evidence. Unnamed items of evidence are e.g. private documents.

Currently there are seven logical structures in force in the form of the following XML schema – JPK_VAT (records of VAT Purchases and Sales), JPK_FA (Invoices), JPK_KR (Accounting Books), JPK_WB (Bank Statements), JPK_MAG (Warehouse), JPK_PKPiR (Tax Revenue and Expense Ledger) and JPK_EWP (Records of Revenue).

The JPK_VAT file is currently the most frequently reported JPK file. This results from the frequency of its transfer. The file may be transferred in two ways. Firstly, based on the provision of Art. 82 §1b of the TO, JPK_VAT introduced under the amendment as tax information transferred on a monthly basis without being summoned by the tax authority. Secondly, pursuant to Art. 193a of the TO, upon being summoned by the tax authority in an evidentiary proceeding.

In the first case the transmission of the file may proceed solely by electronic means. The file ought to be transmitted directly to the server of the Ministry of Finance. The file should be transmitted by the 25th day of the month following the month to which the information reported in the JPK_VAT file refers. Reporting a file solely by electronic means requires that special attention be given when creating the XML file. The tool employed on the side of the Ministry for accepting file checks, among other things, whether the JPK file is correct technically. A file containing any kind of errors will be rejected even if it contains information in accordance with the laws on VAT record keeping and on the manner of producing and storing accounting documents.

It is also possible to submit the JPK_VAT file, just like other JPK files, on request of the tax authority in tax proceedings. If this is the case, the tax authority may require that the file be delivered on a data storage device or be sent to the transfer gate of the Ministry of Finance. However, such requests hardly ever occur in practice (Ministerstwo Rozwoju i Finansów, 2017).

The tax authority has access to all JPK_VAT files submitted on a monthly basis by taxpayers required to do so. Tax information is one of the named items of evidence listed in Art. 181 of the TO. That is why it seems rather pointless to require that the taxpayer should provide information that is already available to the tax authority.

The JPK_VAT file is aimed at reporting the information which should be included in the VAT records kept by taxpayers within the meaning of the VAT Act (mentioned in the paper as VAT taxpayers) pursuant to the obligation stated in Art. 109 (3) of the VAT Act.

Another file is the JPK_FA file which is to report invoices. In the description of this file in the "Invoice" section, it is indicated that the scope of documents entered in the JPK_FA file is laid down in Arts. 106a and 106q of the VAT Act. In line with the intention of the Ministry of Finance, initially the file was to contain the report on VAT purchase and sales invoices (Ministerstwo Finansów, 2016b). Nowadays reporting purchase invoices in the JPK_FA file is no longer required, while the control of purchase invoices is to be carried out using the JPK_VAT file (Ministerstwo Finansów, 2016a).

JPK_MAG is the JPK file related to warehouse management, or to put it more precisely, warehouse records. This vital area, in particular from the perspective of manufacturing firms, finds rather poor support in the legal regulations. That it is necessary to keep warehouse records arises indirectly from the provisions of the Accounting Act (Act of 29 September 1994 on accounting). In Art. 17 (2) of this Act, as one of the types of accounts, subsidiary ledger accounts are indicated which are kept for the purpose of recording individual classes of physical current assets.

The Ministry of Finance indicated that the "JPK_WB structure is a structure concerned with the bank statement – an accounting document produced by the bank. The obligation of submitting this structure lies with the taxpayer; however, the taxpayer shall perform this obligation in cooperation with the bank. In practice, the tax authority, upon the taxpayer's consent, shall be able to ask the bank to release the relevant bank statements in the JPK form, indicating the reason for the request, bank account number and the requested period" (Ministerstwo Finansów, 2016a: 2).

The last of the JPK file discussed is JPK_EWP which is to report records of revenues. Taxpayers who pay personal income tax as a lump-sum payment are required to keep records of revenues.

3 Split Payment Mechanism

The model of split payment is one of the methods of collecting taxes, being also one of the solutions aimed at combating tax frauds and misuse while improving the process of collecting VAT (which is then reflected in the smaller VAT gap). The principle idea behind this mechanism is the breakdown of payment for delivered goods or services rendered into a net amount which the purchaser pays to the bank account owned by the supplier of goods or the provider of services, and the VAT amount which goes directly to a separate bank account which is "supervised" by the tax authority. This model allows tax authorities to monitor and block the resources held on the VAT bank accounts, eliminating the risk of the taxpayer's vanishing together with the tax he was paid by his contractors but which he failed to pay to the tax authorities (Ministerstwo Finansów, 2017).

For the goods sold or the service provided, the supplier shall receive only the net amount. The remainder of the payment as set out in the invoice and corresponding to the VAT amount will be paid to the so called VAT account. The initiative in this respect is left to the purchaser of goods or services; nevertheless, if he uses this accounting method, this will imply specific consequences for both the purchaser and the provider of goods or services. The split payment procedure is voluntary and to be applied only between entrepreneurs, and as such it will not affect ordinary consumers' purchases.

The split payment mechanism is applied only and exclusively with respect to payments made since July 1, 2018. This rule arises clearly from the transitional provisions.

According to the definition provided for in Art. 108a of the VAT Act (Act of 11 March 2004 on the Tax on Goods and Services), the VAT itself may be paid under the split payment. As the provisions stipulate that "the payment, partial or in whole, of the amount corresponding to the net sales value based on the invoice is made to the bank account or to the account of a credit union for which the VAT account is kept, or it is made by other method". The final line of the provision speaks clearly of the possibility of accounting for the net amount by applying a different method (than the split payment).

The taxpayer orders split payment within one payment order. The tool (instrument) for making this payment is the "transfer statement". It can be defined as a special transfer format or a transfer form in which the person ordering the transfer shall indicate certain additional data (information) pertaining to the invoice issuer or the invoice itself which will allow the bank (credit union) to split the payment into two streams of cash and to debit and credit accordingly with the relevant amounts the clearing account and the VAT account.

In the transfer statement – referring to payment for invoices in the form of split payment – apart from the data allowing the receiving party to be identified, one should indicate the following data:

1. the amount corresponding to all or part of the tax amount set out in an invoice which is to be paid according to the split payment mechanism – it should be noted here that the taxpayer specifies the amount of the tax to be paid to the VAT account by himself; the bank is not required to check whether or not the amount set by the taxpayer has been correct; the taxpayer may, in the transfer statement, set out only part of the tax amount which he wants to pay in the form of split payment;

2. the amount corresponding to all or part of the gross sales value – it appears that here the entire gross amount taken from the invoice concerned is to be stated; it can differ from the transfer amount (representing the total of the amount marked as VAT and the net amount paid by using split payment);
3. the invoice number for which the payment is made – one should assume that there is no obstacle for the buyer to indicate several numbers of invoices if he wants to pay for several invoices issued by one seller using split payment;
4. the number which identifies the supplier or service provider for tax purposes – here one should indicate the seller's tax identification number NIP indicated in the invoice.

What is to be discerned from the above: the provisions of the Act do not provide for measures protecting against making an unauthorised split payment in that a larger amount than the tax amount indicated in the invoice in question will be transferred as the VAT amount (from the buyer's VAT account to the seller's VAT account) (Bartosiewicz, 2018: 232).

Among the advantages of the mentioned split payment mechanism is that it is not necessary for entrepreneurs to verify the credibility of suppliers. It suffices to make sure that the money gathered on the special account is reflected in invoices. According to experts, split payment may prove to be an efficient tool in combating tax frauds although it also entails some risk to honest entrepreneurs. That is so because the implementation of this solution will affect the system for paying and declaring VAT, which may have the effect that Polish taxpayers will have to adjust to these new conditions. Moreover, what is being pointed out is that the costs related to the split payment implementation, which are borne by honest entrepreneurs, may prove to be ultimately higher than the state's profit.

4 STIR

One of the strictest measures envisaged within the framework of the project is the communication and information system of the clearing house used for assessing VAT extortion risk, abbreviated as STIR. This solution is meant to tighten the VAT collection system. Drawing on the experience gathered from the analysis of accounts, flows, payments and withdrawals, transfers across the banking sector, the Ministry of Finance (which strengthens itself, as it were, using the power of information technology not only of the entire banking sector but also credit unions and cooperative banks) is implementing an innovative project which in a few months will allow for the implementation of the IT tools which will be at the interface between the National Clearing House, the financial sector in its broad sense, the Ministry of Finance, the National Revenue Administration and the General Inspector of Financial

Information. So far, there has been no such series of information that would be under ongoing supervision of the revenue administration.

Art. 119zn, which was added to the Tax Ordinance, provides for that the head of the National Revenue Administration (KAS) will analyse the risk of using the operations of banks or credit unions for the purpose of committing offences or fiscal offences. This refers to offences involving VAT extortion, including those which, for instance, consists in issuing blank invoices. The risk analysis is to be conducted while taking into account the risk indicator determined by the clearing house in its STIR system.

The Tax Ordinance provides, inter alia, for automatic determination in the STIR system of the risk of banks and credit unions being used for fiscal extortion. The STIR system will analyse the data from the banks and credit unions, as well as publicly available data sent to the Central Subjects Register of National Taxpayer Register (CRP KEP). Obligation will be imposed on banks and credit unions to transfer to the STIR system certain data, including those representing bank secrecy or professional secrecy of the credit union – for the purpose of determining the risk. The clearing house shall transfer the information on the risk indicator to the head of National Revenue Administration and to banks and credit unions.

The tasks conferred on the National Revenue Administration will be expanded including now identification, detection and combating offences related to money laundering.

The data transferred to the STIR system will refer to entrepreneurs' accounts, regardless of whether or not they are VAT payers. If information is obtained that a given entity may conduct an activity aimed at using the operations of banks or credit unions for the purposes involving fiscal extortion, the head of the tax office will have the option of refusing to register the entity in question as a taxable person for VAT purposes (Etel et al., 2018).

Moreover, there are the following mechanisms to be implemented counteracting VAT extortion which involves the so called "missing trader" fraud: blocking the account on request of the head of the National Revenue Administration (thus secured funds will be released if the tax amount due according to the invoice is paid); refusing the registration and deleting ex officio the entry identifying the entity as a taxable person for VAT purposes, without having to notify the entity thereof.

In Art. 119zp, the Tax Ordinance obliges banks to transfer to the National Clearing House all data allowing one to identify the entrepreneur: address, business identification number REGON and the numbers of accounts, as well as to notify the clearing house no later than within 24 hours about any changes, open or closed accounts. The full scope of data allowing for the STIR system to operate will be set out in the regulation by the Minister of Finance.

As the content of Art. 119 zn of the TO states, the list will certainly contain the whole history of transactions present on the account. The National Clearing House will assess the risk of fraud on the basis of the following five criteria: economic (the assessment of transactions carried out by entrepreneur), geographic (analysis of operations with countries where the risk of tax fraud is high), subject-based criterion (assessment of the extortion risk based on the nature of the business), behavioural (the unusual behaviour of the entrepreneur) and links (interdependence net suggesting the risk of participating in fiscal extortion offence).

Thus, all transactions in all the payment systems will be subject to daily reporting by the banks. The processing of data involves the use of a suitable algorithm. The method devised for its creation was thoroughly thought out and fine-tuned and has not been disclosed so far. The Ministry of Finance assures that the tool, which is calibrated, will operate extremely precisely and shall detect only those taxpayers who steal VAT and only their accounts will be blocked. One should then wait and hope that the system is indeed infallible. For in some types of businesses blocking the entrepreneur's account for 72 hours may have a significant impact, distorting or even preventing the business from being further conducted.

As the OECD reports show, in some countries the intrusion into the accounts of taxpayers by tax authorities is considerably larger than that proposed in Poland. It appears that in implementing the project, the Ministry of Finance seeks to strike a balance between the entrepreneurs' rights and the need to combat VAT extortion occurring on such a big scale. Pursuant to Art. 119zv of the TO, blocking the taxpayer's account is to be the final stage of the analysis provided by STIR and it is essentially, according to the statements issued by the Ministry of Finance, to influence the taxpayers' awareness. It should be stressed that the requirement for blocking the bank account of the qualified entity, pursuant to Art. 119zv § 1 of the TO, is satisfied if the information held by the head of the National Revenue Administration shows that it is merely possible for the qualified entity to use the operations of banks or credit unions with the aim of fiscal extortion. Further to that, it should be noted that Art. 119zv speaks of "fiscal extortion", yet does not provide the definition of the concept, which considerably increases the uncertainty felt by taxpayers. One should therefore hope that this definition will be specified so that the taxpayer will not have to rely solely on a teleological interpretation. Moreover, reasonable doubts may be raised by the account blocking under the premise "of reasonable concern of failing to meet the tax obligation", included in Art. 33 § 1 of the TO. It should, however, be emphasised that this condition was the subject of the analysis of the Constitutional Tribunal which in its decision of 8 October 2013 affirmed the constitutionality of this premise (Constitutional Tribunal, SK 40/12, OTK a A 2013, no. 7: 97).

5 Conclusion

It is not easy to assess in clear terms the changes implemented. What is needed is some time to pass to allow these changes to work. However, it seems that some of them, like for instance split payment may carry the risk of violating one of the fundamental principles of VAT, which is the principal of neutrality.

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Due Diligence in Verifying Counterparties in Order to Deduct VAT

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Abstract
Considerations on exercising due diligence while verifying their counterparties by taxable persons for the purposes of settling VAT should be, as a matter of priority, related to one of the fundamental rights pertaining to VAT. The primary right arising from the Council Directive 2006/112/EC is a right to deduct the input tax which may be limited by member states only in exceptional situations. Neither Polish nor the European Union legislation define the concepts of "due diligence" and "good faith". While making a specific assessment of facts, they ensure so called interpretation margin that makes it possible to take non-legal criteria significant for business operations into account. Defining the concepts of due diligence or good faith in a precise manner without evoking controversy seems to be impossible in the process of the application of the law. Due diligence should be suggested to be understood as the regular merchant's commonly adopted diligence that is related to, inter alia, the conviction that goods are not provided or a service is not performed by a person intending to "bypass" tax law provisions.

Keywords
value added tax; tax on goods and services; due diligence; due diligence criteria; verification of a taxable person

1 Introduction

While undertaking considerations on exercising due diligence at verification of their counterparties by taxable persons for the purpose of VAT financial settlements, one

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should refer to one of fundamental rights relating to VAT. The primary right arising from the Council Directive 2006/112/EC[2] is a right to deduct the input tax which may be limited by member states only in exceptional situations e.g. in order to prevent of and fight against fraud.[3] A right to deduct the input tax is an integral part of the VAT mechanism; it is a basic principle underlying a common VAT system and, as a rule, it may not be limited.[4] The principle of VAT neutrality and the challenging of the taxable person's right to deduct the tax being in conflict with the former principle is a subject of many controversies, as well as disputes with tax authorities. These disputes are usually resolved by administrative courts. It is particularly noteworthy, that a right to deduct the input tax is one of the key tenets of a tax, not a form of tax relief or a privilege.[5]

2 The Concepts of "Good Faith" and "Due Diligence"

One should also stress that due to the lack of legal definitions of the concepts of "good faith" and "due diligence", their proper interpretation becomes possible only when the CJEU case law is taken into account.[6] In the light of the position of the CJEU, that has been adopted in the vast majority of its rulings, a tax authority challenging the right to deduct must demonstrate that a taxable person in specific circumstances should know that a transaction does not (transactions do not) meet some commercial standards appropriate for this type of actions. Premises established in an objective manner should provide a basis for this statement.[7] Simultaneously, it should be mentioned that a direction of the CJEU ruling practice was determined in the judgement of 12 January 2006 in the joint cases of C-354/03, C-355/03, C-484/03 Optigen and

2 Council Directive 2006/112/EC of 28/11/2006 on the common system of value added tax (O.J.EU.L.2006.347.1, as amended; hereinafter: Council Directive 2006/112/EC).

3 The right to deduct is an integral component of the VAT mechanism and, as a rule, it is not subject to limitation. See Militz, 2014; see also the judgement of the CJEU on joint cases of C-80/11 Mahagében Kft. and C-142/11 Péter Dávid.

4 See judgements of the Court of Justice of the European Union (hereinafter: CJEU) e.g. CJEU, C-409/99, Metropol Treuhand WirtschaftsstreuhandgmbH v. Finanzlandesdirektion für Steiermark and Michael Stadler v. Finanzlandesdirektion für Vorarlberg, EU:C:2002:2; CJEU, C-465/03, Kretztechnik AG v. Finanzamt Linz, EU:C:2005:320.

5 See judgements of the CJEU, C-354/03 Optigen v. Commissioners of Customs & Excise, European Court Reports 2006, p. I–483; CJEU, C-255/02 Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise, see ruling 2006, s. I–1609; CJEU on combined cases C-80/11 and CJEU, C-142/11 Mahagében and Dávid.

6 The CJEU investigated the concept of a good faith in the following areas: the right to deduct the VAT, exemption of an intra-Community supply of goods, exemption due to supply of goods exported from the territory of the European Union, joint and several liability and an adjustment of the tax demonstrated in the invoice. See Dominik-Ogińska, 2013a: 29.

7 See, inter alia, para. 23 of the CJEU judgment, C-110/94 *INZO;* para. 32 of the CJEU judgement, C-414/10 *Véleclair;* para. 55 of the CJEU judgement, C-439/04 and C-440/04 *Kittel and Recolta;* para. 42 of the CJEU judgement in the joint cases C-80/11 and C-142/11 Mahagében and Dávid, para. 37 of the CJEU judgement, C-285/11 Bonik.

Others. The Court of Justice expressly defined a refusal of a right to deduct a tax as an exception to the general rule. This assumption excludes the possibility of an extensive interpretation in this respect. The most important thesis of the judgement was expressed in para. 52 of the reasoning. The CJEU indicated that a right to deduct input VAT cannot be affected by the fact that in the chain of supply of which transactions of a taxable person form part, another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing about it. The facts of the judgement included the cases of a "carousel fraud" involving a missing trader in order to avoid a duty to pay the tax. The assessment of facts was not altered by the fact that Optigen and Fulcrum Companies did not contact the entity perpetrating a fraud. This reasoning was repeated and developed in the judgement of 6 July 2006 in the case C-439/04 and C-440/04 Kittel and Recolta.

The judgement of 21 June 2012 in joint cases C-80/11 and C-142/11 Mahagében and Dávid significantly affected the establishment of standards of good faith and due diligence. The CJEU expressly indicated the principles pertaining to distribution of burden of proof in a dispute between an entrepreneur and tax authorities. The Court provided more precise standards of due diligence in a series of rulings issued in the disputes between entrepreneurs and Bulgarian tax authorities.[8]

3 Due Diligence in VAT

Regardless of the crucial importance of the principle of VAT neutrality for the operation of the entire VAT system, it must be stressed that its nature may somehow encourage abuse of the right to deduct VAT, and in consequence result in a decrease of budget revenues. On the other hand, legal provisions adopted by a legislator may not aim at the elimination of the right to deduct entirely. Thus, it is important to find a balance between a fiscal interest and maintaining the essence of the value added tax in order to prevent it from turning into actual gross turnover tax. A concern of distorting such balance is related, inter alia, to the issue of an obligation to keep due diligence by a taxable person in terms of verification of their counterparties. Whereas implementation of such obligation seems to be completely understandable, it is extremely difficult to set clear and comprehensible, and simultaneously not discretionary criteria for determination whether due diligence was exercised or not. Moreover, it seems crucial to lay down the statutory obligations imposed on tax authorities when evaluating the correctness of verification of taxable person's counterparties. The basic question is, whether an active subject of taxation such as a tax authority should assess a taxable person's compliance with evaluation criteria of due diligence in a sort of "passive way" or whether, taking into account basic principles of tax proceedings, it should perform an in-depth analysis undertaking, in this way, a "co-verification" of the taxable person's counterparties.

8 Compare judgements of the CJEU, C-285/11 Bonik; CJEU, C-642/11 Stroy trans; CJEU, C-643/11 LVK – 56.

Basic principles of tax proceedings should not be forgotten in terms of the obligation to exercise due diligence while verifying counterparties for the purpose of deducting input tax.

1. The principle of conducting tax proceedings in a manner inspiring confidence in tax authorities and the notification principle (Art. 121 of the Tax Ordinance Act[9]). This principle means, inter alia, that shortcomings of an authority conducting the proceedings may not cause negative follow-ups for the citizen who acts in good faith and with trust to the content of the received decision.[10] Any inconsistencies or doubts pertaining to the factual state shall be resolved only in favour of the taxable person. The taxable person may be accused of a failure to meet his/her obligations only if the content of such obligation is fully understandable, and the taxable person may realistically meet the obligation arising from a provision of law.[11]
2. The principle of objective truth in tax proceedings (Art. 122 of the OP). From this principle arises for the authority an obligation of "comprehensive investigation of all actual circumstances related with this case so as to establish its real picture and obtain a basis for correct application of the provision of law". In specific tax factual states, in which the legislator considers it justifiable for a taxable person or a public interest, the burden of proof may also rest upon a party of the proceedings. This obligation may be imposed on the parties to the proceedings as to the tax authorities, i.e. in an expressed or implied (indirect) manner.[12]

Tax authorities should not impose a general requirement of investigating the counterparty's reliability; it is only recommended to the authority to undertake an attempt of proving discontinuation of an activity meeting the obligation of a taxable person involved in the proceedings with due diligence in case of particularly emphasised doubts.[13] A verification obligation should not burden a taxable person in subject-related area further than the investigation of the direct counterparty's reliability unless a party should know or knows that a transaction may be a tax fraud. In such cases, a party to the agreement should be verified by a tax authority as a further counterparty.[14]

The taxable person, e.g. by checking a purchaser in the VIES system, verification of the bill of lading, collecting payments in form of bank transfer, performs an action that may be reasonably expected by the tax authority. At the same time, pursuant

9 Act of 29 August 1997 on Tax Ordinance (consolidated text, *Journal of Laws,* 2018, item 800, hereinafter: OP).
10 Compare judgement of the Naczelny Sąd Administracyjny w Warszawie, III SA 702/87, ONSA 1987, no. 2, item 79.
11 Compare judgement of the Naczelny Sąd Administracyjny w Warszawie, III SA 964/87, OSP 1990, z. 5–6, item 251.
12 See Hanusz, 2004: 49–54.
13 Compare judgements of the CJEU, C80/11 Mahagében and CJEU, C – 141/11 Dávid.
14 CJEU, C – 354/03 and CJEU, C – 355/03, C- 484/03 Optigen.

to the principle of the proportionality, performing tax inspection of a purchaser in terms of alleged irregularities in performing intra-Community supply of goods and potential penalising him/her is a sole responsibility of the tax authority. The action of an authority that, in fact, makes the taxable person's effectiveness in pursuing the right to deduct input tax dependent on exercising the rights imposed on this person neither by the national law nor the European Union Law targets in a totally opposite direction.[15]

In terms of an obvious, justified intention of a legislator to counteract the procedures of VAT fraud, so called "tax carousel schemes", the position of the jurisprudence that the procedures for assessment of exercising due diligence "should be interpreted so as they prevent a national practice under which a tax authority refuses a taxable person a right to deduct the amount of this output tax or paid tax due to the services provided to him/her from the output VAT, because the entity issuing invoices pertaining to these services or one of its service providers committed an irregularity, only when it was not proved by the tax authority pursuant to objective premises that the taxable person was aware or should have been aware that the transaction that was meant to provide a legal basis to deduct involved an offence committed by the invoice issuer or any other entity acting at the earlier stage of trading" (Naczelny Sąd Administracyjny, I FSK 2033/14).

A requirement of verifying the counterparty may be established only in the situation when the taxable person had prior information evoking doubts as per the reliability of the counterparty. Such approach to the issue of verification of a counterparty is also confirmed by the case law of the Supreme Administrative Court that indicated in one of the judgements that: "Although tax authorities may not impose a general requirement that a taxable person should investigate whether a tax issuer has given goods in his/her possession and whether he/she is able to supply them or whether he/she complies with an obligation to submit a tax return form and pay the VAT tax, in order to make sure that the entities acting at former stages of sales do not commit irregularities or an offence or to make this taxable person be in possession of the documents confirming it, nevertheless, the taxable person who has the information that make it possible to suspect the occurrence of irregularities or an offence may be obligated to obtain the information on the entity from whom he/she intends to purchase goods in order to confirm his/her credibility" (Naczelny Sąd Administracyjny, I FSK 381/15).

The taxable person has an obligation to comply with the requirements of the verification that may be required only on the basis of reasonable premises. If a business entity has undertaken any and all actions that it might be reasonably expected to undertake in order to make sure that the transactions do not involve an offence either in terms of the VAT or in any other area, it may presume that the transactions are legitimate without a risk of losing its right to deduct the input VAT (Naczelny Sąd Administracyjny, I FSK 2033/14).

As it was already mentioned pursuant to the content of provisions of Art. 122 of the Tax Ordinance, tax authorities undertake any and all required actions in order

[15] Compare the judgement of the CJEU, C-409/04 Teleos.

to explain the facts in details and resolve the issue in tax proceedings. The referenced provision constitutes the principle of material truth. The subject of the analysed principle is an obligation of undertaking ex officio any and all actions that would lead to explaining in details of any and all factual circumstances of the investigated tax case in order to recover its realistic picture, and then to obtain a legal basis for application of relevant provisions of law. As it was rightly emphasised by the Supreme Administrative Court in one of its rulings: "It deserves some attention that an obligation to prove any facts significant to resolution of a case rests on a tax authority. Such rule of tax proceedings arises from the content of Art. 122 of the Tax Ordinance. In consequence, a tax authority needs to make an effort to prove any and all facts by means of any available evidence methods and sources in order to issue a relevant ruling" (Naczelny Sąd Administracyjny, FSK 2326/04). An obligation of conducting the entire proceedings on all significant circumstances always rests on tax authorities and may not be, in any way, shifted on a taxable person unless it arises from specific tax legislation.[16] Provisions of Art. 187 of the Tax Ordinance are a development of this principle. An obligation of a comprehensive investigation of any and all actual circumstances (not just the selected ones) related to the case as to establish its realistic (rather than presumed) picture and obtain a basis for adequate application of a legal provision follows from this principle. A uniform ruling practice with regard to the application of this principle to all proceedings conducted by a tax authority regardless of a tax law that is in force at the time has been developed in the case law of administrative courts. Here are some examples:

- While performing an assessment of the evidence, a tax authority may not neglect any completed discovery and is obligated to take account of a demand of a party to perform a discovery of the circumstances relevant for the case, unless these circumstances where acknowledged by other evidence and assess on the basis of the whole collected evidence whether a given circumstance was proven or not (Wojewódzki Sąd Administracyjny w Bydgoszczy, I SA/Bd 259/13).
- The failure of a tax authority to undertake procedural steps aimed at the collection of comprehensive evidence, especially when a party makes reference to specific circumstances that are important for it, constitutes a failure to comply with the provisions of the proceedings resulting in defectiveness of a decision (Naczelny Sąd Administracyjny, SA 234/81, ONSA 1981, no. 1, item 23).
- An obligation to prove in tax proceedings burdens solely the tax authorities, that may not transfer a necessity of proving any circumstances of a case to the addressee of their decision. An authority may not limit its actions to challenging the reliability of evidence to which the party refers only because it "appears" to be unreliable and to state that it did not demonstrate that the facts indicated by it had actually taken place (Naczelny Sąd Administracyjny, II FSK 2690/14).

[16] Compare the judgement of the Naczelny Sąd Administracyjny, SA/Po 1459/96.

- The authority must bear in mind that insufficient explanation of facts may not be a basis for findings that would be negative for a party. An authority should base its statements on convincing evidence and doubts that are not easy to eliminate should be resolved at the favour of a taxable person, pursuant to the principle of in dubio pro tributatio (Wojewódzki Sąd Administracyjny w Poznaniu, I SA/Po 883/13).

While conducting the proceedings, the tax authority, pursuant to the provision of Art. 191 of the Tax Ordinance Act should make assessment on the basis of the entire evidence whether a given circumstance was proven. Here are exemplary rulings relating to this matter:

- A discovery in tax cases is not an objective as such, but it is a search for a reply whether in a specific actual situation, the situation of a taxable person fits into the hypothesis (and in consequence, into the provision) of a specific standard of the substantive tax law. Pursuant to a provision of Art. 188 of the Tax Ordinance, the party's demand pertaining to performing a discovery should be taken into account if the subject of discovery includes circumstances relevant for the case unless these circumstances have been acknowledged to a sufficient level by another evidence (Naczelny Sąd Administracyjny, I GSK 541/12).
- Assessment of evidence by a tax authority becomes discretionary only when limits of discretionary assessment of evidence have been exceeded in a given case. These limits, though, are not directly set forth by provisions of common law in any way. Therefore, exceeding the limits of discretionary assessment of evidence must be investigated on a case-by-case basis in every specific tax case including the rules of logical interpretation of facts and events. Successful accusation of violation of a provision of Art. 191 of the Tax Ordinance requires demonstrating that tax authorities failed to comply with the principles of logical thinking or life experience, as this is the only thing that may be opposed to a right to perform a discretionary assessment of evidence. The conviction of a different significance of specific evidence than the one that was adopted, and its assessment opposite to this performed by tax authorities is not sufficient. The assessment of evidence performed by an appeal authority may be successfully challenged only in the case when there is no logic in linking conclusions with the collected evidence or when the reasoning of the authority goes beyond the rules of logics or, contrary to the principles of life experience, it does not take the cause-and-effect relations into account (Wojewódzki Sąd Administracyjny w Poznaniu, I SA/Po 102/14).

Notwithstanding the foregoing, it should be concluded that in the light of Art. 187(1) of the Tax Ordinance Act there are no reasons to look for the components of facts that do not have any reference to tax law facts of a given case i.e. they do not aim at establishing (or contradicting) the terms and conditions of the hypothesis of a specific material tax law (rather than a hypothesis of the tax authority) that is intended to be applicable in the case. A discovery in tax cases is not an objective as such, but it is a search for a reply whether in a specific factual situation, the situation of a taxable person fits into the hypothesis (and in consequence, into the provision) of a specific standard of the substantive tax law (Naczelny Sąd Administracyjny, 2008: 47). Pursuant to Art. 167 of the Council Directive 2006/112/EC a right of deduction shall arise at the time the deductible tax becomes chargeable. The provision of Art. 168(a) of the Council Directive 2006/112/EC provides that in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person in line with the provision of Art. 178(a) of the Council Directive 2006/112/EC for the purposes of deductions pursuant to Art. 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Arts. 220 to 236 and Arts. 238, 239 and 240. Also pursuant to Art. 220(1) of the Council Directive 2006/112/EC every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party, among others on the case of delivery of goods or provision of services by him/her for other taxpayer or legal person who is not a taxable person. It appears that the above regulations contained in the provisions of Council Directive 2006/112/EC should be a reference point for establishing statutory criteria for the assessment of exercising due diligence, as well as application of the provisions in the tax procedure, especially at the stage of checking actions or inspection proceedings so as to be able to indicate potential failures to comply in a manner clear for a taxable person already at this stage.

4 Conclusion

In conclusion it should be stated that neither Polish, nor the European Union legislation define the concepts of "due diligence" or "good faith". These concepts are so called general clauses and they have been defined for the purpose of a right to deduct the VAT tax only in the case law of the CJEU. While making a specific assessment of facts, they ensure so called interpretation margin that makes it possible to take non-legal criteria significant for business operations into account. It seems anyway that defining the concepts of due diligence or good faith in the manner that is at the same time precise and that does not evoke any controversies in the process of the application of the law is not possible. Explanation of these concepts would make a taxable person able to take advantage of a right to deduct VAT without any concern that he/she may infringe the tax legislation. The case law referred to herein has introduced an equity clause to the VAT system; this clause considers "good faith" to be a sort of buffer against undesirable actions of tax authorities. Compliance with the rules indicated in the CJEU case law gives an opportunity to take account of the taxable person's position and grant them rights in the VAT system, inter alia, in the area of the right to deduct or apply an exemption to the extent of occurrence of specific circumstances that do not allow that (Dominik-Ogińska, 2013b: 26; Michalak, 2016: 190).

A taxable person acting in good faith, especially when he/she has undertaken any and all reasonably required preventing measures required should not bear tax liability. In view of the above, due diligence should be suggested to be understood as the standard merchant's commonly adopted diligence that is related to, inter alia, the conviction that goods are not provided or a service is not performed by a person intending to "bypass" tax law provisions. A taxable person should exercise minimum diligence and good faith while checking a counterparty rather than look for unfair entrepreneurs doing the job of tax law enforcement. The indicated rulings demonstrate that both the CJEU and the Polish administrative courts show that a business entity who has undertaken any and all actions that it may be reasonably expected to undertake in order to make sure that the transactions in which it is involved are not related to any offence, should have an option to take advantage of a right to deduct. It is ensured by a uniformity of interpretation of the provisions of the Community law that needs to be understood in the same way irrespective of a case, court or member state.

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Interventionism or Activation – Local Market Expectations Towards Local Government Units

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Abstract

Representatives of economic and legal sciences very often deal with the issue of the comprehensive impact of local government units on creating local development conditions. The experiences of recent years indicate that public entities, including local government units, are active participants in the local market. This participation can take direct forms when the local government units participate in the market, but also an indirect form, when the local government units act as the regulator of this market. The main restrictions of local government's participation in the market are the law framework, the expectations of the local government community, financial condition and the risk associated with business operations.

Keywords

local government; local market; law regulations

1 Introduction

The issue of comprehensive impact of local government units on the shaping of local development conditions was a relatively rare issue at the initial stage of political change. Difficulties connected with the course of socio-economic transformation significantly

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influenced the directions of actions of local government units in the first years of their existence. Frequent changes in legal regulations, unstable solutions in the area of financing local government units, little experience in local area management, did not create a proper basis for discussions about the long-term prospects of functioning of local government units. Mainly for these reasons, local governments over the years focused more on immediate satisfaction of the collective needs of the territorial community, less attention was paid to the broader programs related to undertaking development initiatives. However, with the passage of time, symptoms of departing from this trend began to appear. It is first and foremost noticeable that by virtue of their functions, local government units induce lasting changes in the local space, which makes it necessary to reflect on changing the approach of local governments towards a multidimensional view of the problems of the local community.

Undoubtedly, the economic activity of public entities is inherently worrying due to the impact on the functioning of the local market, especially in terms of the potential use of a monopoly position or possible violation of the principles of free competition. However, recent years' experience indicates that public entities must engage directly or indirectly in local market affairs. The authors assume that any economic activity of a public entity is in fact an intervention in the local market, the identification of conditions and rules of intervention of local government units should intervene in matters of the local market taking into account current legal regulations and from the perspective of justifying the economic effectiveness of undertaken activities.

2 Economic Motives and Consequences of Intervention of Local Government Units in the Functioning of the Local Market

The area of each local government unit is a specific socio-economic system. It is created by the appropriate territory, together with the natural environment, the infrastructure base and the entire subject structure, which includes residents, units conducting economic activity, local authorities, social, cultural and religious organisations, etc. However, the essence and character of a given entity are really determined by the relations that occur between the listed positions. In this respect, local government units are often seen as a certain system in which the whole is more than a mere sum of parts (Bertalanffy, 1984: 23–24). The development of this system is connected with the process of transformation, in which the object passes from simple forms to more complex ones, more perfect in certain respects (Ziółkowski and Goleń, 2003: 44). Thus, local development cannot be identified only with quantitative growth, but it must also include a set of qualitative and structural transformations to improve the quality of life of the inhabitants. As a result, local development means a harmonised and systematic operation of the local community, local authorities and other entities functioning in this area aimed at creating new and improving existing utility properties, creating favourable conditions for the local economy and ensuring spatial and ecological order (Brol, 1998: 11).

One of the key factors of local development is the economic development of the local government unit. Well-functioning local markets are the foundation of this process. They operate on a number of business entities such as commercial, production and service enterprises, farms, banks, other financial institutions, business organisations, business-related institutions and a whole range of others. The activity of these entities is a prerequisite for the development of local government units. They create jobs for the residents, thus providing them with a certain level of security, both financial and social (Wojciechowski, 2001: 192). Therefore, the level of prosperity of the whole local government community depends to a large extent on the economic results achieved by the sphere of private enterprises. Economic relations also have a significant impact on the shape of other components of local development, namely the social, ecological or spatial dimension. In connection with this, the question arises, what position should local government take towards these processes? Should it actively influence the course of market phenomena, or should it rather adopt a neutral attitude towards them?

The legal provisions regulating the functioning of the local government sector do not strictly define the rules for local government units to conduct local development policy. General guidance in this regard is provided by Art. 6 of the Act on Commune Self-Government (*Journal of Laws,* 2001, no. 142, item 1591, as amended), which stipulates that the scope of the commune's activity includes all public matters of local significance, not reserved by laws for other entities. In addition, a further part of the cited article states that if the law does not provide otherwise, the settlement of matters referred to in para. 1, belongs to the competence of the commune. In these provisions, therefore, there is a presumption of the right of self-government authorities to take actions for broadly understood local development. A more exact regulation in this area is included in Art. 18 para. 2 of the said Act, stating that the sole competence of the commune council is, among others, adopting economic programs. This provision does not clearly indicate the obligation to have such programs, or the way in which they are to be developed, nevertheless the quoted provision clearly suggests such a need and indicates that the entity authorised to enact them is the municipal council. Additional obligations are imposed on the commune by the Act on Freedom of Economic Activity (*Journal of Laws,* 2004, no. 173, item 1807), among others in the scope of records or control. In addition, pursuant to Art. 8 of this Act, the commune as a public administration body is to support economic development, creating favourable conditions for undertaking and conducting business activity.

It follows from the above that there are no legal contraindications as to the impact of a local government on development processes. At the same time, there are no clear premises specifying the relation of local government units to these issues. In this situation, local government units individually determine their role in the issue of creating local development, which is reflected in the tasks carried out. Affecting the socio-economic processes taking place on a local scale, local government units can fulfil two functions (Ziółkowski and Goleń, 2003: 63):

a) regulatory, i.e. preventing conflicts arising between economic entities, as well as eliminating barriers to development or at least reducing the negative effects of their occurrence;
b) real, consisting in undertaking activities stimulating and dynamising development processes in local government units.

This does not automatically mean that taking action in these areas is economically justified. Referring to the previous observations made, a local government unit is not the only participant in the processes of shaping the conditions of local social and economic development. The relationships with the private sector, which in the conditions of the market economy is the main provider of goods and services also in the local dimension, are particularly important in this case. It is worth noting that relations between economic entities in a given unit and local government authorities are often referred to in the literature as a specific game, resulting from a clearly outlined conflict of interest. Economic entities strive to maximise individual benefits, while local government authorities should safeguard the general interest of the local community. The liberal trends in economics explain this contradiction by the existence of the "invisible hand of the market", which turns individual efforts of entrepreneurs into improving the well-being of all inhabitants. However, experience related to the functioning of the market economy prove that it often cannot cope with local problems, as evidenced, among others, by the existence of monopolies, external effects, environmental pollution, which according to some researchers raises the need for active interference in the sphere of socio-economic development. Of course, it is impossible to ignore the issue that, according to the constitutional principles, the local government is to support and not replace the operation of the market mechanism. In this situation, the local government is deprived of instruments that would allow direct manual control of local development in a directive manner. Nevertheless, through the implementation of the statutory tasks, local government units can significantly affect the behaviour of business entities, modifying them in the desired direction.

The presented reflections constitute the background of the discussion on the extent of the influence of local government units on the course of development processes in the local dimension. On the basis of theoretical considerations, the following approaches are distinguished.

a) Radical intervention of the local government sector, manifesting itself in the development of a number of economic programs designed to create new jobs, organise offices, agencies, business promotion centres, affecting business entities located in the unit through tax or credit preferences, and mobilising organisational units of the local government sector and the private sector around the strategic objectives of the development of a given local government unit.

b) The model of public non-intervention in the local government sector, close to conservative, orthodox liberal trends, expressing consent to marginalisation of the role of local authorities in the economic and social sphere. This approach is dominated by the belief that any intervention may mean a distortion of the market mechanism, inefficient spending of public funds in the local government sector and consolidation of traditional structures.
c) The model of traditional public intervention that does not call into question the need to involve public funds in the economic and social spheres, but recognises the dominant importance in this area of market mechanisms.

The approach based on the local intervention model assumes that the market mechanism alone is not able to maintain the proper course of socio-economic development. In this situation, there is a need for local authorities to manage this process. This concept, therefore, sees in local government units the main source of creating initiatives for local development. The effect of such a policy is a wide range of activities, among others application of tax preferences, subsidies, support programs from public funds, infrastructure investments. They are to stimulate the behaviour of business entities in order to achieve the assumed directions of development. In an extreme variation, this trend perceives the role of local government units as a translation of the doctrine of the welfare state into the local dimension (local socialism).

Proponents of active interference in development processes emphasise that this approach enables comprehensive coordination of all aspects of local development. However, conducting such a policy entails a number of side effects. The main threats include:

a) too many priorities result in scattering of funds, which makes it difficult to effectively implement plans;
b) excessive involvement in the sphere of local economy threatens to repress private entities from the market; this often leads to monopoly in certain areas by local government units, such as waste management, heat, gas, etc.;
c) large-scale intervention programs usually require large financial outlays; the implementation of such a policy can lead the local government unit into a debt trap.

These allegations underlie the alternative concept of socio-economic development consisting in refraining from interfering in market mechanisms. According to it, the system of socio-economic relations in the territory of local government units is so complicated that it is impossible to determine all the factors of its development. In this situation, modifying only some variables does not give any reasonable assurance of achieving positive effects. The most radical critics even believe that interventions can permanently dictate the functioning of the local economy system.

According to the proponents of this concept, development impulses are sent from the sphere of private enterprises, and the market mechanism translates them into the well-being of the entire community. The role of local government units in this respect should consist in removing obstacles interfering with the free operation of market rules. In particular, it is about solving property issues in the direction of privatisation transformation of local public utilities. In addition, local government authorities should give up all forms of interference in the economic and social sphere, passing the initiative in these areas to private entities. In this situation, investment activity should not go beyond the simple reproduction of municipal property. In the light of the assumptions of this trend, the role of local government is reduced to meeting the liberal principle of the "night watchman" in the local dimension. One should therefore take into account that the orthodox realisation of the postulates will result in the marginalisation of the role of local government units by reducing their activity only to fulfilling basic regulatory functions.

Although the division is of mainly theoretical importance, it nevertheless sets out the general approach of the theory on the principles of impact on local development. Naturally, in a market economy and the existence of democratic structures, top-down management of the socio-economic development of a territorial unit is out of the question, just as arbitrary external shaping of its spatial organisation, structure and functioning. On the other hand, the previously quoted perception of local authorities as the host of a local territory is part of the trend that assumes that market mechanisms do not spontaneously create permanent forms in which an individual interest would be in line with the collective interest (Eucken, 2005: 400). Active interference in stimulating development processes also finds its theoretical foundations in the literature on the subject. It is more and more believed, that local governments cannot be limited to providing passive public services to local communities, but just like the private sector, they must compete within a global framework.

3 Legal Determinants of the Intervention of Local Government Units in the Field of Running a Business in the Local Dimension – Acceptable Intervention Limits

Bearing in mind the theoretical models of participation of a public entity (commune) in a market game and without prejudging which of these models is appropriate, an analysis of the legal environment in the scope of undertaking and conducting business activity should be made. Activity on the local market can take various dimensions and forms and can be implemented using various legal instruments. However, one should be aware that any form of public entity participation on the local market affects the behaviour of this market and its participants. To undergo further analysis, it should first be determined in which normative way economic activity can be implemented, as well as in what areas of law there are instruments allowing local government units to intervene in the local market.

First of all, it should be pointed out that interventionism on the local market may have a direct or indirect form. An indirect form consists in stimulating appropriate behaviours or phenomena without direct involvement of a public entity in the economic activity. The direct form of interventionism consists in involvement of the local government unit in the economic activity directed by local needs.

In order to assess the legal possibilities of economic activity, it is necessary to analyse the legal provisions of both systemic and financial nature, as well as the scope of public economic law. Starting from basic legal acts, it is necessary to indicate the provisions of the Constitution of the Republic of Poland and the provisions of the European Charter of Local Self-Government. The provisions of the Constitution of the Republic of Poland do not directly refer to the economic activity of local government units, constituting only legally guaranteed freedom in the conduct of economic activity (Art. 22 of the Constitution of the Republic of Poland), referring to the system of local government units, provisions guarantee the legally protected independence of local government units (Art. 165 of the Constitution of the Republic of Poland). In addition, in the provision of Art. 166, local government units are obliged to implement public tasks consisting in satisfying the needs of the local government community. According to Art. 3 of the European Charter of Local Self-Government, the local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.

These seemingly content-poor systemic regulations carry a far-reaching delegation for detailed development in the provisions of ordinary laws. The Act on Commune Self-Government and the Act on Municipal Economy cited above are important for these considerations. The first of these acts in Art. 9 contains regulations on the limits of business activity carried out by the commune. Pursuant to this provision, economic activity can be divided into the one that goes beyond and the one that falls within the limits of usefulness, except that going beyond public utility is allowed only in situations provided for by the act. Conceptual determinations are necessary for further consideration. The legislator decided in this Act to interpret the authentic public utility, which is the implementation of the municipalities' own tasks in order to provide current and uninterrupted satisfaction of the collective needs of the population through the provision of publicly available services. Public utility means, therefore, the implementation of own tasks in such a way as to satisfy the widest possible needs of the community (Kalisiak and Paluch, 2000: 54). This does not mean a lack of profit in connection with the business, but it is assumed that this profit is not a priority and cannot be the goal itself. Therefore, the tasks carried out taking into account the profit in which it occupies an equal place, or goes beyond the implementation of public tasks, are referred to as going beyond the limit of public utilities. This activity is, therefore, profitable and equal to other goals that accompany undertaking activities that go beyond public utility (Wojciechowski, 1997: 13). The implementation of own tasks is therefore a priority in undertaking business activities, however, the scope of these tasks, the intensity of their implementation, and finally the manner of their implementation should be treated in a flexible and, above all, evolutionary manner, taking into account the changing socio-economic conditions. The Supreme Court has a similar opinion, as in a decision of 18 May 2011 it stated: The catalogue of tasks, provided for in Art. 9 para. 4 of the Act on Commune Self-Government of 1990 and Art. 1 para. 2 of the Act on Municipal Economy of 1996, is open and variable, conditioned by the life cycle of residents, external conditions and the general socio-economic situation, which requires adjusting the provision of services to these changes. Determining whether specific services provided meet the above premises should be made in the circumstances of a specific case, by referring to the distinguished features of these tasks, indicating their importance to the commune's community (Ref. no. III CZP 22/11 SIP LEX). Therefore, it should be stated that the analysed provisions of the Act on Commune Self-Government concern the general permit for running business activity of communes, in order to implement widely understood public tasks, in a way that does not go beyond public utility, or that goes beyond these limits.

Another act regulating the admissibility of economic activity by local government units is the Act on Municipal Economy, which apart from repeating the definition of municipal economy and tasks of public utility, also indicates acceptable forms and situations in which local government units may go beyond the tasks of a public utility nature. According to Art. 10 of the Act, it is possible to go beyond public utility tasks only in the forms of commercial law companies and only if the premises are met, which are the unsatisfied needs of the local government community on the local market, and, in the situation of unemployment in the municipality, negatively affecting the standard of living, if other funds failed to improve the local labour market. It should be emphasised that the mentioned provisions indicate the priorities in the activities of local government units, which include a continuous and uninterrupted satisfying of the needs of the local government community. Therefore, any activity not related to satisfying the needs of the community is allowed only if it is provided for by law. Thus, in case of tasks that do not exceed public utility, there is a freedom to choose both forms of implementation of these tasks, while there is no justification for undertaking such activities, while in the case of going beyond public utility, the legislator controls the possibility of undertaking such activities (Banasiński and Jaroszyński, 2017: 156). It is worth referring to the category of profit, which accompanies business activity, but also activities within the municipal economy. The profit category is not a legal category, but economic category. The mentioned provisions in no way relate to the circumstances of a profit within the framework of a municipal economy or broadly understood economic activity, which does not mean that it is not done by the doctrine or judicial decisions. According to the ruling of the Supreme Administrative Court in Gdańsk of 9 January 2003, the fundamental difference between the municipal economy and business activity lies mainly in the fact that the municipal economy has no commercial purpose to gain profits. It must lie within the framework of communal activity, and its obligatory goal is performance of the municipality's own tasks, including the satisfaction of the collective needs of the community (public utility tasks). The commune is first and foremost a body of public authority, and so, by implication, it must perform certain intervention functions in the economy. This is particularly about the areas of socially necessary activities in which private entities are not interested (e.g. lack of profitability), creating new jobs, sustaining local traditions and local centres of economic and cultural activity. Whereas the activity of municipalities directed at social needs and public utility (the necessity to obtain financial resources necessary to carry out tasks) is desired or at least acceptable; pure commercial activity of municipalities may result in monopolisation of certain activities by the municipality and distract its attention from real social needs (SA/Gd 1968/02 SIP LEX).

Another type of intervention of local government units on the local market is stimulation of specific behaviours, not through own activity, but through other instruments – primarily financial ones. And here, paradoxically, the same provisions will apply, which were mentioned when discussing direct involvement of local government units in economic activities. Both the provisions on municipal government (Arts. 7 and 9, as well as Art. 1 of the Act on Municipal Economy) indicate the premises of this activity, which are primarily the unsatisfied needs of the local government community, which fall within the broadly understood own tasks. Municipal authorities are responsible for reading these needs and deciding on ways to satisfy them.

Among the instruments of indirect impact on the local market, we should mention those, which are related to actions and involvement of public funds for economic activation, and those related to other forms of impact on the local market. The first group should first of all indicate the methods and instruments provided for in the Public Finance Act. The second group includes regulations resulting from the broadly understood tax law.

Provisions of the Public Finance Act (*Journal of Laws,* 2017, no. 2077, as amended) contain a number of legal regulations important for business entities operating on the local market. These are primarily provisions regarding access to the implementation of public tasks financed from public funds, available to all entities in principle, without the preference of public entities (Art. 43 of the Act). Also provisions on the provision of budget subsidies (Arts. 218–219, 221 of the Act) do not exclude the provision of these sources of funding to private entities operating on the local market, although their availability is limited by specific provisions (specific subsidy, earmarked subsidy) and the exclusion of entities operating to gain profit (designated subsidy).

Another measure affecting the situation on the local market is conducting a specific tax policy that may stimulate business behaviour in a positive or negative way. The use of instruments belonging to tax authorities may take various forms from shaping tax rates, to introducing certain tax reliefs, to assistance provided in individual tax matters. Undoubtedly, running a liberal tax policy reduces budget revenues from this basic source of income, however, in the medium- or long-term perspective, it should bring the expected effects in the form of economic recovery on the local market (Gonet, 2013: 131).

4 Conclusions

The involvement of local government units as an active participant in the local market is a universal and desirable phenomenon, whenever the local community experiences a lack of accessibility of services, or directed to the recipients of these services or indirectly affecting the quality of life of the local government community. Additionally, due to the fact that the market does not provide or provides insufficient amounts of certain types of goods desired by the local community, the interference of local government units finds its economic justification. The choice of tools for this interference is a secondary issue, assuming that they will be applied within the limits provided for by law. Nevertheless, since the presence of local government in the public administration system is a practical expression of the principle of subsidiarity, it is desirable to set clear criteria for the division of tasks between the state and local government in terms of influencing market mechanisms, including in particular economies of scale, flow-on effects, consumer preferences, and above all, the ability to monitor and evaluate the effects achieved through interventions.

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SA/Gd 1968/02 SIP LEX.

Features of Factor Analysis in Tax Consulting

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Abstract
A distinctive feature of factor analysis in tax consulting is that some of the parameters of taxation or all of them together serve as influencing factors or performance indicators. Therefore, factor analysis requires using the traditional characteristics of financial and economic activities of an economic entity as well as the indicators characterising the taxation parameters.

Keywords
taxation parameters; factor analysis; tax level; taxpayer; cash; methods of factor analysis

1 Introduction

For any state, taxation is one of the main sources of the revenue budget. In addition to having strictly a financial function, taxes also serve as a governmental tool of economic influence on public production, its structure and dynamics, as well as scientific and technological development. The levying and payment of taxes and fees (mandatory charges) are reflected in tax reporting documents. Tax levels may be calculated for separate taxes or for a combination of several taxes.

Methods of economic analysis have been actively applied in managing cash used by an economic entity to pay taxes. Optimisation of the taxation process should not result in a conflict of interests between the state and the taxpayer, and therefore one of the aims of financial management of an economic entity is to make sure that it does not happen.

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2 Economic Analysis

Economic analysis allows for the evaluation of current and expected changes in the taxation of an economic entity and their influence on the financial management of the entity. Therefore, it does not only focus on the reduction of tax rates and payments. Economic analysis of tax expenses includes assessment of the type, structure, and dynamics of tax payments.

The economic analysis performed in this article focuses on the influence of taxation and expected managerial decisions concerning the management of cash flows of a taxpaying organisation. It is aimed at studying the correlation between the parameters and factors of taxation and the results of financial and business operations of a taxpaying organisation.

2.1 The aim of factor analysis

We believe that the aim of factor analysis is to reduce the risk of obtaining inadequate information about the level and parameters of taxation, as this information is important for maintaining budget effectiveness, optimisation of tax calculations, and improvement of the quality of managerial decisions concerning the tax policy of an economic entity. In order to achieve this aim, the following objectives were set.

- Achieving effective cooperation between economic entities in the sphere of taxation by optimising the tax policy, making regular tax payments to the budget, and reducing the risk of tax offences.
- Determining disputable tax situations and factors that may cause them; developing suggestions and recommendations on eliminating the negative effects of these factors through managerial decisions taken in order to solve any arising problems.
- Systematising the tools of economic analysis in order to achieve the desired results (reduction of tax payments, prevention of tax penalties).
- Enhancing the role of economic analysis as an information basis for adequate managerial decisions aimed at tax optimisation and prevention of unjustified tax payments.
- Improving the methodology of factor analysis in taxation by developing economic forecasting, strategic economic analysis, and ecological economic analysis.
- Suggesting complex solutions to tax problems taking into account social, ecological and human resources issues, as well as the policy of use and capitalisation of net profits of an economic entity.

Factor analysis plays an important role in determining the effect of various factors on the resulting performance. The major factors that influence the financial and economic performance of a taxpaying organisation are:

- total tax expenses;
- cash used to pay taxes and charges, and the amount of refunded taxes;
- tax liabilities to the government.

Factor analysis tools allow reducing the ambiguity of information about the taxation parameters, improve the quality of managerial decisions concerning the optimisation of taxation and implementation of the tax policy of a taxpaying organisation.

The main source of information for factor analysis are tax reporting documents used by both internal and external subjects of the economic analysis. One of the major subjects of economic analysis of tax reporting are tax authorities, who use the information from tax returns to control the adequacy and accuracy of payments of taxes, fees, and other mandatory charges.

2.2 Tax indicators and performance indicators

To determine the correlation between the tax indicators and the results of financial and business operations of economic entities, it is necessary to analyse cause and effect relationships between the taxation indicators and the performance indicators of the organisation. Among the major characteristics of taxation indicators which may be analysed in comparison with performance indicators of economic entities, are tax level and tax structure.

We believe that tax level can be characterised by the following indicators of the tax structure (*Financial and Economic Analysis for Tax Consulting,* 2008):

- the share of tax charged over the current (previous) reporting period in the total amount of all taxes charged over the current (previous) period;
- the share of tax paid over the current (previous) reporting period in the total amount of all taxes paid over the current (previous) period;
- the share of tax asset or liabilities in the current (previous) reporting period in the total amount of tax assets or liabilities in the current (previous) reporting period;
- the share of tax accrued in the current (previous) reporting period in the total amount of all taxes accrued in the current (previous) period.

The above parameters can be used to determine the following indicators of the structure, dynamics and structural dynamics of taxes:

- absolute deviation of the amount of taxes in the current period as compared to the previous one;
- the growth ratio of taxes in the current period as compared to the previous one;
- the share of taxes allocated to expenses in the total amount of accrued taxes;
- the share of taxes not allocated to expenses in the total amount of accrued taxes;
- the dynamics of the structure of accrued taxes in the total amount of accrued taxes in the reporting period.

The economic analysis should also focus on the indicators of the dynamics of taxation of an economic entity which include the following:

- the structure of accrued taxes in the current period as compared to the previous one;
- the structure of paid taxes in the current period as compared to the previous one;
- the structure of taxes within the asset and liability items of the balance sheet in the current period as compared to the previous one.

We should note that influencing factors used in factor models gave the resulting indicators. The amount of tax expenses depends on the tax rates and the taxable property for each of the accrued taxes. The relative tax level can be evaluated based on the correlation between the tax payments and the expected economic effect.

We consider tax reporting to be a set of actions performed by the taxpayer (or their authorised agent) and the tax authorities to form, process and submit certain documents containing the information about the economic performance of the taxpayer and their financial status. These documents should also regulate the process of tax calculation and reserve a certain amount payable to the state budget.

Tax return may be prepared by taxpayers themselves, by their authorised agents, or by a tax agent. Tax return is prepared using the data from the balance sheet and specific calculations. The Tax Code of the Russian Federation does not give any definition to the term "tax return" (The Tax Code of the Russian Federation). Therefore, in this article we use this term as defined by the official website of the Federal Tax Service of Russia (Official website of the Federal Tax Service of Russia). According to the website, a tax return is "a set of documents containing the information about the calculation and payment of taxes by individuals, private entrepreneurs, and organisations".

Let us note, that financial statements contain information about the tax indicators (Order of the Ministry of Finance of the Russian Federation No. 66) which should be used in an economic analysis to determine the level of tax indicators. This is demonstrated in Table 1.

Table 1. Tax indicators in accounts (financial statements)

Type of the financial statement	Tax indicator
1. Balance sheet	deferred tax assets VAT on the purchased material assets deferred tax liabilities taxes and fees payable
2. Financial performance statement	current income tax, including permanent tax liabilities (assets) changes in deferred tax assets changes in deferred tax liabilities
3. Group Cash Flow Statement	other income from current operations other payments on current operations

Source: Compiled by the author based on the Order of the Ministry of Finance of the Russian Federation No. 66.

The information from financial statements can be used to calculate the following indicators:

- tax assets;
- tax liabilities;
- net tax payable as the sum of tax liabilities excluding the tax assets;
- net tax flow as the difference between the tax paid and tax refunded for previously overpaid taxes.

Therefore, using the indicators of the tax level based on the information from the financial statements (Sapozhnikova et al., 2018: 360) we can calculate the amount of tax expenses of a taxpaying economic entity.

We performed the analysis of the taxation level using the data from an independent auditor's report on the financial statement of PAO Novolipetsk Steel (NLMK) for 2017 (PAO NLMK financial statements). The results of the analysis are presented in Table 2.

Table 2. Taxation level of PAO NLMK

Indicator	As of the beginning of the reporting period, thousand roubles	As of the end of the reporting period, thousand roubles
Deferred tax assets	153,987	161,667
VAT on the purchased material assets	6,486,168	3,037,696
Deferred tax liabilities	11,341,530	10,954,069
Taxes and fees payable	1,411,715	3,743,118
Tax assets	6,640,155	3,199,363
Tax liabilities	12,753,245	14,697,187
Net tax payable	6,113,090	11,497,824
Deferred tax assets	7,680	
Deferred tax liabilities	387,461	
Permanent tax liabilities (assets)	–11,372,600	

Indicator	As of the beginning of the reporting period, thousand roubles	As of the end of the reporting period, thousand roubles
Tax payments	7,569,942	
Income tax accrued in the reporting period	3,741,224	
Effect of the temporary difference on the financial result	–379,781	
Effect of the permanent difference on the financial result	–11,372,600	
Total effect of the temporary and permanent differences on the financial result	–11,752,381	
Net tax flow	7,569,942	
Convergence of the deferred tax assets in the balance sheet and the financial statement	153,987 + 7,680	161,667
Convergence of the deferred tax liabilities in the balance sheet and the financial statement	11,341,530 – 387,461	10,954,069
Calculation of tax expenses and the income accrued tax	11,497,824 – 6,113,090 – (–11,752,381) – (–7,569,942)	24,707,057
Tax expenses	24,707,057 – 3,741,224	20,965,833

Source: Compiled by the author based on the Financial statement of PAO Novolipetsk Steel (NLMK) for 2017.

The data presented in Table 2 demonstrate that the tax expenses amount to 20,965,833 thousand roubles and are comparable with the amount of accrued taxes (calculated by the tax-paying organisation, not a tax agent) plus the amount of penalties and interests accrued in the reporting period.

The current income tax of PAO NLMK is calculated using the data from the financial statement and the contingent expense (contingent income) adjusted according to the permanent tax liability (asset), deferred tax asset, and deferred tax liability for the reporting period. PAO NLMK also takes into account permanent and temporary differences, determined using the analytical data by comparing the data on income and expenses from the financial and tax statements.

The frequency and the time of tax reporting depend on the organisational and legal basis and the taxation scheme. This can be accounted for by the fact that business owners want to optimise their expenses, reduce the time spent on reporting, and ensure a high level of quality of accounting (Panina, 2014: 39–48). This is especially important in cases when an organisation does not perform any activities in the reporting period, but still has to submit all the reporting documents.

To analyse and assess the level and the dynamics of the taxpayer's performance, the following indicators can be used:

- sales revenue (less VAT, excise taxes and other mandatory charges);
- production costs (including selling and managerial expenses);
- employee compensation (labour costs);
- number of employees;
- average compensation to an employee per month;
- work output per man (calculated using the sales revenue);

- financial results of the economic entity;
- payments to the budget (actual tax payments, amount in arrears, deferred payments).

The analysis of the subjects of tax reporting demonstrated that the tax information and tax reporting system are closely related to other systems of economic data, which means that the number of entities and individuals using this information cannot be restricted to tax authorities only, as defined by law.

Information about the financial status of an economic entity and the way it performs its liabilities to the budget is of great interest to a lot of users who may provide feedback to the reporting entity and influence the parameters of the tax reporting. There are two types of information users in the system of tax reporting: external and internal. Internal users are the administration of the organisation. External users are tax authorities and tax consultants.

To compare the tax indicators and their dynamics to the major indicators of financial and business performance, we should consider the correlation between these indicators, which we do in Table 3.

Table 3. Types of correlation between the tax indicators and the major indicators of financial and business performance

Varieties of correlations between the tax indicators and the major indicators of financial and business performance		
Value of the real property	Elements of property tax	Accrued property tax
Labour costs	Elements of income tax	Accrued income tax
Accrued and paid taxes	Changes in tax liabilities	

Source: Compiled by the author.

The data presented in Table 3 demonstrates that typical correlations occur between tax factors, non-tax performance indicators of an economic entity, factor tax indicators and the resulting indicators of taxation.

According to regulatory agencies, if the expenditure growth ratio is higher than the income growth ratio, it means that the economic entity either overestimates the expenditure or underestimates the income. However, the growth of expenses can be caused by various reasons, such as:

- reduction of sale value of goods, or insignificant growth not in line with the increase in the cost of raw materials and components;
- increase in employee compensation and cost of utility services;
- payment of interests on acquired loans.

If any of the economic performance indicators is lower than average, federal regulatory agencies send a formal letter requesting an explanation for the low level of tax burden. Tax authorities usually request the following information:

- information about the structure of the organisation (its operations, type of economic activities, specifics of delivery of the goods, works and services);
- statement of income and expenditure for the last three years;
- turnover balance sheets on all accounts and sub-accounts;
- tenancy contracts;
- staff list.

Tax authorities also require the head of the organisation and the chief accountant to give explanations in person. Such requests are usually illegal, as the tax legislation clearly names the cases when tax authorities are entitled to require explanations, for example, if the office audit reveals errors, discrepancies and controversy in the presented data (Art. 3.88 of the Tax Code of the Russian Federation). Tax authorities are only entitled to require documents from taxpayers who enjoy tax inducements or want to get VAT refunded (Arts. 6 and 8.88 of the Tax Code of the Russian Federation). A request for an explanation of a low level of tax burden is therefore not legal. The taxpayer may or may not provide the requested data to the tax authorities at their own will.

Factor analysis should determine the main types of correlation between the resulting indicators and the variables (factors) (Gilyarovskaya, 2006: 360) that influence this indicator. The results of such an analysis are presented in Table 4.

Table 4. Types of correlation between factors and indicators in factor tax models

Type of the model	Description of the model
Additive	taxes allocated to expenses are used in calculating the financial results prior to taxation; factor tax indicators and other factor non-tax indicators are used
Multiplicative	taxation basis and tax rate are correlated and considered as factor tax indicators
Divisible	used to calculate the indicators of the structure and relative dynamics and allows to compare the amount of taxes to the interrelated performance indicators of an economic entity
Mixed	relations between defined tax and non-tax indicators and factors

Source: Compiled by the author based on Gilyarovskaya, 2006: 360.

The most frequently used tax factor models are models of taxation level indicators, taxation dynamics indicators and factor models of VAT dynamics. These models are used for the external financial control of an economic entity.

Users and subjects of the results of factor analysis in the tax consultation are the participants of the tax process. The range of users of tax information is significantly limited in comparison with the users of economic information, as a limited number of people are interested in using the results of factor analysis for management decisions in the field of tax optimisation and organisation of tax accounting. This group of persons can be divided into internal users of the taxation process, which include the heads of the economic entity, employees of economic services, responsible for decision-making in the field of optimisation of tax policy, affecting the indicators of taxation of the economic entity, and external, represented by the state control bodies in the field of taxation. The group of users also includes specialists who are involved in the preparation of information to justify management decisions in the field of tax planning and optimisation of tax payments. In the formation of this information, the tax adviser plays the role of the performer and user of economic information. In the framework of the implementation of duties, the tax consultant works with specialists of internal structural divisions of the organisation and external information from a variety of sources. Financial control bodies as external subjects of factor analysis are interested in the data of tax accounting and reporting of an economic entity, primary documents confirming the legality of the facts of economic life, the degree of completeness of the implementation of legislation governing the aspects of taxation of economic entities. Internal subjects of tax legal relations are interested in the business activity of an economic entity, the level of financial stability and solvency, the volume, structure and dynamics of tax payments to the budget, their share in the volume of monetary turnover of the organisation, types and characteristics of tax risks, their impact on the financial results of the economic entity. The most important issue is the assessment of the impact of the management decision in the field of tax optimisation on the financial condition of the economic entity.

The most important ways of information processing in the framework of factor analysis can be a comparison and grouping. As part of the factor analysis in the tax consultation, the comparison is most often carried out in the framework of identifying the impact of individual factors, comparing the tax data of the reporting period with the previous, the actual values with the planned data. When using the grouping method in factor analysis, groupings based on the elements of the indicator and the selection of influencing factors to change its generalised value are used. As part of the use of analytical groups, causal relationships between tax and non-tax indicators are identified. Significant attention should be paid to the analysis of the impact of tax cash flows on its aggregate value from the perspective of optimisation of tax payments in the reporting financial period.

It should be noted that within the framework of the development of recommendations in the field of optimisation of taxation of an economic entity, its tax strategy may be changed, which will depend on changes in the organisational and legal form of the organisation and the mechanism of implementation of the facts of economic life. Management tax decisions will affect the tax base, the selected method of taxation, the timing of the emergence and payment of taxes by the economic entity (deferral, investment tax credit, instalment payments).

The methodological apparatus of the tax analyst will depend on the methods they apply, the proposed rational ways of optimising the parameters of taxation on the results of the factor analysis.

3 Conclusion

Our study demonstrated that providing accurate and timely information about the activities of an economic entity be means of tax reporting is very important. It helps the organisation to avoid penalties or, for instance, the freezing of bank accounts. Tax reporting includes approved tax return forms. Tax returns are submitted by taxpayers separately for each tax payable, unless otherwise explicitly set forth in the laws of taxes and charges.

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The National Revenue Administration and the Protection of the Financial Security of the State and the Security of the Individual

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Abstract

An assessment of the National Revenue Administration, which has changed the basis of the functioning of the Polish tax services from the point of view of the need to protect the financial security of the state and the security of the individual, cannot limit itself to only indicating the evident budgetary benefits that these changes have brought, nor to listing the violations of the rights of the individual due to the unconstitutional solutions adopted in the Act on the National Revenue Administration. This study aims to indicate the area in which individual and public security are compatible.

Keywords

tax; tax administration; financial security

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1 Introduction

The justification of the introduction of the National Revenue Administration reform was primarily the need for effective protection of the financial security of the state. It was undertaken with a view to reducing the tax gap, the size and continuous increase of which was already threatening the stability of public finances. At the same time, the expansion of the competencies and the streamlining of the structures and methods of work of the new tax services could raise doubts about the appropriate protection of the rights of entrepreneurs.

In the opinion of the authors of this study, the contradiction between the financial security of public law associations (state and local government), as beneficiaries of tax income, and on the other hand, the security of taxpayers bearing the public burden, which is stressed in journalistic discussions and sometimes in the literature on the subject, is only a certain fragment of reality, primarily related to the relations between the state and the entrepreneur. For a large group of natural persons, ensuring that the budget income is at a suitable level guarantees their social security. The average monthly gross salary in the national economy in Poland in 2017 was PLN 4,272 (approx. EUR 1,000); however, the scale of wage inequality is easily illustrated by the fact that only 6.3% of the total employed received a gross salary equal to at least double the average salary in the national economy. In turn, employees receiving a wage equal to or less than the average salary (i.e. less than PLN 4,346.76) constituted 66.2% of the total employees. Those who are paid less are not interested in increasing the level of protection of entrepreneurs, but instead are interested in effective and fair redistribution.

The research used the dogmatic-legal research method, analysis of the case law of the Constitutional Tribunal and statistical analysis. Due to lack of space, the article omits terminological considerations regarding the otherwise interesting issue of the scope of the concept of financial security of the state and social security of the individual.

2 Financial Security of the State and Social Security of the Individual

The limits of protection of the rights of taxpayers are determined in practice by the need to ensure the financial security of the state, including, above all, the realisation of planned budget income (sometimes identified with the public interest). It should be remembered that these limits are also determined by such constitutional values as tax fairness and the general obligation to pay taxes, ensuring budget redistribution at a sufficient level. It seems that these values interact and primarily serve the realisation of constitutional guarantees, such as the following:

- the principle of protection of the family, expressed in Art. 18 of the Constitution of the Republic of Poland, clarified by the provisions of Art. 71 of the Constitution, according to which families in a difficult material and social situation, particularly large and single parent families, have the right to special assistance from the public authorities, while mothers before and after giving birth have the right to special assistance of the public authorities;
- special protection of veterans, especially war invalids, in accordance with Art. 19 of the Constitution;
- protection of family farms in accordance with Art. 23 of the Constitution;
- the right to safe and hygienic work conditions in accordance with Art. 66 of the Constitution;
- the right to social security in case of inability to work due to illness or invalidity as well as reaching retirement age in accordance with Art. 67 of the Constitution;
- the right to social security in accordance with Art. 67 of the Constitution;
- the equal right to health care financed from public funds, the duty of the public authorities to guarantee health care for children, pregnant women, disabled people and the elderly, and to fight epidemic diseases and prevent the negative health effects of the degradation of the environment, regulated by the provisions of Art. 68 of the Constitution;
- the duty to provide assistance to disabled people in securing their existence, adapting them to work and social communication;
- the right to education in accordance with Art. 70 of the Constitution.

It is difficult to imagine that the real implementation of the above provisions in practice could be possible without appropriate financial assistance from the state budget – however, this is dependent on an efficient, modern tax apparatus, thanks to which the budget has sufficient financial resources derived from taxes. An unsatisfactory level of implementation of the constitutional provisions (e.g. regarding the right to health care) is often justified in Poland by the insufficient amount of funds received for this purpose.[3] Therefore, it is difficult to speak of a simple conflict of interests between the state on the one hand, and the individual on the other, but this relationship should rather be seen as a complex system of mutual connections that are aimed at harmoniously meeting human needs. In light of this, we should also recognise the constitutional principle of proportionality, which determines the level and principles of the implementation of these interests.

When considering the question of the impact of the NRA reforms, during which mechanisms were introduced aimed at increasing the effectiveness of the tax services and the protection of the rights of the individual, one should remember about "the statutory possibilities to limit the public property rights of citizens, among

[3] There are no official reliable statistics on the size of the gap in the health insurance contributions; however, as a result, the level of health expenditure in Poland in 2016 – according to *OECD Health Statistics 2017* – was only 6.9% of GDP, while the OECD average during this time was 9%.

others, due to the public interest and [...] the barrier to the state's implementation ability, which is the 'common good', as well as due to the ability of the state to fulfil its basic obligations" (Art. 1 of the Constitution). The authors of this study believe that a different approach, always counterposing the security and interests of the individual to the financial security of the state, seems to be a blatant simplification that does not take into account the interests of a large group of people interested in wider redistribution, more than what, from their point of view, is the abstract protection of the rights of taxpayers or (even more) the protection of rights of a (even narrower) group of people running their own businesses.

It is worth noting that there is a large and obvious sphere in which the need to ensure the security (protection of interests) of the individual and of the taxman, represented by the NRA, is not only not contradictory, but instead identical. An example of this is the need to maintain budget balance, the maintenance on which the possibility of public entities to act and assist taxpayers to solve their various life problems depends (Kosińska and Woltanowski, 2014; Trybunał Konstytucyjny, Ref. K 27/98; Trybunał Konstytucyjny, Ref. K 13/01; Trybunał Konstytucyjny, Ref. K 6/02). Here it should be remembered that tax fraud, extortion of loans, dishonest business activities, and money laundering that the NRA struggles against harm not only the financial security of the budget, but also the interests of those economic entities that conduct their activities in an honest way and in accordance with the law. This is because the running of an un-taxed business by different entities in a similar scope of activity, in conditions of free competition, may lead to the elimination from the economy of those who fulfil their tax obligations honestly. The Constitutional Tribunal emphasises that "since there is a 'grey economy' in the Polish economic reality, it is the right and obligation of the legislator to adopt regulations aimed at eliminating it", and also that it "recognises the existence of a significant public interest in establishing regulations to this end, especially since they will not only protect the interests of the state, but also of those economic entities that want to conduct business in a fair and lawful manner" (Trybunał Konstytucyjny, Ref. K 6/02).

Undoubtedly, the limits of interference in the sphere of the rights and freedom of the taxpayer are determined by their necessity, effectiveness in implementing the objectives intended by the legislator, adequacy, optimisation of protection of public interest in a manner and degree which could not be achieved through the application of other means, minimisation of the burden on entities whose rights or freedom are restricted as a result of the application of the legal measures, and rationality and proportionality (Kosińska and Woltanowski, 2014). In this respect, the authors of this study shall attempt to present the most important changes in the reformed tax administration, referring directly to the situation of taxpayers.

3 Financial Security of the State and the Need for Reform of the National Revenue Administration

Research conducted by the authors of this study under the guidance of Prof. E. Ruśkowski before the introduction of the reforms (Kosińska and Woltanowski, 2007; Kosińska et al., 2014; Ruśkowski et al., 2016) revealed the necessity for radical changes, both structural and methodological, as well as changes in the scope of tasks of the tax office. It was necessary to change the concept of management and approach to the client – taxpayer. Experience of the reform of the Polish tax apparatus preceding the reforms of 2017 introducing the system of the National Revenue Administration was not encouraging: there was a delay in the adoption of the draft of the first NRA reform – widely discussed and accepted in academic circles – prepared under the guidance of the Ministers of Finance Prof. T. Lubińska and Prof. Z. Gilowska in 2005–2007 (Gilowska et al., 2007), and later in 2008 it was shelved, while changes after 2008 mainly concerned the organisational frameworks, but did not aim to eliminate many of the important factors which were hampering the effectiveness of the tax administration (Ruśkowski et al., 2016). It is not surprising that with such negligence the costs of the tax administration in Poland in 2015 were the highest in the EU and constituted 1.6% of budget receivables collected by it (Tax Administration 2015, 2018), while the VAT and CIT tax gaps were constantly growing (Kosińska et al., 2014). The then introduction of fragmentary changes in the structure of the apparatus were not preceded by academic research, including above all an accurate description of the challenges that were faced by the tax apparatus and the mistakes and factors limiting the effectiveness, which needed to be eliminated as a result of the reform (Ruśkowski et al., 2016). Certainly, the criteria for the success of the fiscal reform postulated in the literature were not achieved: stability of the adopted solutions, ensuring a suitable substantive preparation of tax office staff (Kosińska and Woltanowski, 2007), appropriate personnel and motivational policy, and the need to properly respect the rights of the taxpayer and non-statutory legal regulations (Ruśkowski et al., 2016). The reform creating the National Revenue Administration since 2017 is dictated primarily by the need to protect the financial security of the state. It was undertaken with a view to reducing the tax gap (Ruśkowski et al., 2015), the size and continuous growth of which was already threatening the stability of public finances (Kosińska et al., 2016). According to the authors of the draft bill, the NRA reform was supposed to achieve the following:

- effective tax collection;
- improvement in customer service to the taxpayer;
- efficient administrative enforcement of monetary claims;
- reduction of the tax gap;
- effective, that is, reliable and quick verification of data provided by taxpayers in tax declarations and customs documents;

- increase in the efficiency and effectiveness of taxpayers' compliance with tax obligations;
- improvement in the image of the tax administration (Justification to the draft Act on the National Revenue Administration of 17 February 2016).

The third priority of the NRA reform is no less important for increasing public security and the security of the individual: the prevention of broadly understood economic crime (including, above all, VAT fraud), which, by reducing budget revenues, limits the performance of public social functions, including access to education, health care, etc. In order to improve the fight against grey economy, new divisions were created to combat economic crime at the level of the NRA head office and in local units, as well as to control procedures:

- customs and tax control – created through the unification of fiscal control and control performed by the Customs Service (hard control); its main task is to detect and combat irregularities on a large scale in situations when the size, complexity and the degree of the impact of existing failings have a significant impact on the financial security system of the state;
- tax control – carried out on the basis of the provisions of the Tax Ordinance (soft control); this control is intended for honest taxpayers and is to be aimed at helping in the proper performance of tax obligations.

It is possible to speculate to what extent the spectacular increase in tax revenues was the result of the extension of the competences of the tax administration and other results of the NRA reform, and to what extent it resulted from the introduction of more modern solutions in the field of substantive tax law (primarily in the VAT Act) – however, the fact is that despite simultaneously reforming tax administration structures, tax revenues in 2017 amounted to PLN 315.3 billion and were PLN 14.2 billion (4.7%) higher than planned in the Budget Act. This was mainly due to higher VAT receipts. In 2017, VAT income was estimated at PLN 156.8 billion, so in comparison to 2016 it was 23.9% (PLN 30.2 billion) higher.

4 Financial Security of the State and Unconstitutional Solutions Adopted in the Act on the NRA

The principle of proportionality resulting from Art. 31 of the Constitution requires that constraints laid down in the scope of constitutional freedoms and rights should be established by an act only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or freedoms and rights of other people and that the restrictions do not violate the very essence of freedom and rights. The authors of the draft Act on the NRA referred to the principle of proportionality, stating in their justification that "the phenomenon of fiscal and customs crime and corruption, especially large-scale VAT fraud, undoubtedly poses a significant threat to the financial security of the state and public order. For this reason, operational-reconnaissance activities should be considered in the light of the norms of the Constitution, as measures proportional to combating this type of crime" (Justification to the draft Act on the National Revenue Administration of 17 February 2016). In the opinion of the authors of this study, ensuring the financial security of the state cannot justify the pro-effective but unconstitutional solutions that the legislator included in the Act on the National Revenue Administration. We signal this problem on the basis of the following:

1. Breach of the scope of the protection of legal professional privilege of advocates, legal advisors and tax advisors in Art. 72 (3) of the Act on the NRA.
2. Restrictions on controlled access to the case file and the right to court as a consequence of accepting the jurisdiction of the customs and tax authorities.
3. Principles of search and personal control in the Act on the NRA.

Ad 1. According to Art. 72 (3) of the Act on the NRA, persons authorised to represent or conduct the matters of controlled persons are obliged to provide explanations regarding the object of the customs and tax control, resulting from the scope of activities or tasks performed. It seems that this provision violates the essence of protection of legal professional privilege of advocates, legal advisors and tax advisors and violates the principles of a democratic state governed by the rule of law, the right to defence expressed in Art. 42 (2) of the Constitution, and the right to court and the right to appeal against decisions issued in the first instance (resulting from Art. 45 (1) and Art. 78 of the Constitution).

Ad 2. The fact that the head of the customs and tax office can exercise control over the entire territory of the Republic of Poland streamlines and speeds up the inspections he carries out. This solution is also designed to make more effective the use of the potential of the NRA authorities and prevent the hindering of control by changing the seat, place of residence or place of business. This pro-effective regulation is irreconcilable with the security of the individual, significantly reducing access of the controlled person to the case file. It should be emphasised that restrictions on access to case files of certain controlled persons are a difficult phenomenon to explain on the grounds of the constitutional principle of equality. What is more, the competent court to hear the case is the Voivodeship Court, the jurisdiction of which is the public administration body whose activity has been contested, so the seat of the customs and tax control authority determines the local provincial administrative court (after the customs and tax control has been transformed into tax proceedings). As a result, control, tax proceedings and court and administrative proceedings may take place in a geographically remote location from the registered office of the controlled place, which may to a certain extent limit the right to a court.

Ad 3. The provisions on search and personal control contained in Art. 133 (1.1) in connection with Art. 64 (1.6) and Art. 64 (2.2) of the Act on the NRA raise a series of serious doubts from the perspective of their compliance with the provisions of the Constitution of Art. 11a (1.3) and Art. 11c (1) of the Act of 28 September 1991 on Tax Audit. The said regulations give officers broad powers to conduct searches of persons and premises (including residential premises), without, however, specifying properly the scope of these activities and are inconsistent with Art. 41 (1) and Art. 47 in connection with Art. 31 (3) of the Constitution. Also, ensuring the possibility of lodging a complaint to the prosecutor on the manner of conducting searches and personal checks during customs and tax control does not ensure a sufficient level of judicial protection of the rights of the controlled person (Art. 54 (1) and Art. 77 (2) of the Constitution of the Republic of Poland). Also, ensuring the possibility of lodging a complaint to the prosecutor on the manner of conducting searches and personal checks at customs and tax control does not ensure a sufficient level of judicial protection of the rights of the controlled person (Art. 54 (1) and Art. 77 (2) of the Constitution of the Republic of Poland).

Due to formal limitations in terms of the length of the text, the authors of this study could not refer here to the issue of the unconstitutional pro-efficiency solutions adopted in operational control by the National Revenue Administration that were discussed in detail by the Polish Ombudsman. On 5 September 2017, the Commissioner for Citizens' Rights filed a motion with the Constitutional Tribunal regarding the compliance of the provisions of Art. 114, Art. 114 (1) and Art. 115 (1), Art. 114 (3) in conjunction with Art. 114 (2), Art. 116, Art. 118 (2), Art. 118 (7), Art. 118 (16) and Art. 122 (4) of the Act on the National Revenue Administration with the Constitution.

5 Conclusion

The article points out the close links between the security of the state and the protection of the social security of the individual. The authors of the article propose supplementing the NRA reform with a study and implementation of a stable motivational system, taking into account the requirements of a suitable personnel policy, effectively motivating employees to raise their qualifications, which will be crucial for filling the structure of the NRA. Unfortunately, despite the reform, the low level of remuneration, instability of employment and lack of guaranteed career progression result in an outflow of experienced staff to the private sector. Experienced employees are often replaced by people without a specialist education. This is of key importance for increasing the level of financial security of the state and social security of individuals, who often benefit from budget redistribution. It is necessary to thoroughly determine the existing human resources potential and to verify the adequacy of the staffing of positions to qualifications and education. In the opinion of the authors of this work, it was good that there was a tax reform and the establishment of the National Revenue Administration; however, considering that the fiscal reform occurred relatively recently, we should withhold the final judgement until it is consolidated. It seems that it will play a significant role for the state finances and social security. It is of fundamental importance to remove those provisions of the Act on the National Revenue Administration, which, although they are pro-effective, are incompatible with the protection of individual rights.

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The Central Bank as a Financial Mega-regulator (Russian Experience)

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Abstract

This contribution deals with the models of institutional regulation of financial markets. The main aim of the contribution is to confirm or disprove the hypothesis that the model of the Central Bank as a mega-regulator of financial markets is not optimal for the developing countries and particularly for Russia. The author highlights main arguments *pro et contra* Central Bank as a financial mega-regulator. The author supposes that before and during financial regulation reforms, it is necessary to answer the question: Is the financial market in the country sufficiently developed and extensive to abandon the functional (sectoral) regulation and move to mega-regulation? For Russia the answer is negative.

Keywords

Central Bank; Russia, financial markets; governance, mega-regulator; supervision

1 Introduction

This contribution deals with the models of institutional regulation of financial markets. The research purpose of the article is to confirm or disprove the hypothesis that the model of the Central Bank as a mega-regulator of financial markets is not optimal for the developing countries and particularly for Russia. The methodology of the study includes general scientific methods (analysis, synthesis, induction, deduction,

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comparison and description) as well as particular legal academic methods (interpretation of legal acts and formal-legal method).

Issues of efficiency of regulation of financial markets by a single authority (the so-called mega-regulator) combining all management powers in this area is the subject of scientific and practical analysis in various countries for many years.[2]

The first to decide on the formation of such a structure were the small countries of Northern Europe: Norway (1986), Iceland and Denmark (1988), Sweden (1991).

Among the major countries of Western Europe, the first on the way to create mega-regulators was the United Kingdom, when it announced the reform of the banking supervision and the establishment of the Financial Services Agency in 1997. In 2002, a single mega-regulator was established in Germany.

The creation of the mega-regulator did not save them from a banking crisis neither Norway in 1988, nor Sweden in 1992. The British Financial Services Agency was reorganised and divided in 2011–2012.

2 The History of the Financial Market Regulation in Russia

The idea of creating a mega-regulator has been the subject of active discussions among scientists and politicians over the past twenty years in Russia.

This idea was first proposed by the British company Cadogan Financial at the end of 1999. The first step in the implementation of this initiative was the creation of the Federal Service for Financial Markets (FSFR). It was assumed that the mega-regulator would be formed on its basis as a collegial and independent authority. At the same time, this authority would combine not only the regulation of the insurance and stock markets, but also banking supervision.

Consideration of the possibility of combining the functions of regulation of all segments of the financial market (stock, insurance, banking, non-state pension funds) and the creation of a mega-regulator, as well as the possibility of combining supervision of various institutions of the financial market in one federal body was provided for in the program of socio-economic development of the Russian Federation in the medium term (2006–2008).

By May 2007, due to contradictions in the government and the resignation of the FSFR Head O. Vyugin, who was an active supporter of the creation of the mega-regulator, the discussion process was almost stopped.

In mid-December 2010, the Ministry of Finance published a draft presidential decree providing for the creation of a mega-regulator on the basis of the Federal Service for Insurance Supervision (Rosstrakhnadzor) controlled by the Head of State by joining the Federal Service for Financial Markets. At the end of the month, after the meeting

2 See Goodhart et al., 2003; Goodhart and Tsomokos, 2011; Moloney, 2014; Moloney et al., 2015; Stolyarenko, 2001; Jurkowska-Zeidler, 2017; Jurkowska-Zeidler, 2015.

with President Dmitry Medvedev, the concept changed – it was proposed to abolish Rosstrakhnadzor and transfer its functions to the FSFR.

On 4 March 2011, the Russian President signed the decree *About Measures on Perfection of State Regulation in the Sphere of the Financial Market,* providing for the creation of a prototype of a mega-regulator on the basis of the Federal Service for Financial Markets.

The long-term discussion on the creation of a financial mega-regulator in Russia ended in January 2013 with the decision of the President of Russia on the integration of the FSFR into the Central Bank of Russia.

3 The Content of the Modern Stage of Regulation of Financial Markets

In July 2013, the Federal Assembly of the Russian Federation adopted the federal law No. 251-FZ of 23.07.2013 *On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Empowerment of the Central Bank of the Russian Federation of Powers to Regulate, Control and Supervise Financial Markets.* The law provides the transfer of the powers of the Federal Service for Financial Markets to the Bank of Russia regarding legal regulation, control and supervision in the field of financial markets, including insurance, credit cooperation and microfinance activities, the activities of commodity exchanges, exchange intermediaries and stock brokers, the formation and investment of pension savings and other powers.

Due to the transformation of the Bank of Russia into a mega-regulator of the financial market, the goals, functions and powers of the Bank have undergone significant changes. Let us note the main changes.

Firstly, the Bank of Russia, although retaining all its functions and powers, but some of them were changed and clarified.

Secondly, the Bank of Russia inherited all the main powers of the abolished Federal Service for Financial Markets of Russia, and therefore its powers have been qualitatively expanded.

Thirdly, the Bank of Russia in its new quality received new functions, belonged neither to the FSFR nor the Bank of Russia.

The Bank of Russia began to make decisions on the official registration of non-state pension funds; to regulate, control and supervise the activities of the non-credit financial organisations (NCFO), i.e. to make decisions that were within the competence of the FSFR: to carry out inspection of the activities of the NCFO, to send them binding regulations, and to apply coercive measures to the NCFO.

He began to set terms and procedure for the preparation and submission of reports by the NCFO, as well as other information provided by federal laws.

In addition, the Bank of Russia began to register issues of issuance securities and reports on the results of issues of issuance securities. The Bank of Russia had the relevant powers before, but only in relation to the securities of credit institutions, and now its competence has extended to the securities of all issuers. Moreover, in its new capacity, the Bank of Russia began to monitor and supervise compliance by issuers with the requirements of the Russian Federation legislation on joint stock companies and securities, as well as to regulate, control and supervise corporate relations in joint stock companies.

In its new capacity, the Bank of Russia has the right to adopt regulations on a much larger number of issues, including those related to the activities of the NCFO.

In connection with the new goals and functions of the Bank of Russia, its competencies have been expanded, which led to appropriate changes in the organisational structure and management bodies of the Bank of Russia, as follows.

1. The collegial body of the Bank of Russia – the National Banking Council – was renamed as the National Financial Council.

2. The Bank of Russia's Chairman is appointed not for four years (as before), but for five years and the list of grounds on his dismissal was expanded.

3. The number of the Board of Directors of the Bank of Russia has changed. In addition to the Chairman of the Bank of Russia, it includes 14 (not 12, as before) members of the Board of Directors.

4. A new permanent body, the Financial Supervision Committee, has been established. It brings together the heads of the structural units of the Bank of Russia, ensuring the implementation of its regulatory, control and supervisory functions in the field of financial markets.

Thus, the Central Bank of the Russian Federation became a single structure that provides end-to-end regulation, control and supervision of all banking and almost all financial sectors in Russia, including insurers, non-state pension funds, exchanges, microfinance institutions, etc.

4 The Positive Side of the Regulatory Reform of the Financial Markets on the Basis of a Mega-regulator

As the analysis of the position of the supporters of the Central Bank as the financial markets' mega-regulator shows, they put forward the following arguments in favour of such a decision.

1. The possibility to regulate financial conglomerates (organisations, each of which provides a variety of financial services) and to supervise them on a consolidated basis with the application of uniform rules; exclusion of abuses of market participants, who used contradictions in regulation and supervisory approaches of different authorities. The Central Bank supervised the banking system before, and the banking system is

closely linked to the securities market. Banks hold a significant share as bondholders in the debt securities market.

2. The unified approach to the different types of financial service providers eliminates discrimination in the regulation of relations with a similar legal nature and the resolution of disputes arising from such relations.

3. Reducing the administrative burden on the participants of the financial market by eliminating the need for coordination of actions and decisions with several authorities.

4. The threats of systemic risks are identified more quickly due to the monitoring of the whole financial system.

5. The creation of a mega-regulator allows to improve the quality of risk management in financial institutions through the use of best practices of the Central Bank.

6. The combination of the a legal creation and law enforcement functions in mega-regulator's activity makes the process of preparation and implementation of new rules more flexible, fast and meets the interests of the market.

7. The single regulator was expected to give impetus to the development of existing areas and formation of new areas of the financial market in Russia, as well as to promote the creation of financial conglomerates when the holding company or otherwise consolidated owner owns several financial institutions and provide financial products related to different sectors of the financial market; cross-offers of financial products.

8. The mega-regulator was expected to respond quickly to unforeseen circumstances, external and internal risks. It is able to combine the activities of various participants of the financial market, quickly and efficiently allocate resources to resolve problems and timely monitor the results of such activities.

9. The activity of the mega-regulator allows to solve the problems of competition of powers and competence of numerous financial control bodies.

10. The mega-regulator is able better to ensure the confidentiality of the flow of information as the turnover of information occurs within a single organisation.

11. The existence of a single authority allows to stimulate cooperation and establishment of contacts with business and international organisations, as well as with state bodies of foreign countries.

12. Optimisation of costs for the implementation of management functions by reducing the cost of interaction.

13. The creation of a mega-regulator on the basis of the Central Bank allows to improve the quality and quantity of management resources without attracting budget funding through the use of Central Bank funds.

14. The Central Bank had a successful experience in supervision in one of the sectors of financial markets. The activities of the Central Bank of Russia are credible among the population. Russians have no culture of investing in non-bank financial instruments, and therefore no long-term money. After the creation of the Deposit Insurance System, we have increased deposits in banks by 10 trillion Rubles, but

cumulative life insurances – decreased. The reason is that the Central Bank created an industry in the banking sector that is being trusted by the population.

15. The FSFR failed to build deep supervision over financial markets, so it is logical to make the mega-regulator on the basis of the most powerful supervisory authority in the financial sector – the Central Bank of Russia.

Thus, the absolute majority of arguments do not connect the usefulness of the mega-regulator with its formation in the structure of the Bank of Russia. The last three arguments, which support this, are largely subjective and momentary.

5 The Negative Aspects of Creating a Mega-regulator

As the analysis of the positions of the opponents of the Central Bank as the financial markets' mega-regulator shows, they put forward the following arguments against such a decision.

1. They feared that could lead to losses in the efficiency of supervision in the transition period. Reorganisation would inevitably take at least 3–5 years and would cause excessive mobility of personnel, weakening of governance, instability of staff, structures and powers, the prevalence of current organisational tasks over promising ones. This may slow down the development of the market, lead to increased regulatory costs and the build-up of systemic risk. The experience of Norway, Sweden and Japan shows the inevitability of losses during the transition period. Meanwhile, the costs were not so great in reality.

2. The consolidation of all functions of the financial market regulation in the Central Bank will lead to ignoring the specifics of certain sectors of the financial market, reducing flexibility in regulation. Financial markets are a narrow field of activity, and there are few who are truly professionals. A number of functions of the FSFR are qualitatively different from what the Central Bank was currently engaged in. For example, the identification of market manipulation, insider trading, registration of microfinance institutions and depositories.

3. The consolidation of all functions on the regulation of financial markets for the Central Bank of the Russian Federation could lead to the mechanical extension of strict rules of banking regulation and banking supervision in this area of activity.

4. The creation of a mega-regulator based on the Central Bank of the Russian Federation, which is already the largest Central Bank in the world, would lead to bureaucratisation of decision-making and "delayed feedback".

5. The creation of a mega-regulator on the basis of the Central Bank causes a certain conflict of interests arising from the concentration of many different functions in the Bank of Russia, as well as the participation of the Central Bank in the capital and management of some major players in the Russian financial market.

6. The creation of a mega-regulator based on the Central Bank would cause a sharp increase in the supervisory workload (the number of supervised organisations will increase by about 9 times) as well as in the supervisory burden on supervised organisations (according to estimates, by about 5 times).

7. The financial market is mobile and unstable, and the Central Bank is conservative. This conservatism could restrain the development of the securities market.

8. In Russia there is no developed multi-sectoral financial market that requires a unification of management efforts in the framework of the mega-regulator for being more effective (through the harmonisation of such rules and management decisions in different sectors).

9. In our opinion, one of the most important obstacles (not allocated by analysts) to the Central Bank's empowerment as a mega-regulator is the uncertainty with the legal status of the Bank of Russia in the system of authorities. According to the position stated on the official website of the Central Bank of the Russian Federation, the Bank of Russia acts as a special public-legal institution with the exclusive right of monetary issue and organisation of monetary circulation, it is not a public authority, but its powers by their legal nature belong to the functions of state power, since their implementation involves the use of measures of state coercion. The uncertainty of the legal status of the Central Bank of Russia affects the regulation of its relations with public authorities. Thus, the procedures of coordination with the Government of the Russian Federation in creation of the main directions of the unified state monetary policy are not regulated by any of the relevant laws.

The allocation of functions of the mega-regulator of the structure with a legal status, which is not fully defined in science or in practice, formally independent from public authorities, is fraught with the loss of control over financial markets, the inability to adequately regulate the processes taking place on them in coordination with national management trends.

The legislation provides the adoption of many management decisions in the field of financial markets by the Government of the Russian Federation in coordination with the Central Bank. Meanwhile, the mechanism of such coordination is not only not written in the law, there is no clear idea of it neither on the scientists' nor practitioners' side.

6 The Optimal Regulation of Financial Markets in Developing Countries

The idea of creating a mega-regulator is in the trend of world reforms in this sector: the gradual consolidation of financial, banking and insurance supervision since 2008 is insisted by international organisations, the relevant recommendations were adopted within the G8 and G20. However, this idea is hardly effective for Russia with relatively isolated banking and financial sectors, as well as less influencing macroeconomic indicators by the financial and stock markets. A single regulator is effective where there is a large share of organisations working simultaneously in all financial markets.

International experience does not give a clear answer to the question of moving to the mega-regulator.

In today's world, many financial markets live without a mega-regulator – it is enough to recall the two most powerful national markets, the US and China, who, moreover, as a result, overcame the consequences of the crisis of 2008–2009 faster than others. Currently, among the 115 full members of the International Organization for Securities Commissions (IOSCO), the concept of a mega-regulator has been implemented in 50 countries. At the same time, 33 countries have a single independent mega-regulator (with a combination of regulation and supervision), which is not a Central Bank. The functions of the mega-regulator are carried out by national (Central) banks in 13 countries, and another 4 countries use the "twin peaks" model, when the powers of prudential regulation and supervision of systemically important organisations (non-bank financial companies with sufficiently large consolidated balances) are assigned to the Central Bank, and the second regulator is responsible for the regulation and control of non-bank financial organisations.

If you take the largest financial markets, only one country out of 25 has the National Bank as mega-regulator – Singapore. All other cases of choosing a Central Bank as a mega-regulator are countries with very small markets where foreign banks are dominated.

The political task of the creation of civilised rules for the preservation of the capital of people and companies, as well as other above-described positive aspects of the mega-regulator are achievable by the other ways, minimising the above-mentioned risks.

7 Conclusion

Like any management activity, the effectiveness of the regulatory reform depends on the state of the object of management (regulation), so it is necessary to answer the question: is the financial market in the country sufficiently developed and extensive to abandon functional (sectoral) regulation and move to mega-regulation? For Russia, the answer to this question is obvious and five years of experience of the Central Bank of Russia as a mega-regulator confirmed the prematurity of giving it such a wide competence. The creation of an effective mega-regulator should be the final stage of a complex period of reform, including the unification of regulation and supervision in various segments of the financial market and taking, as the world practice, at least 10–12 years.

So the purpose of the research was reached. It is approved that the model of the Central Bank as a mega-regulator of financial markets is not optimal for the developing countries and particularly for Russia.

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Multi-Annual Planning of Public Budgets as a Way of Rationalising Public Expenditure

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Abstract
Multi-annual planning is an essential tool in public finance law for the efficient management of public funds. The management by one-year budget should be accompanied by future planning exceeding one calendar year. Such planning is being made at the present time to a certain extent; however, the fulfilment of long-term plans, which cannot be enforced, can be perceived as the basic defect, which means that long-term plans are not obligatory for the next calendar year. The aim of this article is to determine whether, and if so, how it affects the rationalisation of public expenditure, a process that should lead to the efficient and economical use of public funds.

Keywords
public finance; public budget; financial law; expenditure; multi-annual planning

1 Introduction

Maintaining the public finances has been, is and always will be on the agenda. Those finances are not private means of natural or legal persons though, they are means or property being publicly maintained by the citizens through the assigned authorities, which use specific tools (budgets, funds, etc.) As public budgets have gone through their

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historical development, such conclusion has come that the period, for which the budgets are being approved, would be one calendar year (although this is not always the rule). Nevertheless, as practice has shown, when budgets are being set, they never start from zero; different relations are to be taken into consideration either current ones or those occurring in the future.

Therefore, it is logical that the planning usually extends the period of one year; as it will be mentioned below, it often takes into account two or three years. Of course, the planning itself which is mainly planning in the field of public financing, is often as a look into the crystal ball. Thus, the longer the planned period is the bigger the chance is that this plan is going to be changed or at least adjusted in accordance with up-to-dated demands. In the Czech Republic, a multi-annual planning is the solid part of a budgeting process at both state and local (regional) levels. In connection with the adoption of the package of budgetary responsibility rules in 2017, a duty to set a medium-term projection has been extended to all subjects of public institution sector. The rules set for multi-annual planning are also the part of fiscal rules, which are recently being implemented in profusion in individual EU member states in terms of unfavourable development and economic crisis in 2008.[2]

2 Rationalisation of Public Expenditure in General

The subjects of the public sector maintain a huge amount of finances in the frame of its activities. To maintain such finances, each country has its rules, which has to be followed in order to manage those finances in an economical, purposeful and transparent way and, at the same time, in accordance with the legal regulations. However, practice shows that those rules are not perfect in any way and although they are gradually changing, the achievement of an ideal state is still rather far away. The irresponsible management of public finances can cause negative phenomena in society (high public indebtedness, high rate of inflation, increase of unemployment, fundamental public needs of citizens being not guaranteed, etc.). Regional self-governing units and other subjects of public law can maintain their own finances and also get into debts in the same way as the state does. By an irresponsible management of public finances, those units very often even come to the edge of bankruptcy.[3]

The central government and local self-governments are aware of the consequences of such negative phenomenon. Therefore, they try more or less to eliminate it by paying attention to a decrease of public indebtedness, deficit of public budgets and effective economy as it comes to public finances. Basically, two methods exist how to achieve it. The first method involves the increase of incomes to public budgets by taxes increase, deliveries to the budget and yields of properties being owned by the state and local self-governments. The second method consists of an effort to lower expenditures of public

2 For more see Kozieł, 2015.
3 For this issue see e.g. Mrkývka, 2012; Mrkývka et al., 2004.

budgets. One way to achieve the decrease of public expenditures is their rationalisation at all levels. The rationalisation of public expenditures is not a specific activity, it is a set of different methods of effective use of public finances being used by public administration authorities.

Rationalisation itself can be defined as the use of regulations to improve the concrete activities. Public expenditures can be defined as the public means being spent by the public sector to fulfil its mission. Based on abovementioned, the rationalisation of public expenditures can be defined as being the adoption of such regulations, which would lead to the improvement of public means use being spent by the subjects of public sector. The rationalisation of public expenditures can be understood as not only the amount of expenditures but mainly as the change of the size and structure of public expenditures and the process of their division and paying out. The size and structure of public expenditures are always decided by public subjects or they are directly given by the legal norm.

Public expenditures rationalisation is thus a gradual process, as a result of which the effective usage of public means should be aiming a satisfaction of public needs and not only that. As prof. Ruśkowski says, the basis of the economic system is the social market economy. The effective economy including public expenditures rationalisation is an inseparable part of this economic system (Głuchowski et al., 2005).

Definition the term of public expenditures rationalisation, the fruitful experience and achieved results of the Polish legal theory can be used. It has dealt with the topic of public expenditures rationalisation for a long time and in details and has got to the conclusion that this process is to be perceived from different points of view – legal, economic and sociological. Further, it defines the several phases of the rationalisation process:

1. The selection of financing such tasks, the realisation of which would satisfy the most beneficial social needs.
2. Determining the costs of such a realisation.
3. The use of public means taking economic effectiveness into account (Gazda, 2016).

The rationalisation of public expenditures is a developing process similarly to other activities leading to such a situation when public finances will be maintained effectively under a minimum level of public property. There is no ideal solution or instruction of how to manage public possession in the most rational way. Countries are gradually implementing different regulations, which lead to the achievement of such a status. As it comes to this field, some countries are at a higher level, some at a lower one. Right here, an option to search for inspiration is opening for the Czech Republic, which is very far from the ideal state.

Since the rationalisation of public expenditure develops gradually, the list of measures introduced is far from final. It is possible to list, for example, the implementation of fiscal rules to lower public indebtedness, internal and external controlling processes, the increase of effectiveness and purposefulness of public means, the implementation of stricter rules in breach of budgetary rules (Kozieł, 2016) and, last but not least, the introduction of the rules for multi-annual planning that are the subject of this paper.

3 Determining Multi-annual Planning

Multi-annual planning has obviously its inseparable place in the field of public finances. Budgetary law is thus managed by the rule of every-year setting and approval of the state budget (Bakeš et al., 2012: 129 et seq.), nevertheless one-year budgets are very often added by other tools rather related to the future, to the horizon of two to five years. To make public finances stable, such long-term planning is necessary; it enables to arrange expenditures over one year and to spend them purposely. As Marková and Boháč say though, by moving the entire budgeting towards a medium-term horizon, the programming of governmental politics gets stronger (Marková and Boháč, 2007).

In the Czech Republic, the tools of multi-annual planning are used, concretely with a medium-term projection at both levels of state and self-governing units. Considering the medium-term projection of the state budget, it is provided for in Act No. 218/2000 Sb., on Budgetary Rules, as amended. Medium-term projection is being provided for together with the state budget draft at least for two years following the year in which the state budget draft is put forward. Incomes and expenditures of the estate budget and state funds are part of the medium-term projection considering the particular years and presumptions and purposes, based on which those incomes and expenditures are expected. In case the medium-term projection would expect a budgetary deficit, it also has to include an assumed way of its financing. As far as the legislative background of medium-term projection is concerned, the Ministry of Finances is responsible for it together with all interested subjects (chapters' administrators, self-governing units, state funds) and submits it together with the state budget draft to the government. The government then discusses this submitted draft of medium-term projection together with the state budget and after approving it, it submits only the medium-term projection to the Chamber of Deputies together with the bill draft on the state budget (Art. 4 Act on Budgetary Rules). The process of medium-term projection approval thus does not take place because it is only to be informed about and for the Chamber of Deputies is not obligatory.

The medium-term projection of the budget of the self-governing unit is then a tool to plan its economic development and is set for the period of 2–5 years. As for the content of this projection, the basic data about incomes and expenditures, long-term liabilities and receivables, financial sources and needs of ideas being realised within a long-term period are included (Art. 3 Act on Budgetary Rules of Territorial Budgets). Rigel sees one of the fundamental problems here, namely the fact that the law orders to set the medium-term projection for the budget of the self-governing units but the setting itself does not order the duty of the said projection to be approved by a particular authority. There is also not clearly said which authority should approve the medium-term projection, although usually it would be the municipal board, which would approve it together with the submitted budget (Rigel, 2017). The authority which approved the medium-term projection, can also change it continuously based on the need and development of budgetary economic activities of the given self-governing unit. The law also considers the sanctions in case of not publishing the draft of the medium-term projection of the budget, as well as the medium-term projection itself. Such a behaviour would be considered an offence being sanctioned up to the amount of 1,000,000 CZK (Art. 22a Act on Budgetary Rules of Territorial Budgets).

Discussing multi-annual planning, Act No. 23/2017 Sb., on Budgetary Responsibility cannot be omitted. By this act, each public institution as defined in § 3 of this act (units from the general government sector), is obligated to set the medium-term projection of the budget (incomes and expenditures plan or yields and costs plan) for the period at least of two following budgetary years. This projection has to be published by the public institution on its website or in any other way being usual at the given location (Art. 5 Act on Budgetary Responsibility). By the law, the following entities are considered public institutions (compare Kozieł, 2017):

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

This is the act of the European Union's effort to stabilise public finances and to decrease public indebtedness in member states mainly by the implementation of budgetary responsibility rules and the related adoption of the European Council's regulation (Council Directive 2011/85/EU).

4 The Impact of Multi-annual Planning on the Rationalisation of Public Expenditures

As said above, the rationalisation of public expenditures is a complex topic, it is a process not including only one method but many activities, measures and regulations, which complement each other. Multi-annual planning is an inseparable part of this process. Public institutions are obligated to set the medium-term projections now, which enable them to plan their economy beyond one year and partially legitimate those steps, but, on the other hand, they enable the application of controlling mechanisms being applied by the public and other parts of the public authority.

As far as the rationalisation of public expenditures is concerned, it has to be said that the implementation of any measures leading to longer planning is the step towards rationalisation and thus positively influences the maintenance of public finances. Such status has been implemented in the Czech Republic even before the CR entered the European Union and is continuously strengthened by the impact of the EU on the Czech law-making. Rationalisation is not only about one tool. There is the need to implement many different tools in order to be able to say that finances are being maintained rationally thus that they were used purposefully and due to this fact, the maximum has been achieved.

According to Postuła, the current financial theory considers multi-annual planning the essential tool of the maintenance of modern public finances (Postuła, 2012). Ruśkowski says that the implementation of multi-annual planning tools is on the agenda since the 1990s. Continuously, those tools have been implemented into law orders of particular member states aiming at the strengthening of economy based on annual budgets (Ruśkowski, 2014).

There is still a question remaining though, to what range long-term tools should be obligatory. Considering the Czech medium-term projection at the level of the state, it has to be said that this document is rather well elaborated determining individual incomes and expenditures in detail for each year, which is being set for. Being of obligatory character can be the problem. The ministry, respectively the government, which is responsible for the set of medium-term projection, is not sanctioned for departure from its previous long-term plan in any way. Contrary to that, if any change comes, it has the option to change also the medium-term frame together with the budget for the following budgetary year. Because the government is usually represented by the majority of the Chamber of Deputies, it is likely that the changes of the medium-term projection would be approved without any problems. As it comes to the level of self-governing units, the problem can be seen in the diversity of those subjects as for the citizens' number, as well as the objective options to set detailed financial plans. While big municipalities and regions probably would not have problems with that, small municipalities having minimum clerical apparatus would not be able to follow this demand in an adequate way. Above that, a particular municipality's body is not clearly determined, which should prepare and approve the medium-term frame. With time it will be clear how other public institutions would handle this demand.

5 Conclusions

The aim of this paper was to assess whether and how multi-annual planning influences the rationalisation of public finances. Based on the previous chapters, it can be stated that multi-annual planning, not only in the Czech Republic, has a fundamental impact on the rationalisation of public expenditures. The option of medium-term planning positively reflects the projects and tasks extending the period of one calendar year. Of course, the modern budgetary law knows the tools which can be used to handle this issue (e.g. purpose-built funds); nevertheless, multi-annual planning is another segment of the mosaic of the rational use of public finances.

As it comes to the Czech Republic, as said above, it is the country long-time experienced in multi-annual planning and compared to other countries, its elaborated plans can be evaluated as very detailed, although, there are particular problems in the Czech Republic, too. Based on the EU measures package, the obligation to set a multi-annual economic plan has been extended to all public institutions in the Czech Republic as being defined in the Act on Budgetary Responsibility. This step should contribute to the higher rate of public expenditures rationalisation as well.

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Tax Indicators as a Tool for Assessing the Financial Stability of a Budget Educational Institution

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Abstract
The article studies the effect of the changes in legislation on the financial stability of higher education institutions. Changes in the procedure of property tax calculation in the current tax year significantly increase the tax burden of higher education institutions, which may result in much lower solvency ratio and hamper the universities' activities aimed at the formation of social, cultural, scientific and innovative environments of the regions. This, in turn, will affect their financial stability. The aim of the present research is to analyse the level of financial stability of universities after the changes in the property tax laws. The economic analysis is performed by means of approved calculation methods and is based on the case study of a Voronezh Region university.

Keywords
tax indicators; property tax; land tax; financial stability; educational institution

1 Introduction

In the current year, the analysis of the effect of the increase in property and land tax rates on the financial stability of universities is especially important, as its results can be used for the management of cash flows and financial results, and justify the suggested

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Krivosheyev, A. Tax Indicators as a Tool for Assessing the Financial Stability of a Budget Educational Institution. In: Hulkó, G. and Vybíral, R. eds., *European Financial Law in Times of Crisis of the European Union*. Budapest: Dialóg Campus. 2019. pp. 335–342. DOI: https://doi.org/10.36250/00749.32

methods of optimisation of tax burden. This is due to the fact, that since 1 January 2018, the range of taxable property has become much wider as a result of changes in the book value of real property which is now calculated using the cadastral value. There were also some changes concerning tax exemptions on movable property purchased after 1 January 2013. Moreover, regional and local tax authorities offer different land tax exemptions depending on the level of the budget institution.

A large number of studies have been performed by leading Russian researchers on the issues of taxation of non-profit organisations, the procedure of property and land tax calculation, and property tax exemptions. However, none of these articles use empirical data to describe possible changes in the financial stability of a university caused by the increase in the land and property tax rates connected with the new accounting rules and elimination of movable property tax exemption on the federal level.

2 Assessment of the Financial Stability of a Budget Educational Institution

Let us consider the following case. The financial position of FSBEI HE "Voronezh State University" is characterised by the use of funds obtained from various financial sources, as well as the use of assets.

Tables 1 and 2 demonstrate the structure and dynamics of the assets of VSU according to the balance sheet statistics.

Table 1. VSU assets dynamics in 2017 (according to the data from the balance sheet), thousand roubles

Asset items	As of the beginning of 2017	As of the end of 2017	Absolute change	Growth ratio, %
I. Non-financial assets, thousand roubles				
1. Net book value of fixed assets	1,528,457.6	1,489,980.0	–38,477.6	97.4
2. Net book value of intangible assets	192.2	119.8	–72.4	62.3
3. Non-produced assets	2,893,393.6	3,989,388.2	+1,095,994.6	137.9
4. Material inventories	28,414.8	31,894.2	+3,479.4	112.2
5. Investments in non-financial assets	58,421.6	60,767.1	+2,345.5	104.0
6. Total non-financial assets	4,508,879.8	5,572,149.3	+1,063,269.5	123.6

Source: Compiled by the author based on the Annual Report FSBEI HE "Voronezh State University" 2017.

Table 2. VSU asset structure in 2017 (according to the data from the balance sheet)

Indicator	Percentage %		Change (+, –)
	as of the beginning of 2017	as of the end of 2017	
1. Non-financial assets – total	99.2	95.98	–3.22
including: net book value of fixed assets	33.6	25.67	–7.93
non-produced assets	63.7	68.72	+5.02
material assets	0.6	0.55	–0.05
investments in non-financial assets (capital investments)	1.3	1.04	–0.26
2. Financial assets – total	0.8	4.02	+3.22
including: cash and cash equivalents	0.4	3.56	+3.16
settlements with debtors	0.4	0.46	+0.06
3. Total Assets	100.0	100.0	–

Source: Compiled by the author based on the Annual Report FSBEI HE "Voronezh State University" 2017.

In 2017, the aggregate value of assets, including the ones assigned by the founder on the basis of operational management account, increased significantly by 1,260,653.3 thousand roubles (27.74%), and by the end of the reporting period amounted to 5,805,237.2 thousand roubles. The dynamics in VSU assets is explained by an increase in the cadastral value of non-produced assets (of 1,095,994.6 thousand roubles or 37.9%) and an increase of 197,383.8 thousand roubles (or 6.5 times) in the most mobile part of VSU assets – financial assets (monetary funds and accounts receivable).

As of the end of 2017, the largest percentage in VSU's asset structure were the non-produced assets (land) (68.7%) and fixed assets (25.6%). A decrease in the residual value of fixed assets and an increase in financial assets in the reporting period led to a decrease in the percentage of non-financial assets from 99.2 to 95.9%.

In 2017, an increase in the sources of VSU assets formation of 1,260,653.3 thousand roubles (27.7%) was against the background of an increase in the liabilities to the founder regarding the property assigned to the university on the basis of operational management account (land, real estate, and most valuable assets). It resulted from an increase in the cadastral value of non-produced assets due to a large-scale revaluation of land assigned to the university on the basis of operational management account.

Also, there has been a decrease in the liabilities to the creditors of 103,557.5 thousand roubles (27.9%) resulting from a decrease in accounts payable and a closed off line of a credit.

In the assessment of financial stability, there is a special emphasis on determining the coverage of the fixed assets and other non-current assets, which have the greatest percentage in the properties of the university, by long-term sources of financing. Such sources include liabilities to the founder and internal funds in the form of the financial result (from operating activities, accrual of depreciation, and provisions for future liabilities). As of the beginning of 2017, this indicator amounted to 93.2%. At the end of the reporting period, there is a significant increase in the long-term sources of financing (by 6.76%) due to the increase in the costs of non-current assets and improvement of financial results.

Table 3. Coverage of the fixed assets and other non-current assets by long-term sources of financing

Indicator	As of the beginning of 2017	As of the end of 2017	Absolute change (+, –)
A	1	2	3
1. Net book value of fixed assets, thousand roubles	1,528,457.6	1,489,980.0	–38,477.6
2. Net value of intangible assets, thousand roubles	192.2	119.8	–72.4
3. Balance value of non-produced assets, thousand roubles	2,893,393.6	3,989,388.2	+1,095,994.6
4. Investments in the non-financial assets, thousand roubles	58,421.6	60,767.1	+2,345.5
5. Total non-current assets (Art. 1 + Art. 2 + Art. 3 + Art. 4), thousand roubles	4,480,465.0	5,540,255.1	+1,059,790.1
6. Liabilities to the founder, thousand roubles	4,208,646.9	5,308,079.4	+1,099,432.5
7. Financial results (internal funds), thousand roubles	(34,875.6)	229,902.6	+264,778.2
8. Total value of the sources of non-current asset formation (Art. 6 + Art. 7), thousand roubles	4,173,771.3	5,537,982.0	+1,364,210.7
9. Ratio of the coverage of the fixed assets by long-term sources of financing, % (Art. 8 + Art. 5)	93.2	99.96	+6.76

Source: Compiled by the author based on the Annual Report FSBEI HE "Voronezh State University" 2017.

A decrease in the accounts payable and positive financial result in 2017 led to the improvement of financial stability of the university. In the reporting period, the equity to total assets ratio became positive and increased by 0.56 points.

Table 4. Analysis of VSU's financial stability

Indicator	As of the beginning of 2017	As of the end of 2017	Absolute change (+, –)
A	1	2	3
I. Initial values for analysis, thousand roubles			
1. Liabilities to the creditors	370,812.6	267,255.1	–103,557.5
2. Financial results (internal funds)	(34,875.6)	229,902.6	+264,778.2
3. Total value of the sources of financing for the university's activities (excluding liabilities to the founder)	335,937.0	497,157.7	+161,220.7
II. Financial stability index			
4. Equity to total assets ratio (the share of equity capital (financial result) in the total value of sources of financing for university activities)	(0.10)	0.46	+0.56
5. Dependency ratio (share of liabilities in the total value of sources of financing for university activities)	1.10	0.54	–0.56

Source: Compiled by the author based on the Annual Report FSBEI HE "Voronezh State University" 2017.

In the assessment of financial stability, there is a special emphasis on determining the coverage of the fixed assets and other non-current assets (see Table 5), which have the greatest percentage in the properties of the university, by long-term sources of financing. Such sources include liabilities to the founder and internal funds in the form of the financial result (from operating activities, accrual of depreciation, and provisions for future liabilities).

Table 5. Coverage of the fixed assets and other non-current assets by long-term sources of financing

Indicator	As of the beginning of 2017	As of the end of 2017	Absolute change (+, –)
A	1	2	3
1. Net book value of fixed assets, thousand roubles	1,528,457.6	1,489,980.0	–38,477.6
2. Net value of intangible assets, thousand roubles	192.2	119.8	–72.4
3. Balance value of non-produced assets, thousand roubles	2,893,393.6	3,989,388.2	+1,095,994.6
4. Investments in the non-financial assets, thousand roubles	58,421.6	60,767.1	+2,345.5
5. Total non-current assets, thousand roubles (Art. 1 + Art. 2 + Art. 3 + Art. 4)	4,480,465.0	5,540,255.1	+1,059,790.1
6. Liabilities to the founder, thousand roubles	4,208,646.9	5,308,079.4	+1,099,432.5
7. Financial results (internal funds), thousand roubles	(34,875.6)	229,902.6	+264,778.2
8. Total value of the sources of non-current asset formation (Art. 6 + Art. 7), thousand roubles	4,173,771.3	5,537,982.0	+1,364,210.7
9. Ratio of the coverage of the fixed assets by long-term sources of financing, % (Art. 8 + Art. 5)	93.2	99.96	+6.76

Source: Compiled by the author based on the Annual Report FSBEI HE "Voronezh State University" 2017.

As of the beginning of 2017, this indicator amounted to 93.2%. At the end of the reporting period, there is a significant increase in the long-term sources of financing (by 6.76%) due to the increase in the costs of non-current assets and improvement of financial results.

3 Tax Indicators as a Tool for Assessing Financial Stability

In this part we will consider the problems faced by educational institutions when calculating land and property taxes based on a case study of a Voronezh Region university. We will also provide data supporting the suggested tools for optimisation of the tax burden, namely the specification in the provisions of the current tax legislation.

Thus, there is a Decree of the Voronezh Duma No. 162-II dated 07.10.2005 (edited 28.06.2017) *On the Introduction of the Land Tax in Voronezh* acting together with the *Regulations on the Calculation of Payment of the Land Tax in Voronezh*. According to Art. 5 (4) of this decree, state autonomous, budget, and public institutions of the Voronezh Region are entitled to a 50% exempt of the land tax on the land used for educational, medical, social, and cultural facilities (with the exception of parts of the land where the said facilities serve other purposes). This statement is rather ambiguous as to whether the exemption is applicable to federal state autonomous, budget, and public institutions which own land in the Voronezh Region.

We strongly believe, that in order to ensure fair tax exemption conditions for budget institutions of various levels, an amendment should be made to the Decree of the Voronezh Duma No. 162-II dated 07.10.2005 *On the Introduction of the Land Tax in Voronezh*. This amendment should provide 50% land tax exemption to state educational institutions registered and functioning in the Voronezh Region regarding the land used for educational, medical, social, and cultural facilities (with the exception of parts of the land where the said facilities serve other purposes). If such an amendment is approved, the university's land tax burden will decrease by 15.3 million roubles.

The difficulties connected with the calculation of property tax result from the fact, that since 1 January 2018, the range of the university's taxable property has become much wider (see Table 6), due to the following factors.

1. Changes in the book value of real property which is now calculated using the cadastral value.
2. Changes concerning tax exemptions on movable property purchased after 1 January 2013.

Table 6. Dynamics of VSU's property tax rate due to the expanded range of taxable property since 1 January 2018

Taxable property	Property tax			
	According to the tax statement, million roubles	After the changes in the tax legislation, million roubles	Change (+; –), million roubles	Growth ratio, %
A	1	2	3	4
University's taxable property, including:	19.1	51.2	+32.1	268
taxable property in the Voronezh Region	19.1	51.0	+31.9	267
taxable property in the Lipetsk Region	0.01	0.25	+0.24	3,083

Source: Compiled by the author based on the Annual Report FSBEI HE "Voronezh State University" 2017.

Changes in the book value of real property calculated using the cadastral value resulted from the coming into force of a new Federal Accounting Standard for State Institutions "Fixed Assets" (Order of the Ministry of Finance of the Russian Federation No. 257n dated 31.12.2016). According to this standard, as of 1 January 2018, the cadastral value is considered to be the net book value of taxable property. Using the data from the 9-month tax statement, we calculated the tax base as if the standard "Fixed Assets" had been enacted on 1 January 2017. The results demonstrate that in this case, the property tax rate would have been much higher, as the residual value, according to the accounting standard, would have been the cadastral value of the real property object.

As to the problems concerning the property tax, caused by changes in the character of tax exemptions on movable property purchased after 1 January 2013, let us consider the following rules and regulations. The Federal Law No. 335-FL dated 27.11.2017 *On Amending the Tax Code of the Russian Federation* eliminates the tax exemption for the above property with the final decision being made by regional authorities. If the exemption is eliminated, the tax rate on movable property purchased after 1 January 2013, should not exceed 1.1%. This means that if the Voronezh Regional Duma decides to eliminate the exemption, the property tax rate per 9 months of 2017 for VSU will rise from zero to 2.6 million roubles. We can thus say that the forthcoming changes in the taxation policy will have a negative effect on the financial stability of higher education institutions.

4 Conclusion

Tax rates will significantly influence the financial stability of VSU. Therefore, tax indicators are among the most important factors of financial stability and may result in lower financial solvency ratio of the university.

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Development of the Regulation of Insurance Intermediaries in the Czech Republic[1]

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JEL Classification: K20, G22, F36

Abstract

In the insurance market, various distribution channels can be selected to distribute an insurance coverage. The selection of those channels depend on many factors and specific criteria. The insurance intermediaries represent the main channel for external distribution channels (also called the intermediary channel). The aim of this article is to summarise the legal regulation of insurance intermediaries and to show changes in the development of registered intermediaries.

Keywords

regulation of insurance; insurance intermediary; external distribution of insurance; internal distribution of insurance

1 Introduction

For several years, the global insurance industry (including insurance intermediaries) has been facing an enormous amount of regulatory requirements[3] that have different impacts on the insurance sector. Each insurance market is different; differences stem from the different history, demographics, education, financial literacy of consumers, risk management, market cultivation, etc., and therefore, the impacts of regulatory

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3 An overview of the current legislation regulating the insurance industry is compiled in e.g. Mesršmíd, 2015.

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requirements on the insurance sector differ in individual states. At the same time, the insurance industry is a dynamically developing market, which must cope not only with new regulations, but also respond to economic development, the situation in financial markets, the emergence of new risks, changes in risk management, consumer preferences and their needs.

In the insurance market, various distribution channels can be selected for distribution of insurance coverage. The selection of those channels depend on many factors and specific criteria. Economic assessment and legal aspects of the considered distribution channel are being evaluated. Not only economic and legal assessment of the considered distribution channel is being provided but other criteria, as well.[4] The above mentioned insurance intermediaries are important distribution channels. Insurance intermediaries are the entrepreneurs, either a natural or legal person, who, for payment, provide insurance intermediary activities on the basis of Act No. 38/2004 Coll., on Insurance Intermediaries and Independent Loss Adjusters and on the amendment to the Trade Licensing Act (hereinafter: Act on Insurance Intermediaries). The categories of insurance intermediaries should be amended by the new Act on insurance and reinsurance distribution.

The Czech authors dealing with the issue of development of the regulation in the insurance industry primarily include researchers such as Ducháčková and Daňhel, Mesršmíd and Vávrová. Ducháčková and Daňhel (2012) describe changes in the status of the insurance sector triggered by the processes associated with globalisation and crisis. In his books, Mesršmíd (2015) defines selected areas of the European law and the current developmental stages of insurance industry regulation in the EU. Vávrová (2013) in her article analyses the regulatory measure known as Solvency II and the process of its implementation. Hrabalová et al., (2017) analyse the impact of the financial crisis on insurance markets in global aspects. In their article, Vávrová and Nečas (2016) review the development of the financial health of the global insurance market during the lingering financial crisis.

The paper focuses on insurance intermediaries as part of the insurance market. The methods of description, analysis, synthesis and comparison will be applied. The aim is to summarise the legal regulation of insurance intermediaries and to show changes in development of registered intermediaries. The conclusion will include some current problems and trends in the insurance intermediaries. Data used in this article are collected from annual reports provided by the institution of the Czech insurance market mainly the Czech National Bank[5] (CNB), the Czech Statistical Office and annual report of the Ministry of Finance. The statistical data show the development of insurance intermediaries in the Czech insurance market.

[4] More details in Krügerová, 2017.

[5] The Czech National Bank as the regulator of the financial market publishes the lists of regulated and registered subjects of the financial market, the lists are maintained since 1 January 2009.

2 Regulation and Statistics of Insurance Intermediaries

The distribution of insurance products and some related issues are regulated in the Czech legal order:[6] Act No. 38/2004 Coll., on Insurance Intermediaries and Independent Loss Adjusters; Act No. 277/2009 Sb., on the insurance industry; Act No. 89/2012 Sb., Civil Code; Regulation No. 582/2004 Coll., to apply some law regulations on insurance intermediaries and liquidators of insurance events are processed.

European rules for the distribution of insurance products are regulated in the insurance market:[7] IDD Regulation [Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution]; PRIIPs Regulation [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]; Solvency II (Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance).

An important milestone for insurance intermediaries is April 1, 2000, when Act No. 363/1999 Coll., on the insurance industry came into effect. This was the first step toward the legal registration of insurance intermediaries. Intermediary activities are regulated by Section 25 of the Insurance Act. The Insurance Act has defined insurance intermediary activities in Section 2, Letter f) as a professional activity leading to the conclusion of insurance or reinsurance contracts and associated activities. This activity could be performed from two directions, by an insurance agent and by an insurance or reinsurance broker.

An insurance agent was thereof considered a natural or legal person who carries out intermediary activities under their contract with the insurance company. This means that the agent acted on behalf of and for the account of the insurance company. An insurance or reinsurance broker was defined as a natural or legal person who carries out intermediary activities under their contract with the insurance applicant, which is a legal or natural person who is interested in signing insurance or reinsurance contracts (Act No. 363/1999 Coll.). The description of the insurance agent and insurance broker remained essentially the same even in the Act on Insurance Intermediaries.

Insurance intermediaries were required to carry out the insurance intermediary activities with professional due diligence and had to meet the legal conditions. However, neither the credibility nor the expertise of the insurance intermediaries was a condition for their activities. Consumer protection was therefore insufficient. For the first time, the obligation to register was established with the Ministry of Finance, but only for the insurance broker category. But no register has been instituted. The Ministry of Finance finally responded to the market initiatives and has made the list of brokers who have met the conditions to be registered set by law, available on its website. The client

[6] For more details see Ducháčková and Daňhel, 2012; Mesršmíd, 2015.
[7] In more detail see Krügerová, 2016 and Mesršmíd, 2015.

could thus take an opportunity to verify whether the client works with a registered broker. Because the brokers act on behalf of the insurance company and on its account, by law-makers, the registration had not been necessary.

Table 1 shows a development of the registered insurance brokers by the Act No. 363/1999 Coll., on the insurance industry. The same information about insurance agents is not available because those had no obligation to register; therefore, when elaborating annual reports, only average numbers are being worked with, which individual insurance companies report. In 2001, there were about 35,000 insurance intermediaries in the Czech Republic. Nevertheless, the real number was lower because a higher fluctuation of insurance agents has to be taken into account, as well as the fact that one agent could work on behalf of more insurance companies. As for the commercial service of insurance companies, there were 4,351 employees, out of which 3,068 concluded insurances. In 2004, there were 45,000 agents in the market and about 600 brokers and both groups had about 10,000 co-workers.

Table 1. Development of registered insurance brokers by the Act on the insurance industry

	2000	2001	2002	2003
Registered total	236	337	430	526
Insurance broker	212	289	358	426
Reinsurance broker	2	2	5	3
Insurance and reinsurance broker	22	46	67	97

Source: Compiled by the author based on the annual report of the Ministry of Finance of the Czech Republic 2000, 2001, 2002, 2003.

The legislation on the execution of intermediary activities in the insurance sector under the Insurance Act was short and inadequate. Consumer protection was insufficient. The change in regulation was necessary.

The most important ones include an increase in client protection, development and new trends in the insurance market. However, the key reason was an obligation to harmonise our law with EC law[8] as one of the prerequisites for the Czech Republic entry to the European Union. In the area of insurance intermediaries, it was Directive 2002/92/EC on Insurance Mediation (the "IMD1 Directive").

The member states were obligated to transpose the IMD1 Directive into their national legal orders by January 15, 2005. The Czech Republic has met the deadline by the adoption of Act No. 38/2004 Coll., on Insurance Intermediaries and Independent

8 The first try of insurance intermediaries' regulation, Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) were, in particular, transitional measures in respect of those activities. This directive implemented a temporary regime, which enabled the agents and brokers to extend their activities beyond the border of their home state. To make it of higher quality, a new directive was adopted on 9 December 2002, 2002/92/EC, on Insurance Mediation (IMD1).

Loss Adjusters and the amendment to the Trade Licensing Act, as amended with effect as of January 1, 2005.

Act No. 38/2004 Coll., on Insurance Intermediaries and Independent Loss Adjusters (Act on insurance intermediaries) defines significant terms, regulates the activities of insurance intermediaries and independent loss adjusters, establishes a register of insurance intermediaries and independent loss adjusters, defines the conditions for start-up of activities of insurance intermediaries under the right to establish branch offices, or the freedom to provide services and the execution of state supervision of the activities of intermediaries and independent loss adjusters (Act No. 38/2004 Coll.).

In connection with adopting the Act on insurance intermediaries, about 43,000 insurance intermediaries were expected to register of both forms of natural and legal person. It was assumed that some of the intermediaries would have to end their activities because they would not be able to meet the given conditions of the Act on insurance intermediaries and that small intermediaries would unite, mainly brokers, in order to lower administrative costs. By the Czech Statistical Office (Figure 1), within 2004 and 2005, the number of intermediaries increased up to the end of 2004 while the beginning of 2005 showed a decreasing tendency.

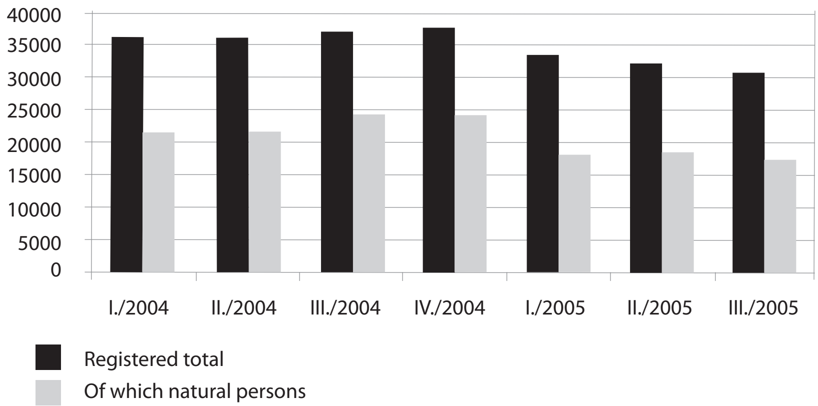

Figure 1. The number of registered insurance intermediaries within 2004 and 2005

Source: The Czech Statistical Office

Intermediaries used simpler conditions to start their activities and tried to start their business up to the end of 2004. By this fact, they could also use the temporary provision of the Act on insurance intermediaries (Art. 29). In 2005, they are seen as factually registered intermediaries.

The Ministry of Finance registered 40,203 people in total up to 8 March 2006, out of which number 38,478 (95.7%) were natural persons and 1,725 (4.3%) legal persons. As for the increase of registered people, a typical postponing of duties fulfilment is seen at the end of a determined term given by the law. The deadline for intermediaries already making business to submit the application to be registered before the date of the Act on insurance intermediaries effect was set half a year after the Act on insurance intermediaries came into force, i.e. up to 1 July 2006.

The act on insurance intermediaries allows to act as an intermediary in the insurance business in the following six categories: a tied insurance intermediary, a subordinate insurance intermediary, a fixed insurance agent, an insurance agent, an insurance broker and an insurance intermediary with a home member state other than the Czech Republic.

In terms of the changes, closer attention will be paid in the text below to the first five categories of insurance intermediaries. The activity of insurance intermediaries is not licensed business. By the Trade Code, intermediaries are the entrepreneurs making business based on other than licensed one; in this case based on the permission of state supervision made by the Czech National Bank (registration). The insurance intermediary is obligated to register in the Register of insurance intermediaries, maintained by the Czech National Bank,[9] and may carry out intermediary activities only in such position and category, in which they are registered. The intermediary could be registered in more positions.

Continual development of the number of intermediaries is shown in Table 2 and Figure 2. The number of insurance intermediaries has an increasing tendency in the market. The most stable category of insurance are brokers. Contrary to that, other categories show more noticeable increase. The most significant increase is seen at subordinated insurance intermediaries; this category is assumed to have the biggest number of non-active intermediaries.

Table 2. Development of registered insurance intermediaries by the Act on insurance intermediaries

Year	Total	of which				
		PM	PA	VPA	VPZ	PPZ
2009	91,063	638	1,183	23,222	10,964	55,056
2010	109,913	689	1,284	27,946	11,814	68,180
2011	132,577	729	1,368	32,329	12,282	85,869
2012	139,175	749	1,399	33,980	12,298	90,749
2013	150,418	782	1,452	36,780	12,676	98,728
2014	157,246	790	1,442	38,709	12,751	103,554
2015	162,956	780	1,393	40,014	12,917	107,852
2016	167,820	783	1,379	41,448	12,822	111,388
2017	174,581	782	1,362	42,227	12,757	117,453

Note: PM – insurance broker; PA – insurance agent; VPA – fixed insurance agent; VPZ – tied insurance intermediary; PPZ – subordinate insurance intermediary.

Source: Compiled by the author based on cnb.cz., 2018.

[9] The state supervision of the operation of insurance intermediaries, who are registered in the Czech Republic or in the territory of the third state is carried out by the Czech National Bank (the CNB).

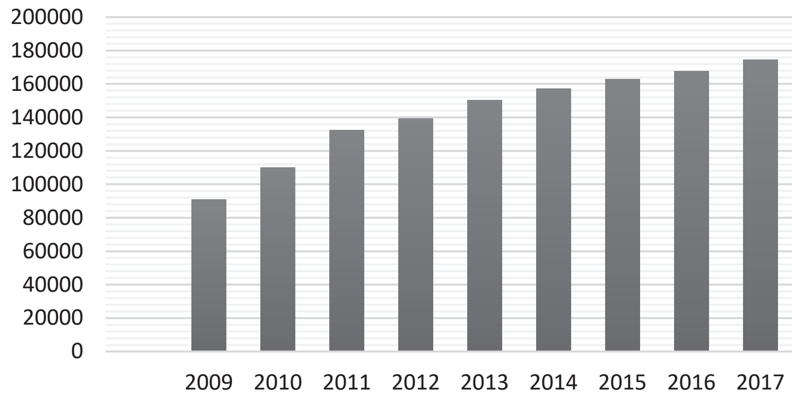

Figure 2. Development of the total registered insurance intermediaries by the Act on insurance intermediaries

Source: Compiled by the author based on cnb.cz., 2018.

As time went on, it became apparent that the Regulation is not suitable enough. An adjusting of just one distributor channel proved to be short-sighted so the adjustment was extended to other ways of insurance mediation. The European Commission published a draft of new regulation on insurance mediation in the beginning of July 2012 – Insurance Mediation Directive (IMD2). In the frame of the legislative process, this regulation was renamed in September 2014 to Insurance Distribution Directive (IDD) [Directive (EU) 2016/97]. The new name reflected its focus on regulating the distribution of insurance products, including direct insurers where no intermediation occurs. IDD regulates the activities of insurance intermediaries, insurance companies, their employees, ancillary insurance intermediaries as well as online distribution. The regulation IDD should have been transposed up to 23 February 2018 at the national level. It should come into force on 1 October 2018 (Krügerová, 2016). The EU Council has postponed the term of transposition at the national level up to 1 July 2018, its effect remained the same. This way, the member states have gained more time to prepare themselves to make such a fundamental legislative change.

In the Czech Republic, the directive first should be implemented by the amendment to the Act on Insurance Intermediaries and Independent Loss Adjusters (The bill amending Act No. 38/2004 Coll.). The amendment had been prepared since 2012, and was often criticised that it should be adopted before the final version of the directive on insurance mediation (distribution). After a reviewing process, there was a bill of the act on insurance distribution prepared for exchanging the current act on insurance intermediaries and liquidators of insurance events. As this paper was written, the bill was not accepted into the legal order. Nevertheless, regarding the transposition term, its acceptation is not being obstructed by anything and it is supposed to be issued in the Statute book at the turn of August and September.

The new act in accordance with the regulation brings several changes and it changes many important aspects of insurance intermediaries' regulation. The change will be made mainly in the categorisation of insurance intermediaries, a request for professionalism of people acting in insurance industry will be intensified. The bill extends a scope of regulation towards a direct sale of insurance in insurance companies' offices (by their employees). The categorisation of intermediaries will be new: independent intermediary, intermediary undertaking and ancillary intermediary. Independent intermediary currently includes both broker and agent under the condition that those activities cannot be done in the frame of one particular insurance policy. The fact that an agent mediates the insurance for the insurance company and a broker only for the customer remains the same. Intermediary undertaking mediates the insurance only for one subject. Ancillary intermediary[10] is a newly implemented category. Those intermediaries mediate the insurance only as their ancillary activity. Contrary to intermediary undertaking, this can make their activities also for more subjects. The category insurance intermediary seated in another EU member state remains the same. The distribution of insurance and reinsurance is conditioned by permission gained from the Czech National Bank (CNB) or by entering the register of intermediaries. According to the new regulation, the person in position of one type of insurance intermediary cannot be registered in the register in position of another insurance intermediary.[11] Permission to provide with intermediary activity is newly limited to a one year period, and, if fee would not be paid, then the registration expires (The bill amending Act No. 38/2004 Coll.).

2.1 Actual problems

Recently, the regulatory measures of Solvency II (Directive 2009/138/EC), application IFRS 4, guarantee schemes in the insurance industry; the regulation of insurance distribution, as well as the regulation of PRIIPs [Regulation (EU) No. 1286/2014], whose aim is to support/achieve greater integration, globalisation and functioning of the single insurance market in EU countries, have the greatest impact on the insurance sector. The Directive constitutes an essential instrument for the achievement and functioning of the internal market; insurance and reinsurance undertakings authorised in their home Member States should be allowed to pursue, throughout the Community, any or all of their activities by establishing branches or by providing services.

[10] Ancillary insurance intermediary is determined also in the directive IDD; such intermediary can mediate the insurance only as his ancillary activity. Permission to do such intermediary can be gained only by the person concluding insurances covering the risks related to goods sale and services provided in the frame of his main business (including life insurance and liability insurance). Such permission cannot be granted to the institutions offering credits and persons under MiFID directive.

[11] In case of ancillary insurance intermediary, such person can be registered as such, who is already registered but as representing a different subject.

European regulations regarding the distribution of insurance products (IDD, PRIIPs, MiFID)[12] become a significant problem in connection with information being provided with to the consumers. This information should help the insurance companies' clients to make better decisions.[13] Unfortunately, duties to inform have not been harmonised, thus insurance companies or insurance distributors will be abided by both mentioned regulations (IDD, PRIIPs, MiFID) and Solvency II.

The second actual problem is personal data protection. The relationship between the client (data subjects) and insurance company or intermediary is abided by many legal regulations. In many cases, it is necessary to apply more of them at the same time in a way not to have them mutually collided. When fulfilling duties resulting from personal data protection by GDPR, requests resulting from financial services regulation has to be taken into consideration, too. It means that insurance intermediaries have to follow new conditions of GDPR, as well.

3 Conclusion

In connection with the implementation of legislative changes, many key problems appear in the Czech insurance market (and not only there). The aim of those changes is to protect the client, to regulate intermediary activities in the insurance industry by determined requests set to enter this field, further it is the increase of market transparency, removal of differences in external and internal insurance distribution, and strengthening of insurance distributor (both internal and external).

Those change also influence the construction of insurance products and the way of their sale, as well as the intermediary activity. The segment of insurance distribution is also significantly influenced by new technologies being used at insurance distribution, new ways in the care of the client are implemented related to a digital age, preferences of current clients or "digital clients" occur. The actual problems are: personal data protection and information obligation to the consumer.

The Directive IDD and in accordance with it also the bill harmonises the regulatory principles for employment (internal) and intermediary (external) way of insurance products distribution. It brings such expecting scope extension i.e. the option to conclude the insurance contract by the employees of the insurance companies. The aim is to protect the consumer (insurance applicant, insurer, insured), as well as the understandability and comparability of information about financial products,

12 The Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs) ("PRIIPS Regulation") determines unified rules related to the form and content of the key information, so called standardised consumer-friendly information ("Key Information Document" KID).

13 Nesleha and Urbanovsky analyse the level of financial literacy in the field of life insurance products in their articles. Their analysis investigates whether customers of insurance companies are provided with sufficient amount of information related to the products they look for, or whether some important information is missing, and such clients have to search for it on their own.

as well as to increase the demands for professionalism of people acting in the insurance industry and not only there but through the entire financial market. There will also be a simplification of the categorisation of insurance intermediaries. Since the current register of insurance intermediaries does not reflect the factual situation of the insurance market (registering in more positions, non-active intermediaries), a new way of registration would help to clean out the market from non-active intermediaries.

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Sources of Financing Health Care in Poland – Findings

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Abstract
In the presented article scientific works published within the grant project were used. The objective of the article is to present results of the scientific research conducted by an international community of financial law researchers. The basic objective of the scientific project implemented was to establish whether Polish legal regulations determining types of public sources of financing secure the implementation of tasks within health care. From the conducted research it can be concluded that the health insurance premium constitutes the main source of financing health care in Poland. Significant sources of financing health care include budgets of local government units and state budget.

Keywords
health protection; public finances

1 Introduction

Between 2015–2018, scientific research was conducted the subject of which involved legal issues of public sources of financing health care in Poland. The research was conducted within the scientific project entitled "Sources of financing health care in Poland – legal aspects" financed within the PRELUDIUM 8 competition organised by the National Science Center (project no. 2014/15/N/HS5/01735).

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In the presented article scientific works[2] published within the grant project were used. The objective of the article is to present results of the scientific research conducted by an international community of financial law researchers. The basic objective of the scientific project implemented was to establish whether Polish legal regulations determining types of public sources of financing secure the implementation of tasks within health care.

This article and other works developed within the scientific project were prepared most of all based on the dogmatic and legal method. For the implementation of objectives of the grant research project, legal regulations and financial law statements concerning legal and financial institutions related to public sources of financing health care were presented and examined. The dogmatic and legal method was completed with historical and legal methods and legal and comparative method, as it was necessary to establish the genesis of legal regulations concerning public sources of financing health care in the currently applicable form and their comparison with solutions functioning in other countries.

2 Catalogue of Sources of Financing Health Care in Poland

The principles of organisation and financing of health care in Poland are determined primarily by constitutional regulations. Pursuant to Art. 68 sec. 2 of the Constitution of the Republic of Poland (Constitution of the Republic of Poland of April 2, 1997, hereinafter: Constitution of the Republic of Poland) public authorities ensure equal access to healthcare services financed from public funds to citizens regardless of their financial situation. The conditions and scope of providing services are specified in the Act. From the provision referred to, it can be concluded that the basic source of financing health care should be public financial resources. In Art. 8 of the Constitution of the Republic of Poland, the legislator does not impose a specific model of organisation and financing of health protection in an unambiguous way. Establishing detailed principles in this scope was left to the legislator. Provisions of the Constitution of the Republic of Poland do not indicate any specific resources from which health care services will be financed (Lenio, 2018b: 62–63).

In relation to this the Polish health care system can be based among others on original assumptions of the Beveridge model or the Bismarck model. The legal bases for the organisation and financing of health care in Poland result primarily from the Act on health care services financed from public funds (The Act of August 27, 2004 on health care services financed from public funds, hereinafter: HCSA) and the Act on Medical Activity (The Act of April 15, 2011 on medical activity, hereinafter: MAA).

2 They include among others: Lenio, 2018a; Lenio, 2018b; Lenio, 2018c; Lenio, 2018d; Lenio, 2017a; Lenio, 2017b; Lenio, 2017c, Miemiec and Lenio, 2017.

The catalogue of public sources of financing health care in Poland also includes: premiums for health insurance as a public levy, state budget expenditure and budgets of local government units (hereinafter: LGUs).

2.1 Historical and legal aspect

From the historical and legal analysis performed, it can be concluded that the method of financing health care in Poland, including sources of its financing, underwent significant transformations. In the interwar period health care was inextricably linked to sickness and maternity insurance. There was no separate source of financing health protection. Health services as well as services related to the occurrence of a sickness risk, which did not directly affect the provision of health care services, were financed from insurance premiums.

After World War II, there was a significant change in the method of financing health care. First of all, post-war health service was clearly separated from the social security system. It should be underlined that the separation of the health care system from social insurance has been functioning until now. The insurance model of health care was also abandoned. Expenditures for health care have been included in the state budget. The state budget was the main and the only source of financing tasks in the field of health protection. In spite of political changes in 1989, this lasted until the end of 1998 (Lenio, 2018a: 117–118).

2.2 The Polish health care system – principles of functioning

The Polish healthcare system is based on common health insurance. Within its framework the following entities function: the insured and other beneficiaries, the insurer and the service provider (Morzycka and Kowalska, 2012: 101). The function of the insurer and the payer is fulfilled by the National Health Fund, and the function of the service provider is fulfilled by entities carrying out medical activity. The Fund as the insurer guarantees provision of health services in case of a health risk, however it does not provide such services itself. Financing of health care services by the National Health Fund is implemented based on the agreement concluded between the Fund and the service provider. In the organisational structure of the health care model approved in Poland, activities of LGUs and government administration bodies are very significant.

The purpose of the functioning of compulsory health insurance is to ensure beneficiaries with guaranteed health services. The provision of Art. 2 sec. 1 of the HCSA indicates that only entities included in the directory of beneficiaries, including insured persons, have the right to use healthcare services financed from public funds under the terms set out in the Act. The catalogue of insured persons includes most of all employees, farmers, people receiving pension benefits, judges and prosecutors, persons running business, as well as officers of uniformed services and unemployed people. In light of the catalogue of insurance titles resulting in the creation of an insurance obligation, it seems justified to state that the health insurance system covers almost all persons within its subjective scope who based on Art. 68 sec. 1 and 2 of the Constitution of the Republic of Poland are entitled to health protection.

2.3 Premium for health insurance as the main source of financing health care in Poland

In light of Art. 79 sec. 1 HCSA, for most insured groups the method of calculating the amount of the health premium involves multiplication of the basis of the premium established in compliance with the provisions of the HCSA by the statutory percentage indicator (rate). Hence, the basis of the health insurance premium and the rate significantly affect its value. For most insurance titles, the basis of the premium is basically the insured person's income resulting from their activity covered by the right title. For some insured groups, the basis of the health insurance premium arising from the right title will not depend on the income from business activities (e.g. in case of entrepreneurs).

The value of the health insurance premium basically arises from Art. 79 sec. 1 HCSA and it is currently 9% of its basis. This rate applies when calculating health insurance premiums for all insured persons, except for farmers and members of their households, referred to in Art. 80 sec. 1a HCSA (Lenio, 2017a: 70). In case of farmers and members of their households specified in this provision, the rate is 1 PLN per conversion hectare of agricultural land on the farm (Lenio, 2017c: 407).

The health insurance premium is an important public levy in the Polish legal order, revenues from which constitute the main source of financing health care. However, a further increase in expenditure on public tasks in the field of health protection requires the modification of the legal structure of the health insurance premium.

The legal structure of the health insurance premium demonstrates that it has all the required features allowing it to be included in the catalogue of public levies, referred to in Art. 217 of the Constitution of the Republic of Poland. From research conducted above, it can be concluded that the health care premium is a public levy constituting a public, common, general, non-returnable and compulsory cash benefit imposed on the basis of the provisions of the Act, with a payable and purposeful nature, allocated for the implementation of the state's constitutional tasks in the field of health protection implemented by the National Health Fund as part of the universal compulsory or voluntary health insurance (Lenio, 2018a: 326).

It is justified to state that the health insurance premium constitutes a *sui generis* public levy and it cannot be equated with other benefits of this kind, including taxes. Their common features only show that they belong to the category of public levies the catalogue of which is internally diverse. The comparison of the health insurance premium and public levies other than taxes (social security contributions and fees along with additional payments) does not demonstrate similarities which could result in the treatment of the service in question as the designate of any of the above-mentioned levies. In addition to features generally common to all public levies, the aforementioned types are in some cases payable and purposeful. However, the purpose of such services and their functions are different.

2.4 The state budget and budgets of LGUs as a source of financing health care in Poland

Expenditure of the state budget allocated for the implementation of public tasks in the field of health care can be divided into at least four categories. The first one includes expenditures earmarked for establishing and running medical entities and financing activities of entities carrying out medical activities. The second one includes funds allocated for financing tasks of the State Medical Rescue. The third category includes expenditures earmarked for financing certain healthcare services. The fourth category includes expenses made to pay health insurance premiums for some insured persons. The provision of Art. 86 sec. 1 item 2–15 HCSA contains a catalogue of insured persons who do not have to pay the health insurance premium from their own funds. In the catalogue the legislator included among others soldiers undergoing basic military service, unemployed people who do not receive benefits or scholarship, as well as people who receive permanent assistance from social welfare (Lenio, 2018b: 66).

A significant source of financing health care includes budgets of local government units. Based on Art. 9a and 9b HCSA, LGUs' funds may finance guaranteed healthcare services only for residents of a given local government community. Furthermore, also activities of medical entities, for which they are the leading entity, are financed from local government budgets. Therefore, LGU budgets constitute a source of financing debts of health maintenance organisations, including the net loss generated by them. Using LGUs' funds, medical entities are established operating as capital companies. LGU bodies can also provide entities carrying out medical activity with public funds in the form of subsidies or on the basis of a contract in the manner and under the terms set out in the regulations of the MAA.

The fact of allowing for financing of guaranteed health services from local government budgets in combination with the obligation to cover expenses to implement previous tasks of LGUs in terms of health care, transfers some of the responsibility for the functioning of the system to local governments.

However, LGU bodies do not affect the principles of its organisation and financing. This leads to burdening local government budgets without increasing their own revenue at the same time, and it also does not guarantee uniform rules for the provision of health services, which raises doubts as to whether the regulations in force comply with the provisions of the Constitution of the Republic of Poland. Increasing the scope of tasks of LGUs in terms of health care manifests that the legislator is looking for new solutions in terms of sources of financing health services which would decrease the scope of burdens of the state budget and finances of the National Health Fund. Transferring the responsibility for financing the health care system to LGUs shows that the legislator is aware of the incorrect formation of existing sources of its financing (Lenio, 2018a: 418).

Financing of health care services from the state budget and from local government budgets, as well as making expenditures from these budgets for health care tasks also justifies the thesis in the light of which the Polish system of financing health care is not fully an insurance model. It is only based on the insurance method of financing health care.

2.5 European funds as a source of financing health care in Poland

European funds are the only foreign source of financing health care in Poland, which is of a permanent nature. Their aim is not to guarantee the financial stability of the health care system. In principle, they are to support state actions in the implementation of public tasks in the field of health protection.

The funds disbursed under the regional operational programs come from the European Regional Fund and the European Social Fund. Tasks implemented under the Operational Program Knowledge Education Development 2014–2020 are financed primarily from the European Social Fund, and funds from the Operational Program Infrastructure and Environment 2014–2020 – from the European Regional Development Fund and the Cohesion Fund (Gwizda et al., 2014: 128, 143, 163).

The vast majority of resources coming from national and regional operational programs are to be distributed among beneficiaries who provide health services financed from public funds or intend to provide them after obtaining EU support. The majority of beneficiaries who can carry out projects financed from European funds are public entities. Most of all, European funds from the Operational Program Infrastructure and Environment for the implementation of investment projects are reserved for public entities. The only exception are medical entities that have been privatised.

The rules for the distribution of EU funds significantly strengthen the position of entities performing medical activities and providing services financed from public funds, including public entities. However, it should be pointed out that the purpose of financing projects in the field of health protection is not to increase competitiveness in this sector. The rationale for the allocation of European funds to the implementation of projects related to the provision of health services is to increase access to them and improve the quality of their implementation. The final recipients of EU funds allocated for health care are beneficiaries, and not entrepreneurs operating on free market principles (Lenio, 2018a: 450–451).

3 Sources of financing health care in Poland – comparative studies

European models of health protection operate on the basis of the principle of social solidarity. They provide every citizen with the opportunity to benefit from health care services, regardless of their financial situation.

As part of this scientific research, a comparison of Polish legal regulations in the field of sources of financing health care with the regulations operating in Germany, Italy, Great Britain and Sweden was carried out.

The analysis of the currently operating European models of health protection performed within the project also leads to the conclusion that in each of them there are at least two sources of financing of the system. The Italian insurance model is financed from local budgets with significant support from the central budget. The German health insurance includes premiums and funds from the central budget. In contrast, the English National Health Service, with revenues from the state budget, also participates in revenues from social security contributions. This means that based on experiences of EU countries, it can be concluded that one public resource is insufficient to ensure the functioning of the health care system. Additional sources to support its functioning are required.

The Polish and German system operate based on the insurance model of health protection (Bismarck model). Therefore, the legal structure of the catalogues of financing sources has much more similarities than differences. The main feature of the analysed systems is based on the principles of their financing from revenues from health insurance premiums paid.[3] A manifestation of its implementation is the statutory manner of determining the value of the insurance premium, where its basis is the most important element. As it has already been indicated, in most cases it depends on the payment capability of the insured member of the fund. "The subjective economic performance of individual members of the funds" (Hase, 2007: 32) is decisive. Statutory health insurance with the same insurance risk and uniform rules for receiving benefits is financed by them to a different degree. The above should also be referred to the Polish health care system which in light of Art. 65 item 1 HCSA is also based on the principle of social solidarity.

Another similarity between the Polish and German system of financing health care is taking public expenditures for health insurance from the central budget. First of all, in the Polish version of common health insurance at least four types of expenses, including a wide range of health services, can be financed from the state budget. Second of all, from the German federal budget a general federal subsidy in the amount of 14.5 billion Euros per year is allocated to the health care system. Since 2016, it has had a permanent nature and it does not depend on the costs incurred by entities functioning within the statutory insurance (Lenio, 2018b: 68–69).

3 Differences and similarities (including *de lege ferenda* conclusions) in the Polish and German health insurance premium are presented in Lenio, 2017a.

In case of the Polish and Swedish health care systems, a similarity in the principles of its financing is taking financial expenditures from local government budgets. Such budgets in both countries have their own sources of revenue, most of all in the form of local taxes. In Sweden and Poland there are horizontal compensation mechanisms in terms of revenues of local government units. Funds from local government units are allocated by local governments to all tasks implemented by them. There is no legal obligation to allocate them to strictly specified goals. However, a different role of local government budgets in financing health care should be indicated. In the Swedish system they constitute the main source of financing public tasks in the field of health care.

In relation to the fact that Polish and Swedish health care systems are based on different organisation models, there are numerous differences between them. In the Polish system the National Health Fund is responsible for the organisation and financing of health services. As it has been previously established, in Sweden a health insurance premium has not been introduced, while it is the main source of financing of the Polish health care system. There is no separate public levy to finance health protection, from which revenues secure tasks of the state in this scope from the perspective of the needs of beneficiaries. In the Swedish health care system there is no strict relationship between public revenues and expenses allocated to its functioning. All revenues obtained by regions are allocated to all expenditures made in order to implement all tasks imposed on them, and not only financing health care. An important difference in the catalogue of Polish and Swedish sources of financing health care is the widespread functioning of out-of-pocket payments made by patients in connection with their use of statutory services in the Swedish system. The scope of out-of-pocket payments made by beneficiaries in the Polish health system is relatively narrow (Miemiec and Lenio, 2017: 185–186).

In the British literature on health care, it is stressed that the UK health care system based on the budget model is a highly effective manner of financing health care (Davies, 2013: 11). It is assumed that the use of financial resources derived from general taxes and constituting revenues of the state budget causes an increase in the control of government administration bodies over the expenditure effected in the system of the National Health Service. Moreover, this kind of financing of health care does not generate high administrative costs allocated to the operation of the health system. Therefore, the health care model based on the National Health Service allows negative effects of the deficit in individual sectors of economy to be avoided (Davies, 2013: 110). The analysis of the National Health Service in the United Kingdom also leads to the conclusion that the state budget is not a sufficient source of financing health protection from the point of view of the needs of citizens as beneficiaries. Although it is an essential source of financing, the NHS must also participate among others in revenues from social security contributions, which in Great Britain is institutionally and organisationally separated from the health care system (Lenio, 2017b: 64).

In turn, the Italian health care system is a budget model in which there is no public health insurance, and beneficiaries are not obliged to participate directly in the costs of the health care system by paying insurance premiums. The current catalogue of financing sources of the National Health Service results from many years of transformations in the organisation and financing of the health care system in Italy. From the findings, it can be concluded that the Italian health care system does not have one source of financing. In order to secure the implementation of public tasks in this scope, it is necessary for several types of resources to exist.

The basic sources of financing the National Health Service in Italy are of a public nature. The model of financing is based on public funds from the state budget and budgets of particular regions. Revenues from fees charged to beneficiaries in connection with the provision of a specific type of health services are also significant. The resignation of the Italian legislator from the obligation to pay fees for the use of the public National Health Service could, however, lead to a significant decrease in the amount of revenues allocated for the implementation of the tasks imposed on it. Nearly 18% of all expenses made for the health care system come from fees incurred by patients. Should the obligation to pay fees be abolished, it would be necessary to increase the share of public funds in financing the Italian health care system from other sources (Lenio, 2018c: 79–80).

4 Conclusion

From the conducted research it can be concluded that the health insurance premium constitutes the main source of financing health care in Poland.[4] Health care services provided within common health insurance are financed from revenues from health insurance premiums. The goal of introducing compulsory health insurance was to separate the health care system and its finances from the state budget. Some budget revenues were transferred to a separate fund aimed at ensuring the financing of health care services.

The health insurance premium does not fully secure the needs of financing the system. It is mainly caused by its erroneous legal structure which, without legitimate grounds, favours certain social groups while at the same time burdening others. An erroneous formation of the structure of the health insurance premium is indicated most of all by the existence of different rules for calculating its value depending on being a member of a specific social or professional group. As a result of the findings, it is claimed that employees and beneficiaries are the most burdened professional groups in terms of the obligation to pay the health insurance premium. Its payers are obliged to pay the health insurance premium from all revenues obtained by their entities without the possibility to reduce the amount of the basis of the premium, as in case of pension and disability insurance. People engaged in agricultural activities (with the exception of special departments of agricultural production) are in the opposite situation. They are clearly privileged in comparison to other social groups. It results from the agricultural

4 The summary developed based on Lenio, 2018a: 453–473.

system formed for many years, within which incurring the burden of public services did not depend on the results of activities carried out.

Consequences of poorly formed principles of establishing the value of the health insurance premium, differentiating the scope of bearing the insurance burden by people subject to compulsory health insurance do not only apply to such people. In this article, it was also found that revenues from the health insurance premium are not sufficient to ensure the proper functioning of the health care system by the National Health Fund. Such errors also significantly affect the manner and scope of financing tasks of the state and local governments in the sector of health care from public funds from the state budget and budgets of LGUs.

A diverse catalogue of public sources of financing health care does not materially cover the implementation of state tasks in this respect from the point of view of the needs of beneficiaries. From the findings it can be concluded that the normative structure of legal and financial institutions determining the shape and efficiency of public sources of financing health care in Poland, as well as some of the relationships between them have been shaped incorrectly and require changes. Funds from sources that constitute the subject of this research are insufficient to ensure the correct implementation of public tasks in the field of health protection. Changes made in the structure of sources of financing are only of an ad hoc nature and they do not significantly increase expenditures from public funds. This results in the need to engage private funds by beneficiaries to ensure health care at the proper level, despite the fact that the Constitution of the Republic of Poland guarantees access to health care services financed from public funds regardless of the financial situation of the beneficiaries.

The legislator takes excessive care of financial interests of the state budget which results in the lack of an appropriately high level of revenues of the National Health Fund in comparison to the costs of financing health care services, for the organisation of which it is responsible, and in partial transfer of the responsibility for the health care system to local government units.

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Interpretation of Treaties for the Avoidance of Double Taxation with Practical Examples

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Abstract
This contribution deals with the problem of interpretation of treaties for the avoidance of double taxation from the point of interpretative models theory. The main aim of the contribution is to confirm or disprove the hypothesis that the continental interpretative canon or Anglo–Saxon one should be used during the procedure of interpretation of the legal concept of treaties.

Keywords
tax; interpretation of treaties for the avoidance of double taxation

1 Introduction

The paper aims to discuss the specific forms of interpretation in tax law with practical examples of the interpretational path used in the recent judgment of the Supreme Administrative Court.[2] The judgement deals with the interpretation of treaties for the avoidance of double taxation (hereinafter: double taxation treaties). In the Anglo–Saxon legal system and continental legal environment, there have been developed sophisticated interpretative guidelines for interpretation of the tax law. The rules outlined in these guidelines are general. The hypothesis of the article is to verify, which of the interpretational paths is the correct one for interpretation of double taxation treaties for the Czech legal system.

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2 Judgment of the Supreme Administrative Court from 25 May 2018, file No. 7 Afs 265 / 2017 (hereinafter: the Judgment).

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From the point of view of the 100th Anniversary of the Founding of Czechoslovakia, it is necessary to say that international double taxation treaties have played in the past years (decades) a significant role in national jurisdictions, because double taxation of income resulting from the very existence of an international element is world-widely an undesirable phenomenon in tax law. The interpretation of double taxation treaties should therefore be given real attention.

The interpretation of international treaties, including, of course, double taxation treaties is, to a certain extent, a specific legal area. It is necessary to take account, *inter alia,* of Arts. 31, 32 and 33 of the Vienna Convention on the Law of Treaties. According to the rules, international treaties must be interpreted in good faith, in accordance with the usual meaning given to the terms in the contract in their overall context, and also taking into account the subject matter and purpose of the contracts. Account must also be taken of the different language versions of contracts and additional means of interpretation (OECD model contracts and commentary on these model contracts).

As mentioned above, the following text will deal with the recent Supreme Administrative Court ruling on the interpretation of double taxation treaty; in particular the Convention between the Czechoslovak Socialist Republic and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (hereinafter: Convention) was the subject of legal interpretation of the court. This contract shows many relatively atypical signs, especially because of its "age". It was negotiated in 1974, and it is the oldest applicable Czech double taxation treaty (the reason the authors use it as an example).

The interpretation of the text of double taxation treaties is the subject of several publications.[3] However, the Czech academic environment lacks literature dealing with methods of interpretations and its basic rules.

To confirm or disprove the hypothesis, the authors will use scientific methods such as analysis, implementation of premises for the purpose of testing it in the legal approach of the Czech legal order and others.

2 Methods of Legal Interpretation

The doctrinal and interpretative rules of the tax law are summed up by the President of the Supreme Administrative Court of Poland, M. Zirk-Sadowski,[4] in the so-called canon of interpretation based on four key points:

a) The preference of grammatical interpretation – the grammatical interpretation is always a key one, however, when the Czech Constitutional Court already confirmed the impossibility of a purely grammatical interpretation as the only

[3] See Sojka, 2017; Vyškovská, 2010; Wassermeyer et al., 2010.
[4] See Zirk-Sadowski, 2004: 9–20.

and always just enough interpretation.[5] The use of teleological interpretation in the field of public law, in view of the *nullum tributum sine lege* principle, is confirmed, even for the area of criminal law, which is *ultima ratio* and the standard of legal protection is the highest.

b) In a situation of interpretational doubts, decision should favour the taxpayer – the principle *in dubio pro mitius* reflects the attempt to protect against ambiguity of provisions of the law. The principle *in dubio pro mitius* is based on Art. 4 par. 4 of the Charter of the Fundamental Rights and Freedoms of the Czech Republic.
c) Strict interpretation (narrow construction) of the tax exemptions – this is the reaction on the abuse of rights.
d) Prohibition of analogy – of course, to the detriment of the taxpayer.

Another and, at some points, a contradictory interpretative canon has been provided by the representative of the Anglo–Saxon legal environment Lord Donovan in the case of IRC v. Mangin.[6] The Anglo–Saxon Legal World has created basic interpretative rules.

First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices.[7]

Secondly, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.[8]

Thirdly, regarding the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.[9]

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.[10]

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5 The Constitutional Court in its plenary decision from 17 December 1997, file No. Pl.US 33/97 stated that: "Language interpretation is only an initial approximation to the legal norm. It is only a starting point for clarifying its meaning and purpose (which also serves a number of other procedures, such as logical and systematic interpretation, interpretation *e ratione legis,* etc.). Mechanical application abstracting from, resp. knowingly, either intentionally or as a result of ignorance, the meaning and purpose of the legal norm, makes the law a tool of alienation and absurdity."

6 IRC v. Mangin AC 739, 746; 1971 1 All ER 179, 192.

7 Turner, J. added in his (albeit dissenting) judgment in *Marx* v. *Commr. of I. R. (N.Z.)* (1970) N.Z.L.R. 208 at p. 208, moral precepts are not applicable to the interpretation of Revenue Statutes.

8 See also Rowlatt, J. in *Cape Brandy Syndicate* v. *I.R. Commrs.* (1921) 1 K. B. 64 at p. 71, approved by Viscount Simons, L.C. in *Canadian Eagle Oil Co. Ltd.* v. *R.* (1946) A.C. 119.

9 It is the very essence of the case (ratio).

10 Lord Mackay, concurring with his brethren in allowing the taxpayers' appeals, did so on the basis that the taxpayers' interpretation was at least one of two possible constructions, and any ambiguity should be resolved in favour of the taxpayer. He did not believe that parliamentary materials should be allowed to be used as aids to statutory interpretation, largely because of the practical difficulties in

The last rule has been precised in time. Lord Braune-Wilkinson formulated three conditions under which the exclusionary rule could be relaxed so as to permit reference to parliamentary materials:

a) where legislation is ambiguous or obscure;
b) where the material relied upon consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; and
c) the statements relied upon are clear.[11]

Professor Brzeziński[12] softly summarises *An Interpretation Strategy for Taxes in the Anglo–Saxon Environment* into these simple rules:

1. The words are to be given their ordinary meaning. They should not be given another meaning because it leads to tax avoidance.
2. In the interpretation of tax regulations, moral rules do not apply.
3. Pay attention to only what has been clearly stated in the text of the provision.
4. There is no equality in taxation and should not be sought for.
5. Do not fill any gaps in the law by implication or by "adding" a text.
6. When interpreting a legal norm, it should be assumed that the legislator did not intend to produce absurd or unjust results. If, within the limits of a grammatical interpretation, it is possible to omit such results, it should be done.
7. The history of legal works on the draft and the reasons for its adoption may be used as auxiliary source of arguments for interpretation (its result).

From these canons of interpretation, it is clear that grammatical interpretation plays a decisive role and law-making ("courtislation") is forbidden. In addition to these two "contact points", however, canons differ from each other. One introduces non-equity and lack of moral rules in the tax law, the other underlines the principle of *in dubio pro libertate* (*in dubio pro mitius* or *in dubio contra fiscum*).

What, however, do these tax rules show in the field of international double tax treaties and whether the Polish interpretational canon – in favour of the taxpayers – or Anglo–Saxon theories – rather textual (for the benefit of the state) prevails in the Czech legal order? To disprove or confirm the hypothesis, the exemplification of the Czech judicial approach will be the subject matter of the next analysis.

terms of the expense and time that would be taken on research by advisers and lawyers. He considers the permissibility to relax the exclusionary rule – for more details see Re, 2014.

11 Pepper v. Hart, AC 593; HL 1992, 65 TC 421; [1992] STC 898.

12 See Brzeziński, 2016: 255–272.

3 Exemplary Judgement of the Supreme Administrative Court; General Background

The judgment of the seventh senate of the Supreme Administrative Court dealt with the interpretation of the Convention, which came into force on 5 November 1974 (see also Decree of the Ministry of Foreign Affairs No. 138/1974 Coll.).

In the present case, it has become questionable, according to which article of the Convention, the silent partner is to tax the income from his silent (limited) partnership.

It is therefore necessary to at least generally explain the Czech legal institute of silent partnership.

Under a silent partnership contract, the silent partner undertakes to make a certain investment contribution to an entrepreneur's business and thereby to participate in it, while the entrepreneur undertakes to pay him a part of the profits proportionate to the silent partner's share in such business (trading result) after the entrepreneur deducts the proportionate mandatory allocation of money transferred to a reserve fund if such fund must be created. The extent of the silent partner's share in a profit and loss must be equal.[13]

An important circumstance is that the rights and obligations towards third parties from business come only to entrepreneurs. This is why they are in "silent" partnership. However, it must be added that a silent partner is, however, responsible for the obligations of the entrepreneur if his name is included in the business name of the entrepreneur or he declares to the person with whom the entrepreneur negotiates the conclusion that he is doing business together with the entrepreneur.

Likewise, it is extremely important that a silent partner has a legal position with respect to his or her contribution, which the creditor has in respect of his claim, but is not entitled to demand the return of his investment contribution before the termination of the contract.

4 Facts of the Case

The petitioner in the Judgment was Dutch company A, established in the Kingdom of the Netherlands (hereinafter: the applicant). On 21 April 2004, the petitioner concluded with the Czech company B (hereinafter: the taxpayer) under Art. 673 of the Commercial Code, a silent partnership contract, under which he provided investment contribution of 425,101 EUR. Due to the contract, the applicant as a silent partner was entitled to 66% of the net profit of the company. On 22 April 2013, the parties agreed to end the silent partnership. According to this agreement, an amount of 5,408,890 EUR was to be paid

[13] See Art. 673 par. 1 of the law No. 513/1991 Coll., the Commercial Code, as amended (the law in force at the relevant time).

to the petitioner as a silent partner. The tax in the amount of 10% from the 5,408,890 EUR has been assessed by the tax administrator.

The applicant disagreed with the tax administrator decision. Therefore, he filed a lawsuit against the tax administrator to the administrative court.

The administrative court dismissed the appeal. According to this court, in the case, Art. 10 (3) of the Double Taxation Treaty cannot be applied because the applicant did not own at least 25% of the capital[14] of the company paying the dividends. The silent partner has a creditor position towards the company. The creditor is not the owner of the debtor's assets. The court further added that Art. 23 of the Treaty cannot be applied to the case, since the income is not an income explicitly mentioned in the Convention, but is income from the profit-sharing debts under Art. 10 par. 6 of the Convention.

Cassation complaint has been filed. In this, he argued that the tax administrators and the municipal court misinterpreted the text of the Convention. According to the applicant's opinion either Art. 23 of the Convention or Art. 10 par. 3 of the Convention must be applied to his situation, as the complainant fulfilled the condition of direct ownership of at least 25% of the taxpayer's capital. From the point of view of the applicant, the notion (concept) of "capital" cannot be narrowly (strictly) defined as "registered capital"; pursuant to Art. 6 par. 2 of the Commercial Code, the capital is the aggregate of all the entity's business property and liabilities.[15]

5 The Judgement

The Supreme Administrative Court considered first the review of the income of the silent partner, and later dealt with the notion (concept) of "capital".

5.1 The income of the silent partner; Art. 10 or 23 of the Convention?

Under Art. 23 of the Convention, the income of resident or domiciled person in one of the states (the Czech Republic or Netherlands) not expressly mentioned in the preceding articles is subject to tax only in that state. Therefore, if the applicant's income would fall under the scope of any article of the Convention, it would not have to be taxed in the Czech Republic, but it would have to be taxed in the Kingdom of the Netherlands. It was therefore necessary to find out whether the income could be subordinated to any other article of the contract or not.

The Supreme Administrative Court held that the income falls under Art. 10 par. 6 of the Convention. The court underlined that the agreement on silent partnership was

[14] In Czech, capital can be understood as the (registered) capital of the company, asset, property or estate, it is an ambiguous legal concept.

[15] Capital in the meaning of business assets.

concluded in accordance with the Czech Commercial Code, and its contracting parties agreed that the contract and legal relations resulting from it will come under the Czech legal system. Based on Czech private law, the silent partner has the same legal position regarding the investment contribution as the creditor to his claim.[16]

Therefore the silent partner is a creditor with a claim to the company (he deposited the claim).[17] The Court further pointed out that the contribution was conjunct with the profit (even due to the agreement).

5.2 Theoretical approach of the interpretation of income

The court reached the first of four steps of the Zirk-Sadowski canon and concluded that the income of the silent partner has the same legal nature (basis) as dividends. The court proceeding differs from the theoretical approach.

On the one hand, the court asserts that the nature of the income from silent partnership is, according to the law, similar to a dividend, on the other hand, it points out that this nature of income also arises from the contract between parties. There is a difference between the application of "the will criterion" and "the private law rule" and the "subordination of the facts of the case under some legal provision". Since the establishment of the Supreme Administrative Court, its case law has formed the rule that in tax law, the factual state of the matter is the only criterion for application of the tax rule (legal provision).[18] Unlike private law, public law regulations do not give recipients the choice of how income from a legal relationship can be taxed. The silent partner and company A (parties to the contract) behaved according to the contract, which no one interfered, if it were otherwise, the actual situation will prevail and the proper assessment would be connected to this factual state.

5.3 The income of the silent partner (the applicant) and Art. 10 of the Convention

In the next procedural step, the court had to answer the question whether the complainant's income fell under the second paragraph of Art. 10 of the Convention or under the third paragraph of the article.[19] It is noteworthy that if the income under consideration had to be assessed under the third paragraph of the Convention, the applicant should not have been taxed by the Czech tax administrator.

16 See Art. 681 of the Commercial Code.
17 See Pokorná et al., 2009: 822.
18 See the judgment of the Supreme Administrative Court from 31 March 2004, file No. 5 Afs 22/2003.
19 Due to Art. 10 par. 3 of the Convention "[n]*otwithstanding the provision of paragraph 2 the State of which the company is a resident shall not levy a tax on dividends paid by that company to a company the capital of which is wholly or partly divided into shares and which is a resident of the other State and holds directly at least 25 per cent of the capital of the company paying the dividends.*"

As aforementioned, the problem occurred in relation to the interpretation of the word “capital”.

Whereas the concept of “capital” is not defined by the Convention, its interpretation must be made in accordance with Art. 3 par. 2 of the Convention. According to that provision, a term which is not otherwise defined has, for the purposes of the application of the Convention, the meaning which it derives from the law of the state which assess the taxes which are the subject matter of the Convention unless the circumstances of the case requires a different interpretation.

The Supreme Administration Court emphasised that for the interpretation of the terms contained in the Convention, the importance of ordinary legal concepts (meanings) at the time of the negotiations of the Convention must be taken into account. At that time, the meaning of “capital” has been used for a legal institute later named as “registered capital”. The same conclusion appears from another two language versions of the Convention (Dutch and English).

The Supreme Administrative Court also applied Art. 32 of the Vienna Convention on the Law of Treaties and admitted the commentary on the OECD model contract as an “additional tool” for interpretation.

The Supreme Administrative Court summarised that the applicant’s opinion would *ad absurdum* conclude that any large creditor of the corporation (such as a trading partner or even a bank providing a loan company) would meet the above mentioned condition of “ownership of at least 25% of the capital”. The share of registered capital is clearly identifiable, essentially stable and publicly verifiable, which can be effectively used to determine the correct tax; this does not apply to the share of assets. The taxpayer also should know his tax regime (forum shopping) in advance.[20]

The interpretation of double taxation treaties is, in practice, quite difficult as we can see. The Supreme Administrative Court chose a grammatical interpretation combined with historical and logical interpretation as classic theory recommends.[21]

5.4 Theoretical approach of the interpretation of double taxation treaties

International law does offer “general rules” for interpreting treaties. These rules are set out in the Vienna Convention on the Law of Treaties and binding on all states. The Vienna Convention on the Law of Treaties offers two main principles of interpreting international law. The first is that treaties must be interpreted “in good faith” in accordance with the “ordinary meaning” of the “terms” or text of the treaty, in their “context”, and in light of the treaty’s “object and purpose”. This summing up of text, context and purpose is described as a holistic, non-hierarchical exercise, albeit one that

[20] See Vyškovská, 2010: 19.
[21] See Knapp, 1993: 170.

starts with the text of the treaty.[22] The second main principle of the Vienna Convention on the Law of Treaties is that the "preparatory work of the treaty and the circumstances of its conclusion" are only secondary sources of interpretation, to confirm meaning established under the first principle or in case the meaning of the treaty remains unclear or leads to an absurd result.[23]

The relationship between two taxpayers cannot influence *forum shopping.* In the present case, the Convention includes direct regulation for forum shopping (Art. 3 par. 2).

The speciality of the interpretation of international treaties generally is that if there are doubts about the meaning of the word, the rule *in dubio pro libertat*e[24] does not apply.[25] If a legal norm is incomprehensible or ambiguous, the interpretative rules apply directly from the Vienna Convention on the Law of Treaties. The main rule is the use of grammatical interpretation and the condition that the result of the interpretation cannot be manifestly absurd or unreasonable.[26] In the case under consideration, however, the rules laid down in the contract were used as a *lex specialis* to the Vienna Convention on the Law of Treaties rules.

The court thus ruled correctly.

Professor Brzeziński[27] states that the practical application of tax law focused on the result. A similar "diversion" from interpretive purity to argumentative persuasiveness can also be spotted in the Czech judicial praxis.[28]

6 Conclusion

The interpretation of double taxation treaties is not a classic interpretation of tax law, yet these treaties are part of the legal order of every country.[29] International law, although it is place of "foreorigins" of heyday of human rights, does not favour the *in dubio pro mitius* interpretative principle. Hierarchically, the interpretation of double taxation treaties is the place dedicated to legal purism that protects the ordinary meaning of the words, legal customs and, finally, the reasonability of the interpretation. Legal certainty prevails in international law.

Although the tendencies for the protection and enforcement of human rights standards are generally on the rise, the interpretation of double taxation treaties is an

22 Abi-Saab, 2010.
23 Pauwelyn and Elsig, 2013.
24 This principle originated from the Roman legal principle in dubio pro reo. For more details see The Corpus Iuris of Emperor Justinian (529–533 A.D.), Legal Maximes: Digest Book 50 Chapter 17, Dig.50.17.56, Gaius 3 de legatis ad ed. urb.
25 An opposite opinion maintains Larouer, 2009.
26 The Supreme Administrative Court used argumentum ad absurdum to demonstrate the absurdity of alternative interpretation.
27 Brzeziński, 2016.
28 See Hlouch, 2011.
29 See Malenovský, 2004.

exception. The application of the law deriving from these treaties is without added value in the form of human law protection and interpretation recalls "the good old times" of legal positivism.

The authors hope they gather persuasive arguments for the suitability of the Anglo–Saxon interpretative approach on the field of double taxation treaties. This approach emphasises the detachment of tax law from the classical equality and prevailing of the teleological interpretation searching for the correct meaning between lines over others.

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A New Nexus Based on the Concept of Significant Economic Presence: The Digital Permanent Establishment

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Abstract

The traditional concept of EP status is obsolete and enables digital companies to enter a foreign market jurisdiction without having a minimal physical presence. These companies usually do not reach the threshold required to establish the necessary taxable nexus to attribute the profits to that jurisdiction. For the purpose of realigning corporate taxation with the location of actual business activities, Action 1 Final Report relaunches the debate of a new nexus based on the concept of significant economic presence.

Keywords

permanent establishment; virtual permanent establishment; digital economy; fair taxation

1 Introduction

Nowadays, there is a new way for carrying business and a non-resident company can operate in a State without having physical presence at all in the country. Under the current tax legislation, in most cases this leads to zero taxation in the source State because there is not a substantial physical presence established in that territory. So, the absence of coherent source rules has created opportunities for profit shifting that have been compounded by the phenomenon of globalisation and the fast growth of digitalisation. The problem is heightened where such companies adopt certain strategies that eliminate taxation also in the State of residence.

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Losada, S. R. A New Nexus Based on the Concept of Significant Economic Presence: The Digital Permanent Establishment. In: Hulkó, G. and Vybíral, R. eds., *European Financial Law in Times of Crisis of the European Union*. Budapest: Dialóg Campus. 2019. pp. 377–389. DOI: https://doi.org/10.36250/00749.36

Following these premises, the OECD/G20 has launched the Action Plan on Base Erosion and Profit Shifting (BEPS) in an attempt to realign corporate taxation with the location of actual business activities. Particularly, Action 1 deals with the challenges of digital economy. Among the four available options mentioned in BEPS Action 1 Final Report to address the broader direct tax challenges of the digital economy,[2] the Task Force on the Digital Economy (TFDE) only recommends the introduction of modifications to the exceptions from PE status (basically, changes on the preparatory and auxiliary exceptions and amendments on the agency-PE definition). But the fact is that as long as the physical presence requirement within the PE concept remains, the proposed changes on Arts. 5(4) and 5(5) OECD MC will not contribute to the attainment of a fair allocation of taxing rights between the State of residence and the market jurisdiction.

Chapter 7 of Action 1 BEPS Final Report addresses the issue of the nexus and the ability of a company to have a significant economic presence in a market jurisdiction without being liable to tax. At this point, some authors argue that despite not having a physical presence in a territory or a dependent agent therein, a digital company can have a *significant economic presence* in the market jurisdiction. The new nexus based on a significant presence goes beyond the PE concept. Actually, the new nexus is not aimed at strengthening taxation at source, but to restore taxation at the market jurisdiction when activities are linked to its territory. In this sense, in order to avoid an unfair erosion of sovereignty in the market jurisdiction in terms of value created by companies, taxing rights should be recognised to whenever the digital or physical presence of business in a country gives rise to value creation.

The significant economic presence is an undefined legal concept that will be determined on a basis of factors that reveal a permanent interaction with the economy of a country via technology and other automated tools. These factors will be combined with a revenue factor, in order to ensure that only cases of significant economic presence are covered.

2 The Significant Economic Presence Test

2.1 The revenue-based factor

The single significant digital presence does not symbolise the existence of a PE at the market jurisdiction if it is not considered cumulatively with other quantitative elements, such as the volume of income obtained by the non-resident in that jurisdiction that exceeds specific thresholds.

2 Namely, 1. the introduction of changes in the concept of permanent establishment; 2. the introduction of a new tax nexus based on the concept of significant economic presence; 3. a withholding tax on certain types of digital transactions; and 4. the implementation of an equalisation levy on non-taxed or insufficiently taxed profits obtained by non-resident digital companies.

Revenue obtained within a country is certainly one of the strongest indicators of the existence of a significant economic presence in the country concerned. Revenues cannot be considered in isolation to establish nexus; however, in combination with other factors[3] can be used to establish nexus in the form of a significant economic presence in a country's market.

In defining a basic revenue factor, it would be preferable to include all revenue generated by operations concluded remotely by a non-resident company with in-country customers. The expression "all revenue generated" covers online transactions – where ordering, payment and delivery of intangible goods and/or services take place in digital form, and offline transactions – where there is an electronic order of tangible goods than can only be delivered by traditional means. Besides, the threshold should be based on the amount of gross revenue generated, in absolute terms and local currency. Additionally, in order to minimise the administrative tax burden for tax authorities, just as the compliance burden and level of uncertainty for the taxpayer, the threshold should be set at a high enough level. For that matter, the size of a country's market can be relevant in setting the level of the revenue threshold. This is important in order to comply with the principles of neutrality and proportionality. Also, in order to prevent any risk of artificial fragmentation of foreign affiliated entities, the amount of gross revenue should be calculated on a related-group basis rather than on a separate-entity basis. The aggregation rule could be implemented as a rebuttable presumption, allowing the taxpayer to demonstrate that there was no artificial fragmentation of activities. Apart from that, the Final Report suggests the introduction of a mandatory registration system containing sufficient information on determining factors of a significant economic presence.

2.2 Digital factors

A *local domain name* is the digital equivalent of a local physical address. It is fairly common that a foreign enterprise doing substantial cross-border business uses a generic domain name (.com) at its home country and local domain names in each market jurisdiction. The use of local domain names is completely optional but recommended, as it makes easier for users in that country to locate the website and reduces the reputational risk from domain squatting and trademark infringement.

The use of a *local website or other digital platform* including relevant linguistic and cultural peculiarities of target audiences is a good way of connecting with local users and customers.

The same applies to *prices* of products or services, taxes, duties and fees that usually *appear in local currency* with the option of using a local form of payment – the last option

[3] These factors shall be selected considering the features and characteristics of the particular market.

is relevant in countries that have strict banking regulations, currency controls or limited penetration of international credit cards.

All in all, these digital factors reflect the contribution to value a closer and more intense customer relationship in the digital economy.

2.3 User-based factors

Due to the importance of network effect in the digital economy, factors based on users may reflect the level of participation in the economy of a country. The following alternatives are suggested in Action 1 Final Report.

The *number of monthly active users* (MAU) in a country reflects the level of penetration in a country's economy. This expression refers to the number of registered users who access to a digital platform in a 30-day period. However, it is still difficult to interpret the meaning of an "active" user and identify them adequately. Besides that, the reliability of this indicator decreases when multiple accounts or bot accounts come into play. Hongler and Pistone also suggest that the time spent by users on a specific online platform reflects the level of use of the infrastructure in the market jurisdiction (Hongler and Pistone, 2015).

The *regular conclusion of online contracts* is another factor that reflects the level of participation of a foreign entity in the economic life of a country. In the context of digital economy, contracts are usually concluded through a digital platform, without the intervention of a dependent agent in the market jurisdiction. On this basis, the regular conclusion of contracts with residents in a given country might be a factor to consider when applying the significant economic presence test.

Finally, the TFDE suggests to consider the *volume of digital content collected* via a digital platform from users and customers habitually resident in the market jurisdiction. The variety of data collected includes personal data, as well as user created content, product reviews or search histories. This said, difficulties might arise in the application of this indicator because data collected and stored by businesses are not usually classified on a country-by-country basis.

3 Income Attribution to the Significant Economic Presence

3.1 Suggestions of the TFDE

Once the new nexus is established, the determination of income attributable to the significant economic presence is a key aspect. Existing principles and rules for allocating profits – currently based on an analysis of the functions, assets and risks of the enterprises concerned – require substantive reformulation in the context of the digital economy. Although the current PE definition was amended and even if a new nexus based on the concept of significant economic presence were implemented, if allocation rules rely on a physical presence threshold and there is not a major change of the rules for the attribution of profits, no reallocation of income will take place in the digital economy (Hongler and Pistone, 2015).

The TFDE's Final Report analyses the alternative use of methods based on fractional apportionment and modified deemed profit methods.

3.2 The new PE nexus as proposed by Hongler and Pistone and Avi-Yonah and Halabi

Following the publication of Action 1 Final Report, Hongler and Pistone came forward with an innovative proposal supporting the introduction of a new Art. 5(8) of the OECD MC. The aim of this new provision is not to strengthen taxation at source or replace the existing rules on the allocation of taxing powers, but to allow the market jurisdiction to preserve its sovereignty on taxation of business profits that have arisen in connection with activities effectively linked to that territory. In other words, it is just about adapting the PE concept to the new era of digital economy and taking into consideration the evolution of the PE towards a new PE nexus based on digital presence, while respecting the essence of the existing principles of international tax law.

The new PE concept, as a nexus for the exercise of taxing powers on business income in the context of digital economy, is grounded in both the sourcing theory and the benefit theory. In this manner, for Hongler and Pistone, the new PE nexus should consist of four main elements: 1. digital services; 2. user threshold; 3. a certain time threshold; and 4. a *de minimis* revenue threshold (Hongler and Pistone, 2015).[4]

The authors consider that this new threshold shall be drawn upon the following elements: a user-based threshold (instead of a customer-based threshold), a certain time threshold and a *de minimis* revenue threshold. However, Hongler and Pistone recall that such a proposal would require further clarification. More specifically, the terms "database", "online marketplace", "storage room", "advertising services", "website", "per month" or "domiciled" shall be adequately defined by the OECD in the respective Commentary. Additionally, customer location is a key element in determining where value creation occurs. At this point EU VAT rules could be used as a model for an

[4] The suggested new paragraph to be added to Art. 5 OECD MC would be worded as follows: *"If an enterprise resident in one Contracting State provides access to (or offers) an electronic application, database, online market place or storage room or offers advertising services on a website or in an electronic application used by more than 1,000 individual users per month domiciled in the other Contracting State, such enterprise shall be deemed to have a permanent establishment in the other Contracting State if the total amount of revenue of the enterprise due to the aforementioned services in the other Contracting State exceeds XXX (EUR, USD, GBP, CNY, CHF, etc.) per annum."*

adequate legal definition of a PE in the customer's jurisdiction (Hongler and Pistone, 2015).

There is common ground between the proposal presented by Hongler and Pistone and the suggestions submitted by Avi-Yonah and Halabi. The latter authors presented two alternatives to deal with the challenges of the digital economy.[5] As stated above, in order to avoid practical difficulties at the time of attributing profits to a virtual PE, Avi-Yonah suggested levying a withholding tax at the corporate tax rate on the income obtained in the source countries that exceeds the said threshold (Avi-Yonah and Halabi, 2014).

Then, once the nexus is established, Hongler and Pistone suggest the application of a modified split method, combined with an upfront allocation of a partial profit (one third) to the market jurisdictions fulfilling the PE nexus. The other two thirds of the profits would be allocated according to the current transfer pricing standards, which most likely would lead to the allocation of the remaining profit to the State of residence. Regarding the enforcement of the profit attribution method, the authors suggest that just one or several jurisdictions collect the tax due on behalf of the others, while being aware that this may require a great degree of consensus among the countries concerned. Apart from that, other issues such as determining the taxpayer – particularly, in cases where the entity collecting the revenue is not a qualifying company but a mere shelf company –, the interaction with other treaty provisions – especially, Arts. 5(1), 6, 10, 11 or 12 OECD MC – or a multilateral implementation shall require substantial further development. Nonetheless, some questions arise regarding the tax treatment of companies relying on both digital and physical presence, as well as the interaction of the new digital nexus with the PE provisions for traditional businesses and distributive rules (Hongler and Pistone, 2015).

The new PE nexus is not incompatible with the use of withholding taxes; but, according to Hongler and Pistone, the introduction of a new PE nexus would be

[5] The first alternative was adding a new Art. 5(3) to the OECD MC as follows: *"Notwithstanding the preceding provisions, a remote seller constitutes a permanent establishment in a Contracting State if it has gross annual receipts in total remote sales in a Contracting State in the preceding calendar year exceeding $1,000,000, whether such a remote seller satisfy any other definition in this Article 5 or not."* The second alternative suggested by Avi-Yonah and Halabi was making an amendment to Art. 7 OECD MC in the following terms: *"(1) Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein, or unless the income is of a remote seller, in whatever capacity, which has gross annual receipts in total remote sales in the other Contracting States in the preceding calendar year exceeding $1,000,000. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2, or the profits of a remote seller, may be taxed in the other Contracting State. (2) For the purposes of this Article and Article 23A [exemption method] -23B [credit method], the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise."*

a preferable option than a standalone gross-basis final withholding tax (Hongler and Pistone, 2015).

4 The UN Model Services PE Provision

It is also worth recalling that the UN Model contains a services PE provision, as a reaction of the developing countries against the obtention of a high return in the source State by foreign companies involved in the provision of technical services without having a physical presence in that jurisdiction. However, the services PE covers services in general, irrespective of their nature. In this context, Art. 5(3)(b) UN Model includes a services PE provision, with the following wording: the term "permanent establishment" also encompasses *"(b) the furnishing of services, including consultancy services, by an Enterprise through employees or other personnel engaged by the Enterprise for such purpose, but only if activities of that nature continue (for the same or a connected Project) within a contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned".* As can be seen from the UN Model service PE clause, the current services PE definition requires the existence of physical factors in the source State – a fixed place of business or workforce; so, if no personnel are used or the time threshold is not met because of the use of digital means, a service PE will not be deemed to exist under the current UN Model service PE provision. As a result, the source State will not be attributed a taxing right on business services.

Many countries have included a service PE clause on the lines of the UN Model clause: Austria, Belgium, Chile, India, Peru, Spain or the US, amongst others. In addition, when the service PE clause is included in tax treaties, it is common that countries describe the nature of services covered under the clause. Therefore, services in the nature of commercial, technical, advisory and other mediation services are covered under the service PE clause contained in the tax treaties negotiated by the Czech Republic (Skálová et al., 2014). In the case of tax treaties negotiated by India, the service PE clause shall apply only to services that do not qualify as fees for technical services or included services (Gada and Sinha, 2014). In this regard, many tax treaties based on the UN Model indicate that technical and managerial services will not give rise to a PE; however, technical and managerial services are not uniformly exempted from service PE provisions – this is the case of the US–China, US–Thailand or US–Jamaica tax treaties (Arthur et al., 2014). Meanwhile, some of the tax treaties concluded by Austria – specifically, the ones signed with China, Cuba, the Czech Republic, Greece, Hong Kong, Indonesia, Mexico, New Zealand, Singapore and Thailand, amongst others – include the service PE definition as determined by or similar to the UN Model; what is interesting in this case is that the Austrian Ministry of Finance interprets the term services as active services and therefore does not consider lease arrangements to constitute service PEs (Naux, 2014).

Although the service PE concept was initially developed under the UN Model, later it has also been introduced into the OECD Commentary. The OECD's discussion on the service PE concept suggests optional clauses which countries may include in their tax treaties to determine the existence of a service PE, specifically an additional revenue test in certain cases, which ensures that a service PE will be created only where more than 50% of the non-resident's business activities are carried on by a single individual in the source jurisdiction. Australia, New Zealand and Norway have adopted the optional service PE clause of the OECD Commentary. By contrast, other countries such as Denmark, Italy, Mexico, the Netherlands, Portugal or the UK decided not to include the service PE concept in their tax treaties, at least at the moment (Desai and Goradia, 2014).

In any case, some authors consider that the elaboration of a "digital services PE" clause would be an interesting alternative that, moreover, would allocate more income to the source country than applying the new PE nexus (Blum, 2015).

5 The New Article 12A for Technical Services on the UN Model: An Alternative to the New PE Nexus?

The introduction of a new provision on the OECD MC that regulates taxation of services could be another way of strengthening the taxing rights of the source State. In fact, this is precisely the intention of the UN with the inclusion of a *new Article 12A for technical services on the UN Model,* granting the source State the right to tax the gross amount of services fees by means of a withholding tax, without requiring any physical presence in the country of the recipient of the services, neither by the use of workforce nor by a fixed place of business. The rendering of services in another contracting State through digital means would be considered, by itself, sufficient engagement and hence nexus in that State.

Such a provision is aimed at preventing base erosion and profit shifting in the source State through the deductibility of services fees paid to non-residents. It is abundantly clear that developing countries are large importers of technical, managerial and consultancy services. Up to now, fees for technical, managerial and consultancy services in the State of the payer of the fee may be used to shift profits from a profitable group company member to another group member in a low-tax jurisdiction. The payer could deduct the service fee in the source State, reducing its taxable base. And the company receiving the fee will increase its profits, which may only be subject to a low or no tax rate. The new Art. 12A will help to address these issues by allowing the source State to levy a withholding tax on the service fees falling within the scope of this provision (i.e. those involving the application of specialised knowledge, skill or expertise by the service provider in the field of technical, managerial or consultancy services – excluding routine and standardised services).

All in all, Art. 12A UN Model is not introduced to specifically address the issue of BEPS in the digital economy, but it definitely plays a part in counteracting certain cases of tax avoidance in the source State by using digital means. It must be noted that this new article provides specific advantages compared with the services PE provision included in the UN Model (Báez Moreno, 2015): 1. while the current wording of the services PE contains threshold requirements, the new Art. 12A does not include any threshold at all. However, in some cases this advantage turns into a disadvantage, due to problems of enforceability; 2. the existence of a time threshold in the services PE may give rise to an artificial avoidance of the service PE. By contrast, since there is no threshold in the new technical services article, there are not problems regarding avoidance of source taxation; 3. important difficulties exist for attributing profits to a service PE; by contrast, the new Art. 12A grants the source State the right to tax the gross amount of services fees by means of a simple withholding tax. A final WHT on a gross basis removes the need for source and computational rules; the WHT will be imposed on the full amount of the service fee paid to the non-resident service provider without the deduction of any expenses, at the time the service fee is paid or soon afterwards. In favour of simplicity and certainty, a final WHT on fees for technical, managerial and consultancy services rendered with the use of digital means is presented as a better choice than a non-final WHT on fees for technical services on a net basis, at least from the perspective of the source State. Developing countries usually do not have enough administrative capacity to administer a non-final WHT, which requires levying a non-final WHT at a first stage, creditable against the tax payable by the non-resident in the source State; later, at a second stage, the taxpayer would have to file a tax return to receive a refund for the excessive WHT paid. It is precisely for this reason that the proposed tax rate should be anywhere between 10 and 15%, in order to reach a balanced attribution of taxing rights between the residence and the source States. So, a final withholding tax on fees for technical, managerial and consultancy services rendered with the use of digital means is suggested, keeping in mind that the State of residence would grant a credit for the tax paid in the source State. In this vein, the State in which fees for technical, managerial and consultancy services arise – i.e. the residence State of the payer of the fees – has the primary right to tax those payments, and the residence State of the payee is obliged to eliminate double taxation of those fees either by granting a credit or an exemption for taxes paid in the source State (Arts. 23A and 23B of the OECD/UN Models).

Anyhow, to avoid problems of characterisation in relation to other distributive rules – such as the royalties' article, business profits' article or the service PE provision – and in order to respect the principle of neutrality, it would be advisable to delete the words "technical, managerial or consultancy" from the new services article on the UN Model, so that the new provision should be applied to services in general.

In short, a new provision on technical services (or services in general) is more desirable than a service PE approach, because the absence of thresholds and the lack of issues in the attribution of profits facilitate its enforcement.

Finally, other options should be considered as an alternative to the cumbersome methods to attribute income to the significant economic presence, such as the introduction of a withholding tax on digital transactions or the eventual introduction of an equalisation levy on non-taxed or insufficiently taxed profits (Rodríguez Losada, 2018).

6 A Common Reform of the EU's Corporate Tax Rules for Digital Activities: A New Nexus Based on the Concept of Significant Digital Presence

The European Commission was aware that the current corporate tax rules are not fit for the modern global economy. In this context, the European Commission has just launched a new package of proposals to ensure that digital business activities are taxed in a fair way within the EU. The Commission states in its Communication *Time to establish a modern, fair and efficient taxation standard for the digital economy,* dated 21 March 2018, that the EU Digital Single Market needs a stable tax framework that is consistent with the current digital business models. To this end the Commission proposes a comprehensive solution that includes three key elements: 1. a new Directive on corporate taxation of a significant digital presence; 2. integrating the provisions in the proposed Directive into the proposals for a Common Consolidated Corporate Tax Base (CCCTB); and 3. extending the solution to the global level (non-EU jurisdictions) through Member States' tax treaties.

The *Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence* provides rules expanding the concept of a PE. This is done by establishing a taxable nexus for digital businesses that are active across borders with no physical commercial presence. Once the significant digital presence (i.e. the virtual permanent establishment) is determined, the proposal sets out principles for attributing profits to a digital business. This initiative aims to protect the integrity and proper functioning of the single market, ensuring that domestic corporate tax bases are not eroded by digitalisation. Therefore, this proposal was also designed to make sure that Member States' finances are sustainable. Finally, the initiative will contribute to preserving social fairness and a level playing field between all businesses.

This Directive is part of a major package that includes a Recommendation to Member States for including rules on a significant digital presence and profit allocation in their tax treaties with third countries, a proposal for a Directive including an interim solution (the Digital Services Tax) and the abovementioned Communication setting the context and explaining the articulation between the proposals.

As regards the proposal for a Directive on corporate taxation of a significant digital presence, it is important to note that it affects corporate taxpayers that are established in the EU, as well as enterprises that are established in a non-EU jurisdiction with which there is no double taxation convention with the Member State where the significant digital presence of the taxpayer is identified (Art. 2). That is, in order to avoid a contravention of those tax treaties, the proposal does not affect enterprises that are established in a non-EU jurisdiction with which there is a tax treaty in force with the Member State of the significant digital presence. Anyway, there is an exception to this rule if the applicable tax treaty with a non-EU jurisdiction contains a similar provision on a significant digital presence which creates similar rights and obligations in relation to that non-EU jurisdiction.

The concept of significant digital presence is developed to establish a taxable nexus in a jurisdiction, expanding the existing concept of a PE. The three user-based factors proposed for establishing a taxable nexus of a digital business in a Member State are the following: revenues from supplying digital services, the number of users of digital services and the number of contracts for a digital service (Art. 4). It is therefore obvious the influence of Action 1 Final Report conclusions on the Commission proposal on significant digital presence. The proxies for determining the digital footprint of a business in a jurisdiction are based on the same indicators of economic activity, which reveals that both the OECD and the EU are perfectly in tune with each other. In any case, different thresholds apply to any of the three user-based criteria.[6]

Besides that, the proposal sets out rules for attributing profits to a significant digital presence (Art. 5). In this regard, the proposed rules for attributing profits to digital businesses are based on the current transfer pricing principles (taking into account the assets used, functions performed and risks assumed) and make it clear that the attribution of profits to a digital business should reflect the particular ways in which digital activities lead to value creation, through use of criteria such as data and users.

This solution is aimed at improving the perception of fairness for EU citizens by ensuring that large companies with significant digital activities do not escape taxation in the EU. The new rules would remove distortions of competition, so businesses would benefit from a more level playing field. On the other hand, this option would also have a positive impact on the public finances of national tax administrations. Conversely, the implementation of this option would lead to an increase in the compliance costs of businesses falling under the scope of this solution. Concurrently, national tax administrations would also incur costs for implementing the new tax nexus. In any

[6] A digital platform will be deemed to have a taxable digital presence (or a virtual PE) in a Member State if it fulfils one of the following criteria: 1. it exceeds a threshold of 7 million Euros in annual revenues in a Member State; 2. it has more than 100,000 users in a Member State in a taxable year; or 3. over 3,000 business contracts for digital services are created between the company and business users in a taxable year. As we argued before, the thresholds should be high enough to exclude small cases where profits attributable to a digital presence would not cover the tax compliance cost for a PE.

case, this solution would contribute to the long-run sustainability of the corporate tax system and to a fairer distribution of tax revenues.

7 Conclusion

The suggestions included in Action 1 Final Report left a bittersweet sensation in those who expected a battery of more innovative recommendations from the OECD to deal with the tax challenges of digital economy. In fact, except in the case of the changes in the OECD MC regarding the concept of permanent establishment, the OECD has not yet suggested the implementation of specific measures to address the broader direct tax challenges raised by the digital economy. Instead, BEPS Action 1 Final Report simply lists different options, being the introduction of a new tax nexus based on the concept of digital economic presence one of them. The significant economic presence is determined on a basis of digital and user-based factors that will be combined with a revenue factor. But, once the new nexus is established, some problems may arise regarding the calculation of income attributable to the significant economic presence and the collection of the tax due. In this respect, some argue that the introduction of a digital services PE clause in the OECD MC would be an interesting alternative that will contribute to allocate more income to the market jurisdiction than applying the new PE nexus. But the introduction of a new provision on technical services (or services in general) in the MC would be a better option than a service PE approach, because the absence of a threshold and the lack of issues in the attribution of profits facilitate its enforcement.

As far as it can be ascertained, the OECD and the EU are pulling in the same direction, although it seems that the European Commission has taken a decisive step towards fair taxation of the digital economy. It remains to be seen whether these proposals are successful or fall by the wayside.

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The Current International and European Actions for De-offshoring the World

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Abstract
This article discusses the most recent actions at international and European level for de-offshoring the world. From the automatic exchange of information to the sophisticated rules to fight money laundering and the use of the financial systems for terrorist financing, everything seems to go into the direction of a world tax transparency. However, there is a dark side of these international efforts that brings to re-offshoring again, in a never-ending story of States trying to eat the revenue from each other.

Keywords
automatic exchange of information; tax transparency; offshore; international tax evasion and fraud

1 Introduction

The scope of this paper is to describe the tremendous acceleration on the most sophisticated measures put in place at international level and within the European Union, for de-offshoring the world. The speed is certainly related to the progress of technology that caused various scandals (LGT, UBS and Falciani cases) and media

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leaks [in sequence, Wiki Leaks (2010), Offshore Leaks (2013), Lux Leaks (2014), Swiss Leaks (2015), Panama Papers Leaks (2016)]. There is a multilevel sphere of the automatic exchange of financial information that received a first boost from the 2010 US Foreign Accounts Tax Compliance Act (FATCA), aimed at ensuring that the US Internal Revenue Service could identify and collect the appropriate tax from US persons holding financial assets wherever outside the United States. A second boost arrived on 20 July 2013, when the G20 Finance Ministers and Central Bank Governors endorsed the OECD proposals for a global modern automatic exchange of information (AEOI) in the multilateral context. The level of the European Union is in the middle with a new approach to administrative cooperation in the field of taxation that is now more than a reality.

However, whether it is more likely than not that in the long run the world will be indeed affected by these measures (the sticks), many doubts arise on the rate of success of de-offshoring in the short term, since each single State of the international community prefers to take care of its own interest with unilateral measures (the carrots) bringing back home alone its slice of the undeclared financial cake and, why not, trying to eat the portions of other States, so inducing to offshore again. In reality, it is a never-ending story (Marino, 2017).

The paper is conceptually structured in three parts. The first is describing the international sticks, the second is describing the European sticks, while the third tries to show the resistance of countries and the carrots they offer to attract (transparent and opaque) high net worth individuals.

2 The Latest International Measures Fighting the Offshore World

The Multilateral Convention on Mutual Agreement Assistance in Tax Matters (OECD Multilateral Convention on MAATM), put forward by the OECD in cooperation with the Council of Europe, which opened for signature by member states of both organisations on 25 January 1988, is the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance, a top priority for all countries.

This sleeping beauty was amended on 31 March 2010, to respond to the call of the G20 at its April 2009 London summit to align it to the international standard on exchange of information upon request and to open it to all countries, in particular to ensure that developing countries could benefit from the new more transparent environment.

Its media turnaround was when Switzerland signed it with no reservation on 15 October 2013, and deposited on 26 September 2016, through its Ambassador at OECD Urlich Lehner, the instrument of ratification with entry into force on 1 January 2017. Currently, 125 countries have signed the Convention, including 17 jurisdictions covered by territorial extension. With the incredible exception of the United States, this represents a wide range of countries including all G20 countries, all BRIICS, all OECD countries, major financial centres and an increasing number of developing countries (oecd.org).

The Convention has taken an increasing importance with the G20's call for the automatic exchange of information (AEOI) to become the new international tax standard of exchange of information. Strange but true, the Convention, by virtue of its Art. 6, requires the Competent Authorities of the Parties to the Convention to mutually agree on the scope of AEOI and the procedure to be complied with. With that background, the OECD has approved on 15 July 2014, a Common Reporting Standard (CRS) which is based on 1. a model Competent Authority Agreement (CAA) providing the international legal framework for the automatic exchange of CRS information; 2. the CRS; 3. the Commentaries on CAA and CRS; and 4. the CRS XML schema user guide.

The Status of commitments released by the OECD in August 2018 shows that the incredible amount of 103 countries, among early and later adopters, shall undertake exchanges by September 2018, while 1 country by 2019. The United States is out of this level playing field (oecd.org).

At the same time, information from academic studies and media leaks demonstrate that professional advisers and other intermediaries continue to design, market or assist in the implementation of offshore structures and arrangements that can be used by non-compliant taxpayers to circumvent the correct reporting of relevant information to the tax administration of their jurisdiction of residence, including under the CRS.

Upon the mandate received with the Bari Declaration, issued by the G7 Finance Ministers on 13 May 2017, the OECD released the last on 8 March 2018 the *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures* and its Commentary with the scope to oblige an Intermediary or user of specifically targets Passive Offshore Vehicles that are held through an Opaque Structure, to disclose certain information to its Tax Administration. Where such information relates to users that are resident in another jurisdiction, it would be exchanged with the Tax Administration(s) of that jurisdiction in accordance with the terms of the applicable international legal instrument.

The Model Rules specifically define: 1. the "CRS Avoidance Arrangements" as any Arrangement for which it is reasonable to conclude that it is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof; 2. the Opaque Offshore Structure as a Passive Offshore Vehicle being a Legal Person or Legal Arrangement that does not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises in the jurisdiction where it is established or is tax resident; and, last but not least, 3. the Intermediary, being any person responsible for the design or marketing of a CRS Avoidance Arrangement or Opaque Offshore Structure ("Promoter"), as well as any person that provides Relevant Services in respect of a CRS Avoidance Arrangement.

The non-compliance to the Model Rules shall bring monetary as well as non-monetary penalties on the Professional Intermediaries.

3 The European Developments on the Automatic Exchange of Tax Information (AEOI)

The "big bang" at European level is represented by the adoption of Council Directives 2011/16/EU of 15 February 2011, on "administrative cooperation in the field of taxation and repealing Directive 77/799/EEC" (hereinafter: DAC), the aim of which is to propose a new approach in order to overcome the negative effects of an ever-increasing globalisation on the internal market.

The DAC is under many aspects revolutionary. First of all, it is designed to follow a more intrusive mechanism for the collection of tax information other than VAT, custom and excise duties, allowing rules that make possible to cover all legal and natural persons in the European Union, taking into account the ever-increasing range of legal arrangements, including not only traditional arrangements such as trusts, foundations and investment funds, but any new instruments which may be set up by taxpayers in the Member States (Art. 3). Second, Member States could not refuse to transmit information because they have no domestic interest or because the information is held by a bank, any other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person (Art. 18). Third, time limits have laid down in order to ensure that the information exchange is timely and thus effective. Last but not least, among the classical alternatives, it is expressly recognised that the mandatory automatic exchange of information without preconditions is the most effective means of enhancing the correct assessment of taxes in cross border situations and of fighting fraud. To this extent, Art. 8 imposes the automatic exchange of available information (AEOI), from the Member State of source to the Member State of residence, regarding taxable periods as from 1 January 2014, on five initial categories of income and capital: a) income from employment; b) director's fees; c) life insurance products not covered by other Union legal instruments on exchange of information and other similar measures; d) pensions; and, e) ownership of and income from immovable property.[2]

Notwithstanding, just as DAC entered into force on the 1st of January 2013, after a few months, the 12th of June 2013, the European Commission released a proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory AEOI in the field of taxation on dividends, capital gains, any other income generated with respect to the assets held in a financial account, any amount with respect to which the financial institution is the creditor or the debtor, including any redemption

[2] The DAC revolution is also confirmed by the *Report from the EU Commission to the European Parliament and the Council on the overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation,* of 17 December 2018, COM(2018)844 final.

payments, and account balances [COM(2013) 348 final]. Certainly, the agreements that many European governments have concluded with the US as regards the US Foreign Account Tax Compliance Act (FATCA) have given further impetus to AEOI as a way of combating tax fraud and evasion. An expanded AEOI, indeed, would remove the need and incentive for EU Member States to invoke the "most-favoured-nation" provision of Art. 19 of DAC, with a view to concluding bilateral or multilateral agreements that may be considered appropriate on the same subject in the absence of a relevant Union legislation, but which could lead to difficulties for economic operators, if not to distortions and artificial flows of capital within the internal market.

The proposal COM (2013)348 final, has been adopted through Council Directive 2014/107/EU of 9 December 2014 (DAC 2), with the consequence that all financial flows shall automatically be exchanged with regard to taxable periods as from 1 January 2016 (Austria as from 2017).

However, this is not the sole extension of DAC. On 8 December 2015, the European Council adopted another extension with Directive 2015/2376/EU (DAC 3) aimed at improving tax transparency on tax rulings given by States to companies in specific cases about how taxation was structured. On 25 May 2016 the European Council adopted Directive 2016/881/EU (DAC 4) extending mandatory automatic exchange of information to country-by-country reporting (CbCR) in order to fight aggressive tax planning of multinational corporations following BEPS Action 13.

Finally, two more recent amendments. On 6 December 2016, the European Council adopted Directive 2016/2258/EU (DAC 5) by providing tax authorities with access to anti-money laundering information. On 25 May 2018, the European Council adopted Directive 2018/822/EU (DAC 6) as regards as mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. This last Directive, following the parallel work of the OECD on the Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures and its Commentary, aims at ensuring early information on cross-border arrangements designed by the tax intermediaries or taxpayers, by creating an obligation to report such schemes on intermediaries (or taxpayers if intermediaries are not located in the EU) and by inserting the collected information in the automatic exchange of information between Tax Authorities within the European Union (by way of the disclosed arrangements to a central directory where all Members States have access to).

The definitions are quite similar to those of the OECD Model: 1. cross-border arrangement means an arrangement concerning either more than one Member State or a member State and a third country that presents an indication of a potential risk of tax avoidance; and 2. intermediary means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

4 The European Collection and Exchange of Information under Anti-money Laundering Legislation (AML)

Everything started after the 9/11 attacks when President Bush signed into law the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001,* better known as the USA PATRIOT Act. In particular, Title III has designed the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 containing provisions to financial institutions for the identification of terrorists through an information compliance on anyone using US jurisdictional means (as any Dollar denominated transaction could be).

As a perfect tsunami, this initiative expanded all over the civilised world, for example, in Europe, where Directive (EU) 2015/849 of 20 May 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (replacing the old Directives 2005/60/EC of 26 October 2005, and 2006/70/EC of 1 August 2006) provides for a stronger customer due diligence obligations on a large variety of intermediaries and professionals with the scope to intercept the *"beneficial owner as the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted"*. On 30 May 2018, such Directive has been further amended by Directive 2018/843/EU, by providing more stringent obligations to make focus on the beneficial owner. Essentially, each single EU Member State must have a financial intelligence unit (FIU) with the power: 1. to control intermediaries and professionals in their customer due diligence obligations; 2. to collect information on the above defined "beneficial owners"; 3. to cooperate and exchange information with FIUs of other EU Member States. Since the area of the "beneficial owner" definition or, alternatively, the Know Your Client (KYC) approach, under the AML is by far larger than any "beneficial owner" perimeter under tax law principles, the level of information obtained is much broader and intrusive and could lead to problems in terms of taxpayers' protection rights. It must be pointed out an everything but homogeneous approach in "beneficial owner" definitions which could have consequences in the correct flow of information.

The above tsunami wave is clear at international and European level: all countries involved do have an anti-money laundering legislation (AML) and related organisation. It is worth noting that for all countries concerned, AML is in essence a criminal law providing limitations to the individual freedom both on the side of intermediaries and professionals as well as on the side of beneficial owners (in this latter case either for money laundering tax related crimes, i.e. aggressive tax avoidance, tax evasion and fraud, or, in some cases, for the so called "self-money laundering"). One outstanding point of further investigation is the possible confusion between administrative cooperation in tax matters (less intrusive information balanced with less taxpayer protection) and the judiciary cooperation in tax matters (more intrusive information balanced with more taxpayer protection). The additional role of FIUs with reference to AML/KYC definitions which are not at all homogeneous all over European Member States may indeed contribute to this overlapping with the consequence to have an explosive cocktail of more intrusive information and less taxpayer protection. On top of this, on 6 December 2016, the European Council adopted Directive 2016/2258/EU (DAC 5) by providing tax authorities with access to anti-money laundering information.

5 The European List of Non-cooperative Jurisdictions for Tax Purposes

On 5 December 2017, the EU Council adopted long awaited conclusions on the establishment of a EU list of non-cooperative jurisdictions for tax purposes. Notwithstanding the common approach achieved by EU Institutions has to do with the prevention of third-countries to use harmful corporate tax practices beyond the European territory, it is worth noting that the main criterion driving the list is the application of or the commitment to the OECD AEOI/CRS that has a major impact on the monitoring of individual taxpayers' behaviours. The third country should not only have committed to and started the legislative process to effectively implement the CRS, but must also be able to provide initial exchanges in 2018 at the latest, and have arrangements in place to be able to exchange information with all EU Member States by the end of 2017, either by signing the Multilateral Competent Authority Agreement (MCAA) or through bilateral agreements.

6 The Paradox of the "Realpolitik", Alias Global Re-offshoring Measures

After the above described tax policy trends, it is now the time to answer a simple question: Are AEOI/CRS/AML strong and effective solutions accepted by the international community to fight the offshore world?

Apparently yes, but the answer is no. Few examples arrive from the United States. According to the majority and minority staff report *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts* released on 26 February 2014, by the Permanent Subcommittee on Investigations at the United States Senate led by Carl Levin, FATCA's disclosure requirements have been limited and weakened by its implementing regulations, and may allow many US taxpayers to continue concealing their accounts in Switzerland and elsewhere [part V, B (3)(b)(iii)].

At the same time, according to the Financial Time Report *US Tax Havens: The New Switzerland?* by K. Scannell and V. Houlder, published on 8 May 2016, in South Dakota financial assets held by local trusts increased from USD 32.8 trillion of 2006 to USD 226 trillion of 2014, and the number of trust companies increased from

20 to 86 in the same period. This is possible because the United States is strong enough to pretend worldwide financial information through FATCA on its citizens, but it is zero generous in outbound transparency.

Las but not least, H.J. Res. 41 through Public Law 115–4 of 14 February 2017 has been approved (first signature of President Trump) which nullifies the *Disclosure of Payments by Resource Extraction Issuers* rule finalised by the Securities and Exchange Commission on 17 July 2016 (the rule, mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act, requires source extraction issuers to disclose payments made to governments for the commercial development of oil, natural gas, or minerals).

6.1 The situation is not different in the European Union

The Report on the inquiry into money laundering, tax avoidance and tax evasion released on 16 November 2017 by the European Parliament Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion (so called PANA Committee), lists the following critical aspects:

At point 190, concludes that the lack of cooperation and coordination between and among the EU Institutions and agencies, Member States and competent authorities on different pieces of legislation with regard to tax evasion, tax avoidance and money laundering is a systemic problem;

At point 191, concludes that some Member States tend not to provide relevant information in the desired quantity and quality and in general do not seem to exert genuine efforts to crack down on tax avoidance and tax evasion, which constitutes a breach of the principle of sincere cooperation enshrined in the TEU; concludes from this that the Member States are seeking to conceal their own misconduct;

At point 202, regrets that tax policy issues at Council level are often blocked by individual Member States, in order to protect tax havens; calls, therefore, for the abolition of the principles of unanimity of the Member States in tax matters in order to make progress in the fight for tax justice and reduce the burden on EU citizens;

At point 206, identified several cases of maladministration with reference to the application of the DAC and AML directive.

Following the PANA Committee Inquiry Report, the European Parliament adopted Recommendation P8_TA (2017) 0491 of 13 December 2017 to the Council and the Commission, where many examples of re-offshoring ambitions are listed:

At point 16, stresses that there is a need to be vigilant to ensure that Brexit would neither favour tax competition between the 27 remaining Member States to attract certain industries and services currently located in the United Kingdom, nor lead to a relaxation of efforts in fighting tax evasion on the UK's side, including its overseas and related territories;

At point 29, emphasises that at least four Member States would be included on the list of non-cooperative jurisdictions if screened according to the same criteria;

Notes that, according to the most recent OECD data on foreign direct investment, Luxembourg and the Netherlands combined have more inward investment that the US, the vast majority of which is in special purpose vehicles with no substantial economic activity, and Ireland has more inward investment than either Germany or France;

At point 73, considers it regrettable that the provisions of DAC, which were in force during the time covered by the Panama Papers revelations, were not implemented effectively and that the amount of information and rulings exchanged was low.

6.2 International level

At international level, the Commentary to the Rule 1.1(e)(ii) of the 2018 OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, expressly states that: *"A number of jurisdictions offer tax incentives to individuals to encourage them to take up tax residence in that jurisdiction. These incentives may involve temporary or permanent exemptions from tax on foreign source income and obtaining such tax residency may only require the resident to have a minimal presence in that jurisdiction. A person who is tax resident in more than one jurisdiction may use such a certificate to not declare the fact the he or she is a tax resident in another jurisdiction. Presenting such a certificate to a Financial Institution as proof of residence in order to undermine the Financial Institution's due diligence procedures would fall within the specific hallmark in Rule 1.1(e)(ii) as an Arrangement for which it is reasonable to conclude that it has the effect of undermining or exploiting weaknesses in, the due diligence procedures used by Financial Institutions to correctly identify all the jurisdictions of tax residence of an Account Holder and/or Controlling Person."*

7 Conclusion

The dilemma is where the international tax policy stands between the edge of the automatic exchange of information for de-offshoring and the edge of any unilateral tax solution of equivalent effect, which may be inducing to re-offshoring. This brings to two concluding remarks. The first is related to the relation between Machiavellian unilateralism and Habermas cooperation, since the latter means to share the revenue related to "datafication" with other members of the international community, while any unilateral initiative brings money straight to the domestic revenue. As "The Leopard" of Giuseppe Tomasi di Lampedusa warns, everything must change because everything remains as it is (Tomasi Di Lampedusa, 1958), and the feeling is that this ocean of information, cooperation and recommendation, risks to be useless in the long run or, better, could only be useful for large but not all taxpayers. The second has to do with the other face of transparency being the privacy (as the recent Facebook/Cambridge Analytica scandal demonstrates). In principle, the United States and Europe have different views on what privacy means. While in the United States privacy is meant as the right of a consumer to know how and where his personal data are being held, and must be balanced with the interests of the business sector and the society as a whole, in Europe privacy is prominently a matter of dignity of the human being, hence a fundamental right of citizens within the society. So far, AEOI is an example of the growing State control on "datafication", like a fuel for impenetrable State authoritarianism, the need of future investigation is more perceived on the individual as taxpayer rather than on the individual as consumer. The mission in this future scenario is probably to analyse how far supranational rules governing big data are being democratically developed, with the scope to go beyond the proportionality principle and tail some sustainable protection rules for the taxpayer.

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Public Levies – Revenues or Expenditures of Public Budgets?

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Abstract

The Constitutions of 1920 and 1948, unlike recently, do not mention the charges in addition to taxes when defining mandatory payments. "Veřejné dávky" (public levies) were understood to be a payment which was imposed on members and participants of such corporations on the basis of a public authority (state and public self-governing corporations) in order to cover the payment of public needs. However, the primary method by which the state has provided the necessary means to cover its expenses was the charges. The core of these charges was equivalency of the mutual fulfilment. Secondly, the principle of requiring funds from the members of the state collective without immediate consideration was followed, i.e. the institute of taxation. In addition to these terms, for example, the term contribution is used for mandatory payments. In a number of cases, the term contribution is linked to the expenditure side of budgets and so often coincides with the concept of subsidy. On the expenditure side of the budget, the term "veřejné dávky" (public benefit) can be used for payments which, given their nature, are provided from the public budget. Differentiation of the use of the term "veřejné dávky" (public benefit eventually public levies) can lead to misunderstandings, which should be solved by the legal terminology.

Keywords

public levy; public benefit; charge; contribution; subsidy

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1 The Legal Terminology of Mandatory Levies

Legislators[2] in representative bodies of all levels, i.e. entities deciding that some levies are enacted, frequently tackle the question of how to correctly term the payment that they want to implement. The issue is not only to avoid problems and disputes regarding the possibility of collecting and enforcing mandatory payments but also to ensure that a new legislation does not conflict with the Constitution or the Charter of Fundamental Rights and Freedoms. This issue raises concurrently the question of whether to use a generic term for all payments or a group of payments in the area of spending.

Financial law regulations apply to the certain sphere of economic processes that are expressed in the monetary form. The ways in which legislative practice takes over and uses theoretical economic concepts are different but, generally, it can be said that legal norms consider the knowledge of economic science to be generally valid and recognised. While the legal norms are formally exempted from the necessity to indicate the origin of the economic concepts that are taken over, they also create a situation in which their content does not have to be understood and interpreted uniformly. In addition to merely acceptance of the economic categories as they are generally valid, other forms of mutual relation between theoretical economic constructions and their legal regulation are practiced.

The requirement that the liability to pay tax or charge should be based on a legal definition in the rule of law has already appeared in Adam Smith's work and has been accepted as one of the underlying principles contained in the Declaration of the Rights of the Man and of the Citizen of 1789. Principles, stipulating the necessity to define citizens' liability to pay tax or charge towards the state through the law can be virtually found in all our Constitutions – both in the Constitution of 1920 (section 111 of the Constitution of 1920) and in the Constitution of 1948 (section 33 of the Constitution of 1948) or in the Constitutional Act on the Czechoslovak Federation (Art. 12 of this Act). This principle of legality is not formulated expressly in the Constitution of 1960. When considering the provisions of the Charter of Fundamental Rights and Freedoms, they confirm that the principle of legality of taxes and charges is part of the constitutional order even today. Art. 4 (1) of the Charter of Fundamental Rights and Freedoms refers to the possibility of imposing a liability only on the basis of the law and within their limits while respecting fundamental rights and freedoms. This general principle is specified by Art. 11 (5) for taxes and charges which may be imposed under that provision only on the basis of the law. However, none of the above-mentioned constitutional legal norms enacted within the territory of the Czech Republic have defined what is meant by the tax or charge and does not address the question whether the term tax or charge should be replaced by a more general term. This issue is only the object of the theoretical works regarding financial law.

2 This paper has been elaborated within the programme "PROGRES Q02 – Publicization of Law in the European and International Context" which is realised in 2019 at the Faculty of Law of the Charles University.

In the past, the name of the payment has only played a secondary role. The decisive factor for the construction of state revenues was the choice of such tool that would bring the necessary revenues to the Treasury and, at the same time, would contend with the least resistance of the obliged entities. The definition contained in a particular law is usually a definition applicable within the frame of such particular law, when the legislator defines what he will understand under a certain term. However, such binding definition of the legal terms (through the fact that is applicable only for the particular legal relationship) given by the legislator beforehand, exists merely as a legal concept (as opposed to facts that exist independently of the legal relationship). Our laws and other generally binding legal regulations sometimes tend to the so-called legal definition method, i.e. to determine the content of some general terms when the particular law applies, especially if the content of the relevant term differs from the generally recognised content of this term. The definition of the term may be used in the same wording in more than one law or it may apply only to a particular law. If other law or laws also refer to it, such definition becomes a generally accepted definition of a particular concept and is associated with an unambiguous meaning. However, if the definition of a term differs in different laws, there may be a problem in the general understanding of a particular term (and thus an interpretative problem occurs), not only from the view of legal theory but also from the view of the application.

2 Public Levies ("veřejné dávky")

The state authority realised, from the embryonic forms of its existence, that by requiring material or monetary payments from the members of the state collective, the state affects other than proprietary relationships. The privilege to levy[3] has always been the right of a public corporation to impose and collect taxes to use them freely and to set rules for that purpose – the state has an unlimited privilege to levy. Even today, it could be said that it is the prerogative of the state to impose and collect taxes[4] and charges assuming that they are determined by law.

The Constitutions of 1920 and 1948 do not mention the concept of charges in addition to the term taxes (both terms are currently included in the Charter of Fundamental Rights and Freedoms) but public levies ("veřejné dávky"). Public levies were recognised as payments that were imposed on the basis of the public authority order (i.e. state and public self-governing corporations) on members and participants of such corporations in order to cover the public needs (Drachovský, 1934: 314). Public levies were legally defined as a bond of public law where the creditor is a state or a public corporation and the debtor is the member or the participant of that corporation.

[3] The term "berně" was very often used for designation of taxes in the past centuries. The term "berní výsost" (privilege to levy) is derived from the term "berně". We could use the term "privilege to tax" today.

[4] The analysis of the term tax is beyond the scope of this paper.

Public levies could be set out by state or self-governing corporations on the basis of the authorisation laid down in the law. As a generic term, the concept of public levies includes special elements – taxes and charges. These were both payments, that were imposed independently, and surcharges (payments bounded to another payment liability) levied in favour of the collecting body or without such a direct link to that body. These payments were not only taxes and charges but also their accessories (penalties, etc.). Public levies have always been a term only for payments of public character (it could not therefore be a payment of a private-law nature – e.g. telephone charge and fee, even if the term "charge" or "fee" is used in this particular term). Sometimes these public levies were also referred to as "taxes in the broader sense of the word" and we also come across the term "berně".[5]

It is also worth mentioning that the Municipal Financial Amendment – Act No. 329/1921 Coll.,[6] laid down the privilege of municipalities to levy taxes – the possibility to impose levies on municipality citizens as a liability towards the municipality (both the material and monetary payments). Within the monetary payments there were contributions, charges, and levies. Levies could be imposed as a general contribution that cover the municipalities' expenditures in the form of the surcharges set out by the levy norm or as an individual municipal levy. Unlike levies, the charge or contribution was associated with a certain benefit that the person who had to pay them gain in return. The value of the charge should be the equivalent for the use of public facilities (i.e. charge paid for the use of water supply) or for the operation of the administrative authority carried out in favour of the applicant – the payment was specified in advance for all entities and it was categorised by particular rates. The value of the contribution was the equivalent for the specific economic benefit that an individual gained by using a particular device – even if he did not have to use it. Surcharges and contributions were thus imposed in the sphere of private law and they were of a different nature than levies – the character of levies was closer to the character of taxes (levies were either mandatory or facultative).

Although the term of public benefits is currently not usually used in legal norms the state can obtain resources for performing its functions both in the form of taxes or charges or other similar payment liabilities, as long as the state is authorised by law. Given the fact that a number of theoretical contributions from the field of financial law and financial science is devoted to the issue of taxation, this paper focuses on some other mandatory payments.

3 Charge

The first method used by the state for obtaining necessary resources to cover its expenditures was the sale of certain rights, privileges, payment for the possibility of

5 Considering the term "berně" see footnote 7.
6 For more details see Šafář and Zeis, 1936.

carrying out certain activities, etc. For these rights, performance of particular activities, etc., a consideration was required. This payment was named by different terms and in the territory of our state these various terms were unified under the term charges. The core of the concept of charges was the consideration for the concurrently gained benefit in favour of the taxpayer, i.e. the equivalence of mutual fulfilment. Secondly, the principle of requiring funds from members of the state collective without immediate consideration was applied, i.e. the concept of tax.[7]

It can be said that charges are payments imposed due to a specific activity of public facilities when this activity is triggered by an individual who pays the charge. The obligation that arises in these situations is reciprocal – the principle *quid pro quo* applies – the commitment of the state to do something in favour of the individual and the liability of the individual to pay for it – the coercion is relative, the assumption for payment is some activity of the state or administrative authority.

In the cases set out by law, an individual (the liable entity) is liable to contribute to the state's authority to cover its expenditures and concurrently he has the right to limit his contribution to a certain amount set out by law. The other entity in a relationship is the state that also has an obligation (and not just the right) to require the liable entity to meet a charge liability. The entities that represent the state have to care about the fulfilment of the obligation (the act is not performed without payment of the charge). The right of the state to enforce these liabilities is exercised by its authorities within the limits of the law and by the legally prescribed means.

In the past, the charge has been already recognised as a particular compulsory levy, that was imposed due to specific activities of public facilities. The liability to pay was most often triggered by an individual's request for a particular activity, for example a court decision, and a levy in the form of the charge was a specific consideration for this activity. The charge also functions as a consideration today, i.e. it is used to cover the specific expenditure of the requested authority that is incurred as a result of the individual's request. In general, it is considered as an unjustified burden for society if the burden of consideration for activities of the competent authorities is borne by the person who does not request the activity of the competent authority. Besides the consideration principle, however, the principle of availability of the decision-making process must also be applied, i.e. in order to make the procedure financially accessible for applicants so that natural and legal persons can actually exercise their rights.

7 As a separate economic-legal category, fees appear in the classical economy. In justifying the payments to the State, this theory was based on the principle of exchange in that the State secures to citizens as taxpayers either a generally desirable or individually desired benefit and accepts for them a reimbursement determined by the nature of the transaction in question. Classical economy has generalised the principle of the charge legal regulation for the entire state administration. The difference between taxes and charges was only quantitative in character and depended on the extent of the services provided by the State and the charges charged for it.
The Czechoslovak financial-legal theory and the relevant legislation were also under the strong influence of the German (Austrian) financial sciences. The most important representatives of the Czech financial legal school or political economy were K. Engliš, A. Bráf, J. Drachovský, V. Funk and V. Vybral.

If the system of charges is defined, the charges are usually categorised by the activities that lead to imposition of the charge, i.e. when decisions of the court or the administrative body are considered then the charges are divided into judicial and administrative charges. Besides these typical charges imposed at the level of the state, there are local charges levied by the municipality that have, however, a number of tax features and should rather be named as local or municipal taxes. But this has not happened so far. However, the question how the charges that are not explicitly included in any of the above mentioned groups should be classified has not yet been clearly answered by the financial theory.[8]

Therefore, it is possible to define a charge with particular features.

1. The charge is first and foremost a legal liability as a tax. Without a legal determination of payment liability, no charge can be laid down. There are laws regulating groups of charges (judicial, administrative, local charges) and specifying the relevant charge liabilities of such groups of charges. In addition to these laws, however, charge liabilities are regulated in a number of other special laws that regulate different areas of public life and the inclusion of these liabilities in the concept of charges as payments of tax law nature is more complex. The situation is also complicated by the fact that the term charge is also used for some payments that are private in nature and these payments thus cannot be included in the group of public law payments for this reason.
2. However, the state (as a self-governing entity) receives revenue through the charges. Then the state covers a part of the expenditures associated with public administration by this revenue and thus the state is always the creditor. Charges perform a fiscal function similar to taxes, although the performance of this function is limited due to their amount.
3. A public law character is also evident considering the charge as the state's claim – this claim is linked to the activity of the state authorities and the element of the objectivity of the payment is emphasised (for example, when determining the amount of the charge, the social status of the person liable to pay the charge is not taken into account). For some local charges, however, this feature is somewhat modified.
4. As regards the charges, unlike taxes, it is not a payment that is only to be used to raise funds for public needs but the definition of the state's consideration is important considering charge liabilities – the obligation is formulated bilaterally.
5. The content of the charge liability is, in addition to other liabilities, the liability to pay a charge, i.e. it is the monetary payment similarly to taxes. For none of the charges currently levied, there is a possibility of fulfilling the liability in kind.[9]

[8] This is not something new – C. F. Bastable has already mentioned in his work *Veřejné finance* [Public Finances] (1927) that charges lack any harmonisation or logical organisation and that the charges may appear in every field of public power (p. 242).

[9] Engliš already in 1929, in his work *Finanční věda* [Financial Science] stated that earlier typical charges were paid in kind and paid by public employees (sobotales, športle) later transferred to money form,

6. Fee liability is also associated with a certain result that the legislator wants to capture. The law defines and differentiates between the fees and the amount of the fee for which the fee is payable.
7. Lastly, considering the characterisation of the term "charge", it is possible to state that the state plays another role than the taxpayer because of the state's character of power since the state may determine the types and amounts of payment liabilities. To a certain extent, the municipality also has this authority (as regards the local charges) but the limits of the decision-making of a municipality are also laid down by law.

4 Levy

By the end of 1992, the term "odvod" was often used to designate the mandatory payment. These were mandatory payments imposed on state organisations (state-owned enterprises) where the difference in payment obligation was considered to be the transfer of funds within one form of ownership, i.e. from state ownership to the state budget, i.e. back to state ownership. The definition of the term "odvod" was based on its economic substance as a means of reallocation of funds within the framework of the unified state ownership.[10]

At present, we rarely meet the concept of "odvod", although it is no longer a specific payment liability that no longer has the characteristics to which this payment liability was previously associated. Therefore, the term "odvod" can be attributed to two large groups of payments which have a different character – payments that can be described as tax payments and payments that are a certain penalty for failure to fulfil obligations. An example of the first group's payments may be a payment for withdrawal of land from the agricultural land fund or payment under the Employment Act, payment to the Wine Fund, etc. The second group includes the payments associated with a certain sanction – they are especially payments that are imposed due to breach of budgetary discipline.[11]

It is clear, therefore, that there are the above-mentioned payments ("odvod") that are close to taxes but they should not be classified as public levies owing to their sanctioning nature. Although they are revenues to the public budget, they are not levies imposed on a particular taxpayer by a law but a payment that is imposed only when the liability has been breached.

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with their income flowing to the state treasury so that the population did not feel as being an employer. Since the time of Engliš, many have not changed in this way. Engliš, 1929: 203.

10 Bakeš, 1979: 99 et seq.

11 However, it should be noted that the word deduction in conjunction with the word tax or charge is the expression of a certain activity, indicating what is to be done – it is not the term that would imply a payment obligation.

5 Contribution

The borderline between public benefits and private sector reimbursements was attributed to contributions that were used to cover a part of the expenditures and that were collected from users of particular facilities.

Historically, their origin is associated with charges. These are payments imposed by the state to certain entities in connection with the service that the state provides to them. A certain difference from the charges is that the contribution is also levied on entities that do not individually reap such benefits. Contributions in this sense are in the nature of statutory payment liability and they differ from voluntary contributions levied for the same purpose.

At present, the term "contribution" is also used for designation of payment obligations associated with the various benefits that the state provides in return and that differ considerably from the original structure of contributions (see below). The term "contribution" is also used for the funds received by the municipality or the region to carry out tasks within the delegated powers. However, these contributions are in fact a form of subsidy – it is a transfer of a part of the funds for the state administration from the state budget to the budgets of the municipalities that perform the state administration instead of the state. It is not a full payment of costs, it is only a contribution, because a part of the expenditure in this area is provided by the municipality for itself and it gains certain revenues (administrative charges) for this activity.

6 Public Benefits on the Expenditure Side ("Veřejné Dávky na Straně Výdajů")

The expenditure side of budgets does not have clearly classified and identified types of expenditures. An exception is the term "subsidy" or "recoverable financial assistance" which are defined and determined in the Act on Rules. But, for example, the term "subsidy" may appear not only in the meaning of the expenditure of one budget but also in the meaning of the revenue of another public budget. In many cases, the term "subsidy" also merges with the term "contribution" as regards the expenditure side of budgets. However, these terms should be distinguished more precisely – when it comes to the revenue of the public budget it is a payment liability towards the public budget that stands on the revenue side along with taxes and charges.

It is thus a payment that – given its nature – can be classified as a public benefit. As regards the expenditure side of the budget, where the term "contribution" is used, it is a payment close to subsidies and should be therefore termed "subsidy" and classified as subsidy. However, it should be noted that in some cases (see the contribution to the performance of delegated powers) such a contribution at the level of municipal and regional budgets is their significant income and thus the providing of this contribution is close to obligatory payments at this level (the State Budget Act defines how much the state has to pay to the budget of each municipality).[12]

The term "contribution" is used especially in connection with certain payments that go to the social sphere and are linked to non-budgetary legal norms (parental allowance, housing allowance, etc.). The state provides particular public benefit on the basis of the law and contributes to a defined purpose. For participants involved in a particular scheme, the term "contribution" is used to describe the payment of the state for the benefit of a participant.[13] This contribution is by its nature one form of the state support. The Nature and Landscape Protection Act allows the providing of allowances under specified conditions for a particular activity (for example mountain mead mowing) or the Forest Act defines certain types of payments related to forest care, which are also referred to as contributions or allowances and are inherently purposeful public benefits. The Act on Elections to the Chamber of Deputies – contribution to election expenses or the Act on Association in Political Parties according to which the contributions are provided from the state budget (the permanent contribution and contribution to mandate).

The term "contribution" is also associated with a certain type of organisation that is taken into account by laws regulating budgetary management (Act No. 218/2000 Coll., and Act No. 250/2000 Coll.). State contributory organisations receive a contribution from the founder (state) – from the public budget – a contribution to operation. If such an organisation is established by the municipality, the contribution organisation receives a contribution from this founder (municipalities or regions). Again, this is a targeted state support. As a rule, the contribution is linked to the fact that the state wants to support a certain area in the sense of supporting a particular state policy. There is some objective to be achieved through public benefits. However, the state has to respect the rules of public support under the regulation it has adopted. Thus, the expenditure from the state budget may be a public benefit of a municipal budget, which treats these benefits according to the determined rules. This municipal budget may also provide public benefits to other entities.

7 Conclusion

On the basis of the above-mentioned definitions of mandatory payments, it can be concluded that the common term "veřejné dávky" (that can be translated as a "public levies" or "public benefits" but in the Czech language these terms are interchangeable) should rather be used as a common term for the designation of budget expenditure rather

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12 There was one more type of public revenue, which was referred to as an allocation. On the basis of special laws, the local government was granted a share in the yield of some state taxes to fulfil its tasks. At present, this function is ensured by the mechanism of budget tax determination.

13 For example, according to Act No. 96/1993 Coll., on building savings and state aid for building savings.

than as a designation of all mandatory payments to the public budget. It would include subsidies, repayable allowances, and contributions to a specific area provided that it is coming from the public budget. As the concept of tax is often recognised in a broad sense of the word, including all mandatory payments to the public budget – without differentiation, classification and inclusion of other mandatory payments (levies, contributions, etc.) – then the concept of public benefit ("veřejné dávky") could be one of the alternatives for the common term of payments provided by public budgets (on the expenditure side of the budget).

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The Application of In-house Procurement by Municipalities in Municipal Services Management

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Abstract
The topic of the article is the application of in-house procurement by municipalities in municipal services management. The essence of in-house contracts, also known as direct contracts, is a specific relation between the contracting authority and the economic operator. The contracting authority, which is a body governed by public law, exercises control over the economic operator, which is legally separated from its structure, similarly to the control it exercises over its own departments. Moreover, the economic operator is obliged not only to submit to this control, but also to carry out a principal part of its activities for the controlling contracting authority. It was often argued in the literature that awarding services, supplies, or works to one's own subsidiaries without following a tendering or design contest procedure may adversely affect certain economic sectors, in particular by reducing competition or deteriorating the quality of provided services. The aim of this publication is to answer the question so formulated. To do so, one has to examine how in-house contracts have been regulated in the act currently in force.

Keywords
in-house procurement; municipalities, local self-government; services management

1 Introduction

The term "in-house procurement" does not exist in the Public Procurement Act (Act of 29 January 2004). However, it is often commonly used when referring to public contracts awarded to one's "own" organisational entities.

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The essence of in-house contracts, also known as direct contracts, is a specific relation between the contracting authority and the economic operator. The contracting authority, which is a body governed by public law, exercises control over the economic operator, which is legally separated from its structure, similarly to the control it exercises over its own departments. Moreover, the economic operator is obliged not only to submit to this control, but also to carry out a principal part of its activities for the controlling contracting authority. In consequence, such arrangements are considered in-house contracts and are exempted from the application of the provisions of the PPA (Nowicki and Nowicki, 2010: 118).

Given the specific relation between the contracting authority and the entity to which a contract is awarded, the literature describes in-house contracts as internal contracts (Nowicki, 2017: 155–156). According to the law of the European Union, the internal operator can be a body governed by public or private law (e.g. a limited liability company or a joint-stock company) (Art. 2 point (j) of Regulation (EC) No. 1370/2007 of the European Parliament and of the Council).

An example of the exemption from the application of the provisions of the Public Procurement Act is the award of a contract to a public sector enterprise created by the head of any public finance sector unit identified in Art. 139 par. 2 of the Public Finance Act (*Journal of Laws,* 2017, item 2077). The Public Procurement Act does not apply to contracts awarded to a public sector enterprise by the aforementioned public authority if the following conditions are cumulatively met (Art. 4 item 13 of the PPA):

- a principal part of the activities of the public sector enterprise involves carrying out public tasks for this public authority;
- the public authority exercises control over the public sector enterprise similarly to the control it exercises over its own departments having no legal personality, in particular in the form of influencing strategic and individual decisions concerning the management of the institution’s affairs;
- the subject matter of the contract is a part of the essential activity of the public sector enterprise set out in Art. 26 par. 2 item 2 of the Public Finance Act.

The municipality as a unit of the local government does not constitute an entity authorised to create a public sector enterprise. Taking this into account, it would not benefit from the exemption of the application of the PPA referred to in Art. 4 item 13 of the said act. A question should therefore be asked whether the municipality may entrust the performance of its own tasks to other, self-created organisational units, which may constitute an internal contract without the need for applying the provisions of the Public Procurement Act. To answer such a question, one must examine systemic legal regulations of the forms of municipal management.

In order to fulfill their own tasks, local government units, including municipalities, may create organisational units. According to Art. 9 par. 3 of the act of 8 March 1990 on municipal government, the forms of municipal management, including the fulfillment of public service obligations, are set out in a separate act of 20 December

1996 on municipal services management (*Journal of Laws,* 2018, item 994). Art. 2 of the Municipal Services Management Act (MSMA) provides that municipal services management can be conducted by local government units in particular in the form of local government budgetary establishments or commercial law companies (*Journal of Laws,* 2017, item 827). Moreover, local government units may entrust municipal management tasks to natural persons, legal persons, and units without legal personality. The authorities of local government units select the preferred form of carrying out their own responsibilities.

A local government budgetary establishment does not have legal personality, and therefore cannot individually participate in an economic activity. It constitutes an organisational entity created by a local government unit under the provisions of the PFA in order to carry out its own tasks in broadly defined public services.[2] When entrusting its tasks to such an establishment, the municipality merely distributes tasks without creating civil law obligations. The legal nature of local government budgetary establishments and the type of tasks assigned to them do not allow them to become a party to a contract. Therefore, they cannot be economic operators in a public contract. The basis for entrusting such tasks is an appropriate resolution of a decision-making municipal authority appointing the said establishment and also approving the statute regulating its tasks and the manner of its operation.[3]

A similar situation arises in the case where the municipality's own public service tasks are assigned to a municipal company created by the said municipality, and where such tasks simultaneously constitute statutory responsibilities of the company. Although the municipal company is a legal person, entrusting it with such tasks shall also materialise in the appropriate records of the municipal authorities (resolutions of the municipal council, ordinances of the head of the municipality, the mayor, or the president), therefore in sovereign acts which also create conditions for the meeting of the said responsibilities. In the procedure of assigning one's own public service tasks to such a company there is no place for contractual obligations under which each of the parties would obtain a specific benefit. Such relations assume ownership. It can be presumed that the fulfillment of an obligation by one's "own" organisational unit, whose subject are the tasks set out in the MSMA and which results from a legal arrangement other than a contract, determine that the provisions of the PPA cannot be applied, even when the subject matter of the obligation are services, supplies, or works. Hence, also in this case there can be no public contract involved.[4]

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2 Art. 14 of the PFA provides that local government budgetary establishments perform local government units' own tasks in the scope of 10 listed areas constituting matters of public service.

3 The Supreme Administrative Court adopted such a view in the judgment of 11 August 2005 (Ref. No. II GSK 105/05), according to which: "The fulfillment of the municipality's own municipal service tasks by an organisational unit created for this purpose does not require the conclusion of a contract."

4 However, a distinction should be drawn between entrusting one's own tasks and commissioning their performance under a contract. Such a case occurs when the municipality outsources the aforementioned responsibilities to a third party instead of its own municipal company or when the provisions of the act so require. An example of the last instance, according to Art. 6 d paras. 1

In case of both indicated forms of conducting business activity by the municipality and entrusting the municipality's own tasks referred to in the MSMA to the units it has created, it should be assumed that the assignment of the aforesaid responsibilities can be described as in-house procurement. The requirement for the municipality to exercise control over a legally separated economic operator similarly to the control it exercises over the departments of the municipal office is clearly present here, and the economic operator carries out a significant part of its activity for the controlling municipality. Therefore, such an assignment does not constitute a contract award in the meaning of the PPA. Thus, until 1 January 2017 in-house contracts in municipal management were awarded largely outside of public procurement procedures.

It was often argued in the literature that awarding services, supplies, or works to one's own subsidiaries without following a tendering or design contest procedure may adversely affect certain economic sectors, in particular by reducing competition or deteriorating the quality of provided services. The aim of this publication is to answer the question so formulated. To do so, one has to examine how in-house contracts have been regulated in the act currently in force, that is after its amendment, which entered into force on 1 January 2017 (*Journal of Laws,* 2016, item 1020) as a result of the implementation of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (also known as the "Classic Directive"). However, it is worth to first present a short analysis of the application and regulation of in-house contracts in the EU judicial practice and law.

2 In-House Contracts in the Judicial Practice of the CoJ EU and Union Regulations

The term "in-house contract" appeared in the judicial practice of the Court of Justice of the European Union (hereinafter: CoJ EU) on the basis of the provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts (OJ EU L 134/114), which pointed out that public procurement regulations do not apply to certain contracts concluded between bodies governed by public law. The primary judgment which shaped the regulation concerning in-house contracts was a preliminary ruling of the CoJ EU of 18 November 1999, C-107/98, *Teckal Srl* v. *Comune di Viano* and *Azienda Gas-Aqua Consorziale di*

and 2 of the Act of 13 September 1996 on keeping municipalities clean and in order (consolidated text: *Journal of Laws,* 2017, item 1289, as amended), is the obligation on the head of the municipality, the mayor, or the president to award the public contract for collecting municipal waste from households or for waste collection and management. In this case the commission of such tasks by the municipality to its own municipal company will be considered a public contract awarded by open tendering procedure, to which the provisions of the PPA shall apply.

Reggio Emilia, ECR 1999 (the so-called Teckal case) (Judgment of the Court Case C-107/98). The CoJ EU recognised in its ruling that the exemption from public procurement rules is valid only when the contracting authority:

1. exercises control over the internal operator similarly to that which it exercises over its own departments (organisational dependence);
2. the internal operator carries out an essential part of its activities for the contracting authority (economic dependence);
3. there is no private capital participation in the internal operator.

The Teckal case ruling was the first judgment concerning in-house contracts. Its delivery established an entire ruling practice on the topic. Advocates-General of the CoJ repeatedly applied the "Teckal Test", which confirmed the possibility of exemption from the provisions on public procurement only when specified conditions were met. It was predominantly verified whether an organisational and economic dependence exist between the contracting authority and the subsidiary.

Later judgments provide the exemplification of the aforesaid position held by the Court, among others, the judgment of 7 December 2000 in Case C-94/99 *ARGE Gewässerschutz* v. *Bundesministerium für Land- und Forstwirtschaft*, of 8 May 2003 in Case C-349/97 *Spain* v. *European Commission* (Nowicki and Nowicki, 2010: 119), or of 11 May 2006 in Case C-340/04 *Carbotermo SpA* and *Consorzio Alisei* v. *Comune di Busto Arsizio* and *AGESP SpA* (Judgment in Case C-340/04). In the reasons for these judgments, it was emphasised that meeting the condition regarding the control exercised by the contracting authority does not stem from the very fact that the public institution holds the entire share capital of the enterprise to which the in-house contract would be awarded, but rather from the requirement to carry out comprehensive assessment of control exercised by the contracting authority over the third party. As a result, the public institution awarding such a contract should have a decisive impact on strategic objectives and essential decisions taken by the enterprise to which the contract would be awarded. The essence of control should not be reduced only to holding 100% of the shares in the share capital, but it should rather mean that the contracting authority has appropriate authorisations allowing it to have a real impact on the activity of the said enterprise in terms of formulating strategic aims and making crucial decisions (Nowicki and Nowicki, 2010: 119). In another judgment, dated 13 October 2005 in Case C-458/03 *Parking Brixen GmbH* v. *Gemeinde Brixen* and *Stadwerke Brixen AG,* the Court laid down a list of circumstances which should not occur when the contracting authority exercises control over the enterprise to which a contract has been awarded. It means that each exemption from the provisions on public procurement should be interpreted in a restrictive way (Judgment in Case C-458/03).

The second condition that must be met in order to employ an in-house procedure is the requirement which states that the economic operator must carry out an essential part of its activities for the contracting authority. The introduction of this prerequisite entails the need to protect competition. Otherwise, such contracts may lead to establishing a privileged position of the operator in the market, distort competition, and constitute discrimination against private enterprises which may be interested in the implementation of public procurement. The Court has repeatedly pointed out in its rulings that the regulations on public procurement are designed to ensure "free movement of services and open and undistorted competition [...] in all the Member States" (CoJ judgment C-26/03).

The judicial practice of the CoJ EU formulated in this way resulted in the introduction of Art. 12 to the Classic Directive 2014/24. It not only standardised the regulations on in-house procurement but primarily made the CoJ EU rulings prescriptive. In the rationale for the Directive, it was emphasised that the implementation of its provisions in the member states cannot lead to changes to the possibilities of awarding in-house public contracts (Pawelec, 2015: 106–107).

In the scope of Art. 12 one can list five forms of in-house public contracts:

1. contracts awarded to controlled legal persons (traditional in-house contracts);
2. contracts awarded by a controlled legal person to a legal person exercising control over it (reverse in-house relation);
3. contracts awarded between legal persons under the control of the same legal person ("sister" in-house relation);
4. contracts awarded to a legal person controlled by two (or more) controlling legal persons (in-house contract under the so-called joint control);
5. contracts in horizontal public-private cooperation.

According to Art. 12 par. 1, the Directive does not apply to a public contract if the following three conditions are cumulatively fulfilled:

a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority;
c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

With regard to the condition of control, the requirements formulated in the judicial practice of the CoJ EU have essentially been repeated, that is the contracting authority must exercise over a given legal person a control which is similar to that which it exercises over its own departments and that it must simultaneously exert a decisive influence on strategic objectives as well as on essential decisions of the controlled legal person. Such a control may be exercised by another legal person which is itself controlled by that contracting authority (Art. 12 par. 1 subpar. 2 of Directive 2014/24/EU). Moreover, the control exercised by the contracting authority ought to be decisive. It should therefore be actual and indisputable (Sadowy, 2013: 85).

Another rationale exempting from the application of Directive 2014/24 is the requirement that 80% of the activities of the controlled legal person should be carried out in the performance of tasks entrusted to it by the contracting authority. The 80% criterion was recognised as the one allowing to maintain the principles of fair competition on the market. The percentage of the activity is determined on the basis of the average total turnover or another alternative measure such as costs incurred by the relevant legal person or the contracting authority – with regard to services, supplies, and works for the last 3 years preceding the award of the public contract. If because of the date on which the relevant legal person or the contracting authority was created or commenced activities or because of a reorganisation of its activities, the data on the turnover or the alternative measure based on operating costs for the last 3 years are unavailable or no longer relevant, it is sufficient to show that the measurement of activity is credible, particularly by means of business projections (Art. 12 par. 5 of Directive 2014/24/EU).

The last condition is the lack of private capital participation in the controlled legal person. This premise is not absolute. The Directive allows for the participation of private capital in non-controlling and non-blocking forms which do not exert a decisive influence on the controlled legal person, if it is required by national legislative provisions of the Member States and remains in conformity with the Treaties. However, the Directive does not address the effects of private capital participation that occurs during the implementation of a public contract.

Yet another case where the exemption from the application of the Directive is possible is the so-called reverse in-house procurement. According to Art. 12 par. 2 of the Directive, the provisions on public procurement do not have to be applied where the controlled legal person which is the contracting authority awards a public contract to its controlling contracting authority or to another legal person controlled by the same contracting authority. Additional criteria imply that there is no direct private capital participation in both the contracting authority and the legal person being awarded the public contract, with the exception of non-controlling and non-blocking forms of private capital participation, and that more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the contracting authority.

Art. 12 par. 3 of the Directive regulates the award of a public contract between legal persons controlled by the same legal person ("sister" in-house procurement). It concerns the case where at least two legal persons governed by public law do not exercise individual control over a third legal person but nevertheless influence its activity because of the existing interdependencies. The award of the public contract to that legal person can be exempted from the application of the provisions of the Directive if all additional requirements set out in par. 3 are met.

Another form of public contracts identified in the Directive are in-house contracts as part of horizontal public-public cooperation (Art. 12 par. 4). The exemption from the application of the provisions of the Directive concerns two bodies governed by public law which have no organisational or capital relations but are functionally interconnected. The use of this exemption is permissible when all criteria specified in Art. 12 par. 4 of the Directive are met. It may be assumed that the aforementioned type of contract can be used only by bodies governed by public law which cooperate directly with each other in the implementation of public services while acting solely in the public interest, and no private provider will find itself in a more advantageous position than its competitors.

Thus, the current EU regulation allows for the exemption from public procurement rules in certain contracts between bodies governed by public law, provided they fulfill the strict conditions intended for particular forms of in-house contracts (Olejarz, 2014: 37). It should be assumed that the three essential requirements are indispensable for the application of in-house contracts. Namely, the contracting authority must exercise control, the controlled legal person must carry out more than 80% of its activities for the contracting authority, and there must not be any direct private capital participation in the controlled legal person (Nowicki, 2015: 197).

3 In-House Contracts in the Polish Public Procurement Act

The regulation of in-house contracts in Art. 12 of Directive 2014/24/EU also had an impact on Polish legal regulations. Firstly, the existing exemption regarding public contracts awarded to public sector enterprises laid out in Art. 4 item 13 of the PPA remained unchanged. Secondly, a rule of the Polish legal system set out in the Municipal Services Management Act that allows local government units to entrust their own public service tasks to their own departments constituting legal forms of carrying out their services, in the so-called administrative procedure by-passing the provisions of the PPA, where the aforesaid requirements concerning the economic and organisational dependence and the lack of private capital participation in the performer are present, was kept without any modifications.

Contrary to the union regulations, in the amendment to the PPA of 2016 in Art. 67 par. 1 items 12 to 15, the Polish legislator provided the possibility of awarding in-house contracts as a rationale for the application of a single-source procurement procedure. Following the example set by EU regulations, the national legislator has made certain modifications when identifying particular types of in-house procurement.

Art. 67 par. 1 item 12 allows exclusively the contracting authorities referred to in Art. 3 par. 1 items 1 to 3a to award their contracts by a single-source procurement procedure to a legal person if all of the following three conditions are met:

- the contracting authority exercises over that legal person control similarly to the one exercised over its own departments and involving dominant influence

on strategic goals and essential management decisions; this condition shall also be fulfilled where another legal person controlled by the contracting authority exercises control in the same manner;
- more than 90% of the activity of the controlled legal person involves the execution of tasks entrusted to it by the controlling contracting authority or other controlling legal person;
- there is no private capital participation in the controlled legal person.

The modification of the Polish regulation, apart from the clearly defined entities which may award their in-house contracts by a single-source procurement procedure (Art. 3 par. 1 items 1 to 3a of the PPA), also involves:
- raising the percentage of the activity carried out by the legal person for the contracting authority from 80% required by EU regulations to 90%;
- eliminating direct private capital participation.

Raising the percentage of the activity carried out for the contracting authority means that the controlled legal person's scope of activity on the open market will be significantly reduced, in contrast to the union requirements. However, the requirement concerning the lack of direct private capital participation in the controlled legal person is not absolute, as it does not apply to legal persons with the participation of a partner selected on the basis of the act on public-private partnership (*Journal of Laws,* 2017, item 1834) or shares or stocks belonging to the employees in the amount of up to 15% of the share capital or company stocks represented at a meeting of shareholders or a general meeting (*Journal of Laws,* 2016, item 981). Making use of the exception involving the employees is not always the right solution, as their leaving the company creates private capital. Hence, the said company cannot be considered "an internal structure acting on behalf of the municipality" (Judgment C-231/03).

With regard to the possibility of applying a single-source procurement procedure to "reverse" in-house procurement (Art. 67 par. 1 item 13 of the PPA) involving the award of a contract by a legal person which is the contracting authority referred to in Art. 3 par. 1 items 1 to 3a of the PPA to another contracting authority identified in Art. 3 par. 1 items 1 to 4 of the PPA which controls the awarding contracting authority, the fulfillment of all of the three conditions laid down in item 13 points (a) to (c), which are in essence similar to the ones set out in item 12 points (a) to (c), is also required. The legislator formulated similar requirements in Art. 67 par. 1 item 14 of the PPA with regard to the award of a joint contract to a legal person by the contracting authority referred to in Art. 3 par. 1 items 1 to 3a of the PPA, together with other contracting authorities referred to in Art. 3 par. 1 items 1 to 4 of the PPA, of which in respect to at least one of the requirements set out in item 14 points (a) to (c) of the provision discussed must be collectively met. Also here the prerequisites are similar to the aforementioned ones.

The final type of an in-house contract presented in Art. 67 par. 1 item 15 of the PPA is a horizontal public-public contract. When allowing the award of a contract using a single-source procurement procedure, the legislator requires for the contract to be concluded exclusively between at least two contracting authorities referred to in Art. 3 par. 1 items 1 to 3a of the PPA, if the conditions formulated in Art. 67 par. 1 item 15 points (a) to (c) are collectively fulfilled. It is essential for the contract to establish or implement cooperation between the participating contracting authorities in order to provide public services for the achievement of common goals. Further prerequisites provide that the implementation of this cooperation should be connected solely with public interest and that the collaborating contracting authorities carry out less than 10% of the activity subject to cooperation on the open market.

The conditions that must be met in order to apply a single-source procurement procedure have been formulated by the legislator in a very strict way. The implemented solution is far more complex than in the classic EU Directive. The Polish municipal companies were surprised by it, as from 1 January 2017 (date of entry into force) it was required that in the 3 years preceding the award of the contract they carried out more than 90% of their activities for the contracting authority. According to Art. 67 par. 8 of the PPA, the calculation of the percentage of activity referred to in Art. 67 par. 1 items 12 point (b) 13 point (b) 14 point (b) and 15 point (c) of the PPA takes into account the average revenue generated by the legal person or the contracting authority within the aforementioned 3-year period with regards to services, supplies, and works. Art. 9 of the provision in question states that if because of the date on which the legal person or the contracting authority was created or commenced activities or because of a reorganisation of their activities, the data on the average revenue for the last 3 years preceding the award of the contract are unavailable or inadequate, the percentage should be calculated by means of reliable business projections. In the common sense of the word, a projection means foreseeing the future on the basis of events, documents, or facts already known. However, the term “projection” has not been defined in the PPA. One should therefore assume that the presented linguistic interpretation can be applied to the contents of Art. 67 par. 9 of the PPA. The submitted and owned documents, reports, balance sheets, and financial analyses should unequivocally prove that the requirements regarding the percentage of activity carried out for the controlled contracting authority have been met. The provision formulated in this way and its interpretation may in practice prevent the award of an in-house contract. The adopted solution shows that it would be easier to award a contract to a newly-created municipal company than to an existing one. This is due to the fact that in case of an emerging company the aforementioned percentage of activity would be calculated on the basis of reliable business projections, which are usually easily verified.

4 Conclusion

The in-house solution introduced in the PPA does not exclude and, as it has been shown above, does not conflict with performing tasks by a local government unit in order to meet collective needs identified in the MSMA. However, the solution regulated in the established provisions has a broader scope of entities set out in Art. 3 par. 1 items 1 to 3a of the PPA. It can be applied not only to the agencies of local government units. Moreover, it is not limited in scope. Hence, in the case of "commission in the form of a contract" it is not necessary to fulfill the conditions for in-house procurement. In all cases it will be a contract to which the provisions of the PPA concerning in-house contracts may be applied, given that a local government unit entrusts its own tasks to a municipal company and concludes with it a payable contract for the performance of a specific task (Cieślak, 2017: 15–21). The award of a contract by a non-tendered procedure contributes to reducing the costs of contract implementation, which may be crucial for smaller municipalities.

The implemented solution provides a basis for the application of a non-tendered procedure while controlling the decision of the contracting authority on awarding contracts directly to a subsidiary. The control over such contracts is also exercised by meeting the obligations required from the contracting authority on the basis of the provisions of the PPA, consisting, among other elements, of the obligation to announce information about the intention to conclude a contract by a single-source procurement procedure (Art. 67 par. 11 of the PPA); having commenced the procedure, to, depending on the value of the contract, place the notice of intention to conclude it in the Public Procurement Bulletin or dispatch the notice to the Publications Office of the European Union (Art. 66 par. 2 of the PPA); to inform the President of the Public Procurement Office about launching the procedure within 3 days of its date while providing factual and legal justification for the application of a single-source procurement procedure (Art. 67 par. 2 of the PPA); ban on the conclusion of the contract awarded on the basis of Art. 67 par. 1 items 12 to 15 before 14 days have elapsed since the date of announcing the information referred to in Art. 67 par. 1 item 11 (Art. 67 par. 12 of the PPA); immediate announcement (no later than within 14 days as of the conclusion of the contract) on the contracting authority's website of the Public Information Bulletin or if there is none, on the contracting authority's main website of the information about awarding the contract under par. 1 items 12 to 15 (Art. 67 par. 13 item 1 of the PPA) or witholding from the award of the contract (Art. 67 par. 13 item 2 of the PPA). The aforementioned requirements have different legal nature, but the contracting authority's obligation to meet them is evident. Hence, an in-house procurement contract will be concluded in a transparent manner. Moreover, the award of such a contract is stricly controlled also by the supervisory authority, which due to its dominant influence on strategic objectives and essential management decisions regarding the affairs of the controlled legal person implementing the contract will be able to counteract potential violations of law.

It seems that the changes that have been introduced, involving the possibility of awarding an in-house contract as grounds for the application of a single-source procurement procedure are subject to specific legal control. Therefore, it should not contribute to the monopolisation of the market and the restriction of free competition on the municipal services market.

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Tax Rulings in Poland – Wealth or Crisis?

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Abstract
The article addresses the issues of significance and practice of applying the provisions concerning tax interpretations in Poland. This issue is presented in the context of global trends, especially in the law of the European Union. It demonstrates a great development of the number of issued individual interpretations of tax law in Poland until the year 2007, and their subsequent significant regression, both in terms of the number and practical significance for taxpayers. The article points to problems resulting from the development of the system of individual interpretations in the tax law.

Keywords
tax ruling; Poland; EU law

1 Introduction

Poland is a country where obtaining tax interpretations is a taxpayer's daily practice. We probably have the highest number of individual interpretations (tax rulings) in the world. In Poland there is also a great variety of tax interpretations. Importantly, legislative work is currently underway which is likely to result in an increased number of interpretations and similar legal instruments offered to taxpayers.[2] Thus, it could be concluded that tax interpretations in Poland have been successful. However, the problem is more complex. At the same time, taxpayers' confidence in the interpretations is now

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[2] A new Tax Ordinance Act is currently under development; for more information see Etel, 2017a.

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gradually diminishing. The protection policy of the holder of a tax interpretation has been subjected to numerous exceptions. In addition, the practice of tax authorities is becoming less and less user-friendly to taxpayers who make use of the interpretation. The perception of individual interpretations in the world is also slightly changing. Although seemingly successful, it is possible to put forward a thesis that from the taxpayers' point of view, tax interpretation in Poland, at the same time, is in a crisis. It is worth sparing a thought about the causes of this situation.

2 Tax Interpretation – Version 2017

In Poland, the issuance of general and individual interpretations has a clear legal basis in the general provisions of tax law – the Tax Ordinance Act of 29 August 1997 (hereinafter: O.P.). There are also specialised interpretations, based on laws regulating particular taxes, but they will be omitted in this paper.

The current system of interpreting the tax law "was born" on 1 July 2007 (Act of 16 November 2006). The basic structure of the regulation remained unchanged compared to its original form, but it introduced a large number of changes which significantly changed the practice of applying these provisions.

The regulation introduced on 1 July 2007 was characterised by a significant centralisation of the process of issuing interpretations. Centralisation was fully implemented only in relation to general interpretations, which were issued by the Minister of Finance himself (Art. 14a O.P.). In case of individual interpretations, only the Minister of Finance was formally the issuing authority (Art. 14b § 1 O.P.). However, he could authorise some of the Directors of Tax Chambers to issue them on his behalf. These were tax authorities of second instance, their number corresponded to the number of voivodeships. However, only 5 Directors were authorised to issue interpretations. The individual interpretations were issued in the following manner: individual Tax Chambers had separate units in other locations (branches) which issued those interpretations. Full centralisation of issuing individual interpretations in one (physical) place was not possible on account of the size of the country and, consequently, a potentially large number of cases that were handled.

In practice, therefore, there existed separate organisational structures which were responsible for issuing individual interpretations. As of 1 March 2017, Poland underwent a fundamental change in the structure of its tax administration. A single National Revenue Administration (KAS) was established, under which a separate body, the National Revenue Information Service (KIS), was established and is headed by the KIS Director who issues individual interpretations. The KIS took over the branches of the Tax Chambers which had previously issued individual interpretations. Therefore, an authority competent to issue tax interpretations was formally singled out.

Interpretations concerning local taxes should be approached separately.

Individual interpretations were issued at the request of the person concerned (Art. 14b § 1 O.P.), which could refer to both the already existing factual situation or future events. The entity applying for an individual interpretation was obliged to present in an exhaustive manner the facts or the future event and to present its own standpoint as to the legal assessment of the facts or the future event (Art. 14b § 3 O.P.). The tax authority was not entitled to examine the truthfulness of the facts presented by the taxpayer (Judgement of the Provincial Administrative Court in Gdańsk of 26 January 2010. I SA /Gd 912/09).

Individual interpretations were inexpensive – the fee for issuing an interpretation was only PLN 40, i.e. less than EUR 10.[3] Initially, there were no explicit exemptions as to the subject matter of these interpretations. What is more, it was possible (and still is) to repeatedly ask about the same issue.[4] An individual interpretation could be requested even if a general interpretation had already existed. At first glance, applying for an individual interpretation in such a situation would seem pointless – it would have been difficult to count on the fact that the interpretation authority would issue an individual interpretation contrary to the general interpretation of the Minister of Finance. However, it should be noted that individual interpretations could be challenged by the holder before an administrative court. The court could oblige the interpretation authority to issue an individual interpretation contrary to the general one.[5] Therefore, asking for an individual interpretation often made sense, even in such a case. If there was a conflict between individual and general interpretations, the taxpayer could choose the one which he considered more advantageous.

Both individual and general interpretations were not binding on the tax authority. In the event when during an examination of the taxpayer's case it was found that the interpretation was incorrect, it was obliged to issue a tax decision on the basis of the provisions of the law. The taxpayer was entitled to file an application for a tax exemption, which allowed them to actually pay the tax in the amount that would have resulted from the interpretation, as long as it related to future events (Art. 14m O.P.). If a taxpayer asked a question about the past, they were only exempted from the obligation to pay default interest, but they had to pay the amount of tax itself, under the provisions.

Individual interpretation could be changed either as a result of the applicant's appeal or on the initiative of the interpretation authority, if the latter considered it to be defective. The change consisted in issuing a new individual interpretation. When issuing and changing individual interpretations, the interpretation authority was obliged to take into account court rulings, although it was not bound by them.

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3 The Ministry of Finance estimated the cost of issuing one interpretation at over PLN 1,000.

4 This seems pointless only at first glance. In practice, however, a taxpayer may apply for a new interpretation when the court's ruling changes and there is no possibility to challenge an individual interpretation issued a long time ago.

5 However, it could not annul a general interpretation, the legality of which it could not examine.

3 Functioning of Tax Interpretations until 2016

As a result, the number of individual interpretations issued in Poland by the Minister of Finance was enormous and increased further. In 2008, the number of interpretations amounted to 24,229, in 2009 – 28,153, 2010 – 30,920, 2011 – 35,929, 2012 – 36,816, 2013 – 36,147, 2014 – 37,891, 2015 – 37,710 (mf.gov.pl, 2013). Later, the number of interpretations decreased, probably due to the legal changes described below.

The cost of the functioning of the system of individual interpretations from the point of view of the state budget was also increased by the possibility of appealing against them, similarly to tax decisions. From the taxpayer's point of view, the costs of appeals to both court instances were also small, up to a total of PLN 400 (EUR 100). However, they have generated significant burdens for administrative courts. For example, only in the case of complaints to the Supreme Administrative Court in 2011, out of 6,192 complaints in tax matters, there were 1,342 complaints against interpretations, in 2012 the figures were 6,164 and 1,271, in 2013 – 7,714 and 1,874, in 2014 – 7,789 and 1,527. It follows that over 20% of tax cases considered by the Supreme Administrative Court were complaints concerning individual interpretations. In case of voivodeship administrative courts, this percentage was usually about 15% (Etel, 2017: 87).

When compared to individual interpretations, general interpretations came down as extremely feeble. In 2007, after the analysed provisions entered into force, no general interpretation based on them was published, in 2008 nine general interpretations were published, in 2009 – six, and in 2010 – five.

In reaction to the Minister of Finance's tardiness, a possibility for taxpayers to submit applications for general interpretation was introduced (Act of 16 September 2011). No real changes occurred because the conditions for an effective request for a general interpretation were very difficult to meet. As a result, in 2012, 14 general interpretations were issued and in 2013 – 16, in 2014 – 11, in 2015 – 11, in 2016 – 9 and in 2017 – 6 (sip.mf.gov.pl).

Therefore, individual interpretations still dominated.

In practice, any major economic operation was carried out (as long as time was available) following an individual interpretation. The weight of the dispute over the interpretation of tax law increasingly shifted from the stage of tax proceedings to the stage of obtaining an interpretation. Obtaining an individual interpretation greatly reduced the taxpayer's risk. At the same time, it could encourage attempts of quite radical tax optimisation, since the risk could be minimised by obtaining an interpretation in advance. Additionally, the issuing of individual interpretations generated increasing administration costs, which were in no way balanced by symbolic fees for their issuance.

Of course, this raised a fundamental question: Should the individual interpretation be the main component of the tax system?

4 The Shortcomings of the System of Individual Interpretations – Introduction

The system, which was set up in 2007, quickly revealed many limitations. Lots of interpretations were issued, which generated huge costs for the tax administration. The more interpretations were issued, the more difficult it was to maintain uniformity. At the same time, legal solutions were not always tailored to the needs of taxpayers. Ever since the changes of 2016, the efforts to both reduce the number of individual interpretations and improve their usefulness to taxpayers have essentially been combined. Whether this has been achieved is another matter.

5 Joint Interpretation Requests Made by Counterparties

One of the problems was that each of the parties to the economic operation had to request a separate interpretation. The interpretation could only be used by its owner, but not by its counterparties. This increased the risk of the lack of a consistent approach to the same problem by the interpretation authority and also generated completely unnecessary work for that authority.

The answer was two new institutions, which appeared on 1 January 2016. One is the so-called joint request for an individual interpretation (Art. 14r O.P.). A request for an individual interpretation may be made by two or more interested persons who are in the same factual situation or who are to participate in the same future event. In order to avoid a multitude of entities in the course of the interpretation procedure, the parties concerned must identify one entity to be party to the interpretation procedure. The procedure will result in one interpretation that will assess the entire operation from the point of view of tax law. It shall be sent to the concerned person designated as party to the procedure and to the other persons concerned in the form of copies. Individual interpretation may be used by all parties, but it can be challenged only by the person who is a party (Decisions of the Supreme Administrative Court of 22 December 2016, II FZ 889/16 and of 14 February 2017, II FZ 967/16).

Undoubtedly, the purpose of introducing this provision is to reduce the number of requests submitted by several entities for which, as a result, identical individual interpretations are issued, which is to improve the effectiveness of interpretation bodies. From this point of view, this change should be seen as positive. Of course, taxpayers can always make several separate requests for interpretation.

6 Regulating the Relationship between Individual and General Interpretations

Certainly, a solution introduced on 1 January 2016, which boils down to the primacy of general interpretations over individual interpretations, offers great opportunities as far as the reduction of the number of issued individual interpretations is concerned. Currently, the existence of a general interpretation makes it impossible for an individual interpretation to be issued to a taxpayer when the legal and factual situation is identical (Art. 14b § 5a O.P.). In such a case, the interpretation authority, while refusing to issue an individual interpretation, will indicate to the taxpayer which general interpretation relates to their question. If a general interpretation is issued after the previous issue of an individual interpretation, the latter shall expire (Art. 14e § 1a(2) O.P.). However, the holder of the Interpretation shall be protected until the individual interpretation expires. The protection that results from individual interpretation will not therefore expire automatically.

This solution is not very well thought out. It often requires a huge amount of work on the part of interpretation authorities, which must find all individual interpretations that expire as a result of issuing a general interpretation, and then issue a decision on the expiry of each individual interpretation. These provisions can be challenged with an appeal and with a complaint before the administrative court. In addition, the interpretation authority is certainly unlikely to be able to achieve the expiry of all interpretations at the same time.[6]

This results in different levels of protection for holders of interpretations who are in the same factual situation. However, by fulfilling a rather sensible demand, the lawmaker has led to a situation where procedural solutions are complicated, expensive and do not guarantee equal treatment of taxpayers. In the event when the Minister of Finance started to issue interpretations in bulk, interpretation authorities would probably have to deal mainly with searching and determining the expiry of individual interpretations.

7 GAAR and Individual Interpretations

The introduction of a general anti-avoidance rule on 15 July 2016 triggered a real revolution in the Polish tax law. The changes have resulted in a radical reduction in the degree of trust that the taxpayer can have for an individual interpretation.

If the interpretation authority comes to the conclusion that there is a reasonable suspicion that the action described in the request for an individual interpretation may constitute a basis for the application of GAAR, it must seek the opinion of the Head of the KAS. Only after such an opinion has been obtained may it issue an interpretation, if it considers that the rule is not applicable (Art. 14b § 5b O.P.). They make use of

6 Even if all orders were sent simultaneously, they would not be served at the same time.

the possibility of refusing to issue an interpretation in quite a number of cases (out of 29,955 requests filed in 2017 the interpretation was refused on these grounds in 650 cases).

Even if the applicant obtains an interpretation when the interpretation authority does not notice the applicability of the rule, they are left with nothing. In accordance with Art. 14na of the Tax Ordinance Act added then on 15 July 2016, the provisions on the protection of the holder of an individual interpretation do not apply if the actual state or future events which are the subject of the interpretation constitute an element of the operations which are the subject of a decision issued on the basis of GAAR or in connection with the abuse of rights within the meaning of the provisions on value added tax.

This leads to a quite obvious conclusion that the individual interpretation does not protect the holder in any way when tax avoidance occurs and it is irrelevant that to some extent the defect in interpretation is the result of an error on the part of the interpretation authority. As a result, it can be concluded that the interpretation authority will in no case suffer negative consequences of its error in assessing the taxpayer's actions and its failure to request the opinion of the Head of the KAS.

Similarly, the protection of the interpretation holder is also excluded, for example, under the Slovak law (Lang et al., 2016: 588). In other countries, such as Portugal (Lang et al., 2016: 526) and Finland (Lang et al., 2016: 256), obtaining a "normal" tax interpretation protects against the application of GAAR.

8 Sad Practice of the Tax Authorities

The greatest threat to taxpayers, however, does not lie in the provisions of law, but in the practice of tax authorities. We are increasingly often confronted with situations where the tax authorities refuse to apply the interpretation on the grounds that the description of the actual state or a future event in the request does not correspond to the actual course of the event. The alleged differences between the content of the request and reality give the impression, to put it mildly, of being far-fetched. As a result, requests for individual interpretations are becoming more detailed.

At present, the Polish tax administration often takes pride in the increase in tax collection. The fight against tax fraud has become a trademark of the Polish Prime Minister (earlier: Minister of Finance and Development) Mateusz Morawiecki. There is no doubt that a significant number of actions of the government should be given the credit. However, the prevailing atmosphere of fighting against fraud creates a tendency among the tax authorities to focus only on the result of tax collection. Less attention is paid to the legitimacy of the actions of the tax authority. If individual interpretations which are beneficial for the taxpayer are disregarded, the trust that the taxpayer should have in those interpretations and tax authorities is undermined by them.

9 Climate Change around Individual Interpretations in Global Terms

Likewise, we must not overlook the growing doubts about the functioning of tax interpretations, which are appearing in the world. Tax interpretations may constitute an instrument of harmful tax competition.[7] It is tax interpretation that Luxembourg has been using for many years (the *LuxLeaks* scandal). It was in Luxembourg that a discretionary system of "creating" tax law for the use of large multinationals and to the detriment of the fiscal interests of other countries was created. This practice was well described by the International Consortium of Investigative Journalists (ICIJ) (Kleinnijenhuis, 2014).

The actions of Luxembourg authorities were treated by the European Commission as an unlawful State aid.[8] This is a common trend nowadays. The Commission runs a significant number of cases in which it argues that obtaining an interpretation (including an advance pricing agreement) can be an example of an unlawful State aid.[9] This does not mean that the interpretation itself as an institution constitutes State aid. Rather, state aid is a misinterpretation of the law in this interpretation, or a hidden agreement between a taxpayer and a state that creates a favourable tax regime (Lang, 2015: 395).

The practice of Luxembourg authorities is quite commonly quoted as an incentive for the OECD and the EU to address the issue of transparency of tax interpretations (Balco and Yeroshenko, 2017: 263) and changes in the exchange of tax information.

Polish tax interpretations have never been an instrument of harmful tax competition. However, it cannot be ruled out that in the future the European Commission will consider some of them to be state aid, which will entail the obligation to return the tax advantage. This is certainly an additional risk factor for taxpayers.

10 Conclusions – Wealth or Crisis?

The system of tax interpretations in Poland seems to be well-developed in every aspect. For many years now, new, useful legal solutions have been introduced to adapt it to the taxpayers' needs. Tax interpretations are widely used by taxpayers. However, it seems that the success also proves that there is a crisis. Issuing more than 37,000 tax interpretations each year is a disastrous sign of the relations between taxpayers and authorities. The taxpayer does not trust the tax authorities and therefore always tries to be on the safe side and obtaining an interpretation. However, current changes in both the law and the practice of its application undermine the taxpayer's confidence even in the tax interpretation. In too many cases tax interpretation no longer protects the taxpayer. In the course of their discussions, lawyers quite often take the view that "the time of tax interpretations in Poland is over". Maybe it is a bit exaggerated, but in

7 For more information on the issue see Harmful Tax Practices, 2017.
8 For more information see Rossi-Maccanico, 2016: 475–507.
9 For more information on the issue see Luja, 2015: 379–390.

fact since 2016 the number of tax interpretations issued in Poland has finally started to decrease significantly.[10] I do not think that Polish tax law has become clearer. Rather, it is the result of a combination of two factors: first, the introduction of legal restrictions on the possibility of applying for tax interpretations; second, the taxpayers' confidence in the protective power of interpretation has been significantly undermined.

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[10] In 2016, 33,605 individual interpretations were issued (i.e. 3,000 less than in the previous year), and in 2017 only 25,718.

Sovereign Green Bond Market – A Comparative Analysis

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JEL Classification: G15, G23, H63, Q56

Abstract
Green bonds have become basic instruments considered sources of green projects financing. The green bond market is relatively new as it was inaugurated in 2007, however, its rapid development has recently been observed. The aim of this paper is the analysis of sovereign green bonds, as well as the comparison and assessment of profitability, price changes and the structure of investors of these instruments. The analysis includes all green bonds issued by governments until the end of June 2018. The study adopted a hypothesis that there are significant differences in the parameters and yield of sovereign green bonds.

Keywords
green bonds; treasury bonds; bond yield; green projects

1 Introduction

The idea of sustainable development and sustainable economy has recently become a new paradigm discussed on the international forum uniting governments, international and national organisations, as well as the private sector in joint initiatives for environmental protection. As the transition to the sustainable economy needs enormous financial sources for environmentally-friendly projects, the idea of "green finance" has been promoted at the supranational level. Green projects need usually long-term financing

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Mosionek-Schweda, M. and Szmelter, M. Sovereign Green Bond Market – A Comparative Analysis. In: Hulkó, G. and Vybíral, R. eds., *European Financial Law in Times of Crisis of the European Union*. Budapest: Dialóg Campus. 2019. pp. 433–443.
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and the bond market can provide an additional source of green funds to bank lending and equity financing. The green bond market emerged in 2007 with the first issuances offered by the World Bank and the European Investment Bank. Private sector issuers joined this market in 2013–2014, and since that moment the green bond market has been continuously increasing by around 120% yearly (Bieliński and Mosionek-Schweda, 2018: 14). The first sovereign green bonds were issued only at the end of 2016. The issuer of these instruments was Poland, thus entering the history of the development of the global financial market. One of the initiatives affecting the governments' decision to issue green bonds is undoubtedly the Paris Agreement within the United Nations Framework Convention on Climate Change (UNFCCC). The Agreement was signed by 195 parties (countries and organisations) on 12 December 2015 and entered into force on 4 November 2016. According to Art. 2 of the Paris Agreement, its aim is to support the global response to the threat of climate change by keeping a global temperature increase in the 21st century below 2 degrees Celsius. The enhancement of the countries' ability to manage with the impacts of climate change, as well as making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development are other goals of the Paris Agreement (Paris Agreement, 2015).

The aim of this paper is the analysis of sovereign green bonds, as well as the comparison and assessment of profitability, price changes and the structure of investors of these instruments. The research includes all green bonds issued by governments until the end of June 2018. For better understanding the origin of green bonds, the basic theoretical background of green bond was also provided. The study adopted a hypothesis that there are significant differences in the parameters and yield of sovereign green bonds issued by governments on foreign markets. A descriptive analysis was used to summarise the main characteristics of the analysed sovereign green bonds (namely the issuers, maturity profiles, denominated currencies, coupon). Additionally, a comparative analysis was adopted to assess differences between examined issuances.

2 Theoretical Background of Green Bonds

There is no one commonly accepted definition of green bond. Generally, a green bond is simply a fixed-income financial instrument sold on the market with a promise to devote the funds raised to environmentally-friendly projects. However, for further development of green bond markets, it is necessary to clearly state what green investments and green projects are, as well as to standardise rules and requirements relating to green bonds issuance. Among many of existing national and international standard frameworks used for labelling green bonds, the most popular are the Green Bonds Principles (released in 2015, updated in 2017) issued by the International Capital Market Association (ICMA). Those principles are entirely voluntary and should be seen as the guidelines for all green bond market participants. They also serve as the basis for many national frameworks. According to the GBP, green bonds are "any type of bond instrument where the proceeds will be exclusively applied to finance or re-finance, in part or in full, new and/or existing eligible Green Projects and which are aligned with the four core components of the GBP”. The GBP indicates also four basic types of green bonds: 1. Use of Proceeds Bond; 2. Use of Proceeds Revenue Bond; 3. Project Bond; 4. Securitised Bond (International Capital Market Association, 2017: 2–6).

It should also be mentioned a significant involvement of China in the development of the green bond market. In December 2015, the People’s Bank of China and the National Development and Reform Commission published two sets of guidelines for green bond issuance on the Chinese financial market. As a result, China becomes the first country in the world to publish official rules for the issuance of such bonds (Weber et al., 2016: 339). Moreover, the Chinese definition of green bond differs from other proposed definitions as projects including coal-powered generation, clean coal and high-efficiency transport fuel production are recognised as green in China (Dai et al., 2017: 13).

The diversity of green bond definitions and the lack of the standardised rules for certification of these securities reduce the transparency of the green bond market and, thus, are one of the biggest barriers for its development.

3 Governments as Green Bond Issuers

There are many factors that may influence sovereigns’ interest in issuing green bonds. Firstly, green bonds can be a key tool for governments to raise capital necessary to implement infrastructure plans in line with national climate targets made as the result of the commitments under the Paris Agreement. Thus, issuance of sovereign green bonds can provide a strong signal of the country’s commitment to a low-carbon economy. Moreover, by issuing green bonds, a government may reduce the cost of capital for green projects by attracting new investors interested in green investments. And finally, such governmental focus on green projects and green finance may mobilise the private capital towards sustainable development (Climate Bonds Initiative, 2018a: 2).

Although the beginning of the green bond market dates back to 2007 with the first issuances offered by the World Bank and the European Investment Bank, the first sovereign green bonds were issued only at the end of 2016. By the end of June 2018, barely 7 sovereigns decided to rise capital by issuing green bonds (see Table 1). The inaugural issue of sovereign green bonds was made by Poland in December 2016. In February 2018, the Polish Ministry of Finance offered another issuance of green bonds, as a result of which Poland once more became a pioneer in the financial markets – this time as the world’s first issuer placing the second issue of green bonds. In case of both issues, the investors’ demand significantly exceeded the issuance targeted by the Polish Government. The orderbook for the first Polish green bonds amounted to EUR 1.5bn while the planned issuance was worth EUR 500m. As a consequence, the final placement was upsized to EUR 750m. This green bond issue contributed to the diversification of the investor base investing in Polish Treasury bonds as 61% of the issues was acquired by investors specialising in investments in financial instruments related to environmentally-friendly projects. Geographically, 27% of the issues was purchased by investors from Germany and Austria, 17% from the Benelux countries, 16% from Great Britain and Ireland, 15% from the Nordic countries, 13% from France, 7% from Poland and 5% from other countries. Taking into consideration the types of investors, the largest share among investors was held by asset management companies (49%), followed by banks (22%), pension funds and insurance companies (16%), central banks and public institutions (12%) and other investors (1%) (Ministry of Finance, 2017: 5). Green bonds issued in second issuance were instruments with a tenor of 8.5 years and a coupon of 1.125%. Once more, the demand for Polish sovereign green bonds exceeded the issuer's expectations by reaching EUR 3.25bn, as a result of which the amount of the issue was doubled from the planned EUR 500m to EUR 1bn. About 40% of this issue was bought by investors specialising in investments in environmentally-friendly assets. The majority of investors came from Europe, including France (23.5%), Germany (19.0%), Great Britain (13.9%), Poland (9.6%), Switzerland (5.0%), Scandinavian countries (4.8%), Austria (3.9%), Benelux countries (1.9%), others (8.1%). Bonds were purchased primarily by asset management companies (66.5%), followed by banks (15.9%), central banks and public institutions (9.2%), and insurance companies and pension funds (7.8%), hedge funds (0.3%) and other entities (0.2%) (Mf.gov.pl, 2018).

The main purpose of both Polish issues was to finance environmentally-friendly projects consistent with the requirements set out in the governmental document entitled *Green Bond Framework* (The State Treasury of the Republic of Poland, 2016). However, no specific investments were pointed out. It was only indicated that the proceeds from the issue may be used to finance or refinance budget expenditures for green projects. Six eligible sectors were identified: renewable energy, clean transportation, sustainable agriculture operations, afforestation, national parks and reclamation of heaps.

One month after the pioneering Polish green bond issuance, in January 2017, the French Government joined the sovereign green bond market by issuing a 22-year maturing bond. Investors' demand for these instruments was very high with orderbooks closing at above EUR 23.5bn, leading the bond to be upsized from EUR 3bn up to EUR 7bn which is the largest and longest-dated green bond ever issued. The geographical distribution of investors shows strong domestic demand for these instruments as investors from France acquired 37% of the issuance. The share of investors from the Netherlands was 19%, the United Kingdom 18%, the Nordic countries 7%, Asia 3%, and America 2% (Agence France Trésor, 2017). Proceeds from these bonds were to be allocated to projects belonging to one of six eligible sectors: 14% of raised capital to energy, 33% energy efficiency, 20% transport, 3% waste, 23% sustainable land use and 8% adaptation.

In 2017 there were only two more sovereign green bonds issuances. At the end of the year Fiji and Nigeria placed their green bonds becoming the first issuers among developing economies. Nigeria's 5-year maturing bonds worth NGN 10.69bn

(USD 29.7m) are listed on the Nigerian Stock Exchange and FMDQ, an over-the-counter exchange. The proceeds would be used to provide green electricity to rural communities, improve education and support a government afforestation initiative (FinancialTimes.com, 2018b). It should be noted the very high coupon of these instruments set at the level of 13.48% and the lowest rating among the analysed instruments. In turn, Fijian's issuance worth FJD 100m (USD 49m) was divided into two tranches with 5-year bond maturing in 2022 with a coupon rate of 4%, and a 13-year bond maturing in 2030 with a coupon rate of 6.3% (Government of the Republic of Fiji, 2017). These instruments are listed on the London Stock Exchange. The purpose of the Fijian green bonds was to provide a new source of finance for sustainable development supporting particularly projects relating to the renewable energy, low-carbon transport and sustainable water supply.

Table 1. Details of sovereign green bond issuances

Country	ISIN	Nominal value	Coupon	Price (%)	Date of issuance	Maturity date	Tenor (years)	Rating
Poland	XS1536786939	EUR 750m	0.5%	993.43	20.12.2016	20.12.2021	5	A– (Fitch), BBB+ (S&P)
France	FR0013234333	EUR 7bn	1.75%	100.162	24.01.2017	25.06.2039	22	Aa2/AA/AA by Moody's, S&P, Fitch
Fiji	FJ0406990624, FJ0406990632	FJD 100m	5 years: 4.00%; 13 years 6.30%	100	17.10.2017	01.11.2022; 01.11.2030	5; 13	Ba3 (Moody's), B+ (S&P)
Nigeria	–	NGN 10.69bn	13.48%	1000	18.12.2017	22.12.2022	5	B+ (Fitch), B (S&P)
Poland	XS1766612672	EUR 1bn	1.125%	997.76	07.02.2018	07.08.2026	8.5	A– (Fitch), BBB+ (S&P)
Belgium	BE0000346552	EUR 4.5bn	1.25%	99.466	27.02.2018	22.04.2033	15	Aa3/AA/AA– by Moody's, S&P, Fitch
Indonesia	US71567RAJ59	USD 1.25bn	3.75%	100	01.03.2018	01.03.2023	5	BBB– (S&P), Baa2 (Moody's), BBB (Fitch)
Lithuania	LT0000610305	EUR 20m	1.2%	100	03.05.2018	03.05.2028	10	A (S&P), A3 (Moody's), A– (Fitch)

Source: Compiled by the authors based on Issue Letter No. 20/2018 of the Minister of Finance of February 5, 2018 regarding the issue of eight-year bonds with a fixed interest rate and maturity on August 7, 2026, offered on foreign markets; Letter of Issue No. 67/2016 of the Minister of Development and Finance of December 16, 2016 regarding the issue of five-year fixed-interest bonds and maturity on December 20, 2021, offered on foreign markets; FinancialTimes.com, 2018a and 2018b; Fmdqote.com, 2018; Globnewswire.com, 2018; data from Thomson Reuters Eikon on the basis of the agreement between the University of Gdansk and Thomson Reuters company.

In the first half of 2018, the green bond market expanded by four new sovereign bonds issues, including second issuance of Polish bonds, and three new issuers, i.e. Belgium, Indonesia and Lithuania. Belgium offered a 15-year maturing sovereign green bond with a total value amounted to EUR 4.5bn (the second largest in the analysed period). Investor demand was strong with an orderbook of EUR 12.7bn. According to the Belgian Debt Agency declaration, the EUR 4.5bn sovereign green bond is expected to grow to EUR 10bn within four years (Climate Bonds Initiative, 2018b). Proceeds from these instruments would be used according to the Belgium's Green Bond Framework that aligns with its environmental commitments and policies by focusing on climate change mitigation and adaptation (96% of available eligible green expenditures), natural resource protection (3%) and biodiversity (1%). The Framework includes five eligible green sectors: energy efficiency, clean transportation, renewable energy, circular economy, and living resources and land use (Debtagency.be, 2018).

The Indonesian bond issue is, in turn, the first sovereign green sukuk[3] on the green bond market.[4] This issue allowed Indonesia to attract both: Islamic investors and green investors. The total size of the issue amounted to USD 1.25bn with a maturity of 5 years. Proceeds were allocated to projects which promote the transition to a low-emission economy and climate-resilient growth, including climate mitigation, adaptation and biodiversity. The eligible sectors are: renewable energy, energy efficiency, resilience to climate change/disaster risk reduction, sustainable transport, waste-to-energy and waste management, sustainable management of natural resources, green tourism, green buildings and sustainable agriculture (Climate Bonds Initiative, 2018b: 5).

The last sovereign green bonds issuance, in the analysed period, was the Lithuanian's offer of 10-year maturing bonds worth EUR 20m with a 1.2% coupon. It is also the first issue of government green securities in the Baltic region. Moreover, these bonds are quoted on the Nasdaq Baltic Bond List (Globnewswire.com, 2018). The funds raised by Lithuania are intended for modernising residential buildings to make them more energy efficient. The proceeds of the bond issue will be loaned to the Public Investment Development Agency which will in turn back subsidised loans to owners of multi-apartment buildings for building renovations (Imperial College Business School, 2018: 17).

The presented analysis of all issues of green bonds offered until the end of June 2018 showed a very large variation in the parameters of the issuance, i.e. coupon, maturity, value and currency of the issue. The common feature of all these instruments is the purpose of their issue: to finance green projects which address key environmental problems, such as climate change, depletion of natural resources, loss of biodiversity, air, water or soil pollution.

4 Comparative Analysis of Sovereign Green Bonds

The analysis is based on indicators such as: *current yield* (CY), *yield to maturity* (YTM), as well as bond prices. All data was derived from Thomson Reuters Eikon database which gives the access to real time market data (type of data used in research: *daily*, *last, mid*).

[3] Sukuk are Islamic bonds structured in such a way as to generate returns to investors without infringing Islamic law that prohibits riba or interest. Commonly referred to as "sharia compliant" bonds.

[4] The green sukuk were issued for the very first time by Tadau Energy which is a Malaysian company from the solar energy sector. The total value of the issuance amounted to MYR 250m. These bonds were offered in June 2017 with a tenor of 15 years.

Six green bonds quoted in Eikon were examined: FR0013234333, BE0000346552, LT0000610305, XS1536786939, XS1766612672, US71567RAJ59. The analysed period is the first half of 2018 because most of the examined green bonds were issued in 2018.

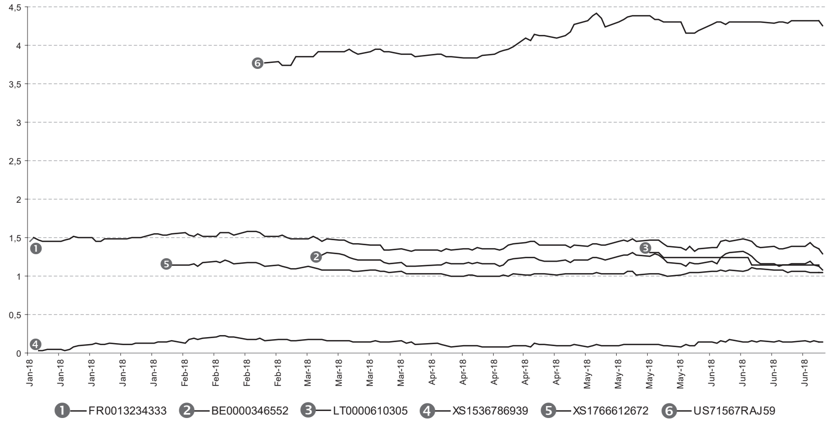

Figure 1. Yield to maturity (YTM) of the analysed sovereign green bonds (in %)

Source: Compiled by of the authors based on data from Thomson Reuters Eikon on the basis of the agreement between the University of Gdansk and Thomson Reuters company.

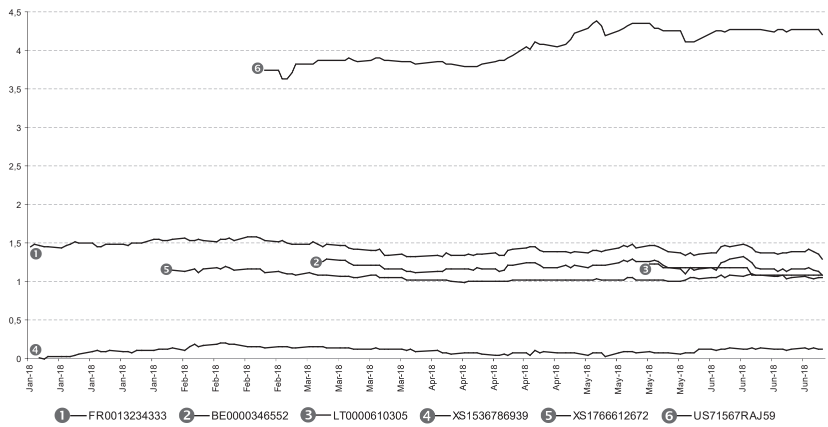

Figure 2. Current yield (CY) of the analysed sovereign green bonds (in %)

Source: Compiled by the authors based on data from Thomson Reuters Eikon on the basis of the agreement between the University of Gdansk and Thomson Reuters company.

There are significant differences in the level of the analysed indicators (see Figure 1 and Figure 2). The highest value was observed for Indonesia with YTM changes in 3.75–4.42% channel (CY: 3.64–4.38%). France is at the second place (yields fluctuated at the level of 1.44%) followed by Belgium, Lithuania, and Poland (XS1536786939) for which CY and

YTM were very similar. Securities issued by Poland are characterised by relatively low yield indicators (especially XS1536786939 green bond with average YTM at the level of 0.13%, and CY: 0.10%). Table 2 shows the maximum and minimum levels of YTM and CY in the analysed period. The biggest spread is observed for Indonesian securities.

Table 2. YTM and CY indicators (max, min, average, in %)

	FR0013234333	BE0000346552	LT0000610305	XS1536786939	XS1766612672	US71567RAJ59
Max YTM	1.59	1.32	1.30	0.22	1.20	4.42
Min YTM	1.29	1.08	1.15	0.03	1.00	3.75
Average YTM	1.44	1.20	1.21	0.13	1.07	4.10
Max CY	1.58	1.31	1.22	0.19	1.19	4.38
Min CY	1.29	1.07	1.07	-0.01	0.98	3.64
Average CY	1.43	1.19	1.13	0.10	1.05	4.06

Source: Compiled by the authors based on data from Thomson Reuters Eikon on the basis of the agreement between the University of Gdansk and Thomson Reuters company.

Price of green bonds changed with different dynamics (see Figure 3, Table 3 and Table 4). The most unstable was FR0013234333, for which the 1-day average change in price reached the level of 0.35% (max: 1.51%). On the other hand, the price volatility of XS1536786939 was relativity low with the average at the level of 0.05% (and max volatility was 0.19%). The spread (difference between max and min price) was the highest in case of the French bond (5.46), and the lowest in case of the Polish security XS1536786939 (0.79). Comparing all green bonds, we can divide them in two groups, i.e. a group of relatively variable securities consisting of French, Belgian, and Indonesian green bonds and a group with relatively stable securities including Polish securities. Changes in price of: FR0013234333, BE0000346552, US71567RAJ59 were clearly visible in the first half of 2018.

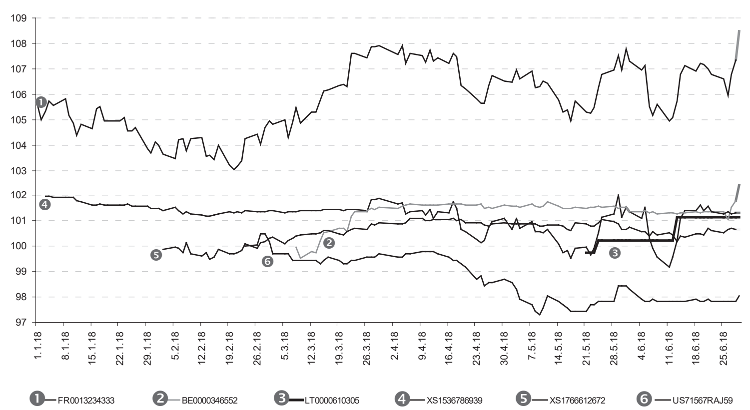

Figure 3. Fluctuations of the prices of the analysed sovereign green bonds

Source: Compiled by the authors based on data from Thomson Reuters Eikon on the basis of the agreement between the University of Gdansk and Thomson Reuters company.

Table 3. The price of green bonds (max, min, average)

	FR0013234333	BE0000346552	LT0000610305	XS1536786939	XS1766612672	US71567RAJ59
Max	108.48	102.42	101.17	102.00	101.12	100.50
Min	103.02	99.20	99.77	101.20	99.51	97.31
Average	105.76	100.84	100.59	101.50	100.56	98.69
Spread	5.46	3.22	1.40	0.79	1.62	3.19

Source: Compiled by the authors based on data from Thomson Reuters Eikon on the basis of the agreement between the University of Gdansk and Thomson Reuters company.

Table 4. 1-day dynamic in prices of green bonds (absolute value)

	FR0013234333	BE0000346552	LT0000610305	XS1536786939	XS1766612672	US71567RAJ59
Max	1.51%	1.18%	0.93%	0.19%	0.45%	0.64%
Average	0.35%	0.30%	0.06%	0.05%	0.09%	0.12%

Source: Compiled by the authors based on data from Thomson Reuters Eikon on the basis of the agreement between the University of Gdansk and Thomson Reuters company.

The analysed green bonds were purchased mostly by asset management companies located in the European Union (i.e. the UK, Denmark, Germany, France, Netherlands), Switzerland, United States, Hong Kong and Singapore. Table 5 shows the most important investors for each green bond. Financial institutions having almost all types of analysed green bonds are capital groups: BlackRock, BNP Paribas and Deutsche. The green bond issued by France has the most diverse holding structure as it is included in portfolios of almost 90 managing firms. The Indonesian bond is characterised by a limited number of investors (around 20 managing companies). The Belgian green bond is included in the portfolio of 40 managing firms, and the Polish in 35.

Table 5. The holding structure of the analysed sovereign green bonds

	FR0013234333	BE0000346552	XS1536786939	XS1766612672	US71567RAJ59
Name of the managing firms	External Manager Not Disclosed (North America)	Fidelity Worldwide Investment Ltd. (the UK)	Union Investment Privatfonds GmbH (Germany)	External Manager Not Disclosed (North America)	Pictet Asset Management Ltd. (the UK)
	The Vanguard Group, Inc. (the US)	External Manager Not Disclosed (North America)	Deka Investment GmbH (Germany)	BlackRock Investment Management Ltd. (the UK)	External Manager Not Disclosed (North America)
	BNP Paribas Investment Partners (France)	Schroder Investment Management Ltd. (SIM)	First Private Investment Management KAG GmbH (Germany)	Anima SGR S. p.A. (Italy)	Vontobel Asset Management AG (Switzerland)
No. of managing firms	87	42	36	35	21
No. of funds/portfolios	283	123	59	78	42

Source: Compiled by the authors based on data from Thomson Reuters Eikon on the basis of the agreement between the University of Gdansk and Thomson Reuters company.

The size of a bond issue often determines the number of managing firms and number of funds/portfolios managed by them. Thus, the French green bond is included in over 280 portfolios/funds, and the Belgian bond is present in over 120 portfolios/funds. Comparing securities issued by Poland, they are constituents of a limited number of portfolios/funds (around 60 in case of XS1536786939, and 80 for XS1766612672). Indonesian green bonds are only in 42 portfolios/funds. The average number of funds/portfolios at single managing firm range from 1.6 (XS1536786939) to 3.3 (FR0013234333). This indicator is around 3 for French and Belgian bonds, and 2 for the Polish security XS1766612672, as well as for the bond issued by Indonesia.

5 Conclusion

The above analysis confirmed significant differences in the profitability and the main features of sovereign green bonds issued in 2016–2018. The coupon of examined bonds ranged from 0.5% to 13.48%, the maturity was from 5 up to 22 years, and the total value of raised capital ranged from EUR 20m to EUR 7bn. Those instruments also differed considerably while indicators like YTM, CY, or price, as well as investors structure were considered. The highest and the most fluctuated yield indicators (YTM and CY) were for Indonesian bonds. Other green bonds have indicators on a similar level. As a consequence, there are observed differences in changes of green bond prices. Polish securities were characterised by relatively low volatility, and the French bond was the most unstable. Green bonds were bought by international financial institutions that come from developed markets. Some of the managing firms invested in securities issued by almost all analysed countries.

The sovereign green bond market is at the early stage of development. However, bearing in mind the global commitment to shift to a sustainable economy, the continuous growth of this market should be expected in the nearest future.

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Permanent Establishment – New Concept

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Abstract
The permanent establishment is an essential concept in International Tax Law. The traditional definition was based on the existence of a fixed place of business. At present, the new economy requires a change in the concept of permanent establishment. The topic of permanent establishment is based today on the so-called sufficient economic presence. The European Union is working on the definition of a permanent digital establishment.

Keywords
permanent establishment; fixed place of business; sufficient economic presence; permanent digital establishment; OECD

1 Introduction

The concept of *permanent establishment* is a typical notion of International Tax Law. It is a concept that arises from the definition of Double Taxation Conventions. And the idea of a PE cannot be understood without understanding the content of Art. 5 of the OECD Model Convention (Carmona Fernandez, 2012), in addition to the exclusion of preparatory and auxiliary activities. A first symptom of the crisis of this concept of permanent establishment comes from the important novelties of the digital economy. The emergence of electronic commerce, in the nineties of the last century, raised doubts about the application of the traditional category of permanent establishment.

As García Prats says, the basis of the permanent establishment was traditionally the verification of the existence of a *geographical link* between the activity developed

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Novoa, C. G. Permanent Establishment – New Concept. In: Hulkó, G. and Vybíral, R. eds., *European Financial Law in Times of Crisis of the European Union*. Budapest: Dialóg Campus. 2019. pp. 445–455. DOI: https://doi.org/10.36250/00749.42

and the permanent establishment, in order to demonstrate a qualified connection between the establishment and the territory of the State (Garcia Prats, 1996). Therefore, the idea of a permanent establishment requires a physical presence. From this point of view, the permanent establishment of Art. 5 of the OECD Double Taxation Model is any permanent installation that is integrated into the economy of the country.

This concept is overcome in the context of the digital economy. The adaptation of international taxation to the digital economy is one of the great challenges of today (Pires, 2017).

Different international entities are making proposals on taxation of the digital economy. Thus, Action 1 of BEPS is dedicated to addressing the tax challenges of the digital economy, and identifies the main difficulties that the digital economy poses for the application of existing international tax rules. The Final Report of October 5, 2015 outlines options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation. The report of Action 1 addressing the tax challenges of the digital economy was finalised at the last meeting of the Task Force on the Digital Economy and then was ratified by the Committee of Fiscal Affairs. It was issued with other BEPS reports on 5 October, with approval by the G20 Finance Ministers on 8 October in Lima. The report includes the digital tax options (i.e. the digital nexus, withholding tax, or equalisation levies), but it does not stop there. It notes the opportunity to build practical experience of how such options would operate if countries unilaterally adopt them in the short term, potentially encouraging countries to do so. Any country taking this route needs to respect its existing treaty obligations, and to recognise that the outlines provided are not a blueprint and would need more work to be done. So, work will continue with regard to monitoring developments in the digital economy, although it has been left open whether this will be undertaken by the Task Force on the Digital Economy or otherwise (Avery Jones, 2006).

2 Challenges Posed by the Digital Economy in the European Union

Challenges posed by the digital economy to fair taxation in the European Union took centre stage at the informal ECOFIN meeting in Estonia on 15–16 September, during Estonian Presidency.

The Estonian Presidency highlighted that the current tax rules are out of date and in need of reform to aptly deal with the digital economy. The Estonian Presidency says that, while a global resolution is the best solution in the long term, a common solution encompassing all the Member States in Europe is very important in the short to medium term. Estonia suggests that the European Union could mould the global solution in the future if an agreement on the approach inside the European Union is possible. In terms of a solution, the Estonian Presidency proposes changes to the definition of permanent establishment so as to abandon the requirement that companies have to be physically present in a country or own assets there, and replace this with the concept of a virtual permanent establishment. A precondition for this is a more precise agreement on the virtual taxpayers who must to start paying taxes.

On March 21, 2018, the European Commission has proposed new rules to ensure that digital business activities are taxed in a fair and growth-friendly way. The measures would make the European Union a global leader in designing tax laws fit for the modern economy and the digital age.

The proposals come as Member States seek permanent and lasting solutions to ensure a fair share of tax revenues from online activities, as urgently called for by European Union leaders in October 2017 (European Council, 2017). Profits made through lucrative activities, such as selling user-generated data and content, are not captured by today's tax rules. Member States are now starting to seek fast, unilateral solutions to tax digital activities, which creates a legal minefield and tax uncertainty for business. A coordinated approach is the only way to ensure that the digital economy is taxed in a fair, growth-friendly and sustainable way.

Two distinct legislative proposals proposed by the Commission today will lead to a fairer taxation of digital activities in the European Union.

The first initiative aims to reform corporate tax rules so that profits are registered and taxed where businesses have significant interaction with users through digital channels. This forms the Commission's preferred long-term solution. The new rules will also change how profits are allocated to Member States in a way which better reflects how companies can create value online: for example, depending on where the user is based at the time of consumption.

The second proposal responds to calls from several Member States for an interim tax (3% Digital Services Tax on revenues) which covers the main digital activities that currently escape tax altogether in the European Union.

The proposal for a Directive laying down rules relating to the corporate taxation of a significant digital presence has a broader scope than the Digital Services Tax and is designed to introduce a taxable nexus for digital businesses operating within the European Union, with no or only a limited physical presence. It also sets out principles to attribute profits to businesses having such "significant digital presence".

The Directive aims at taxing under the normal corporate income tax system of a Member State, profits generated by businesses providing certain digital services and having a "significant digital presence" within this Member State. The notion of "significant digital presence" builds on the existing permanent establishment concept and covers any digital platform such as a website or a mobile application that meets one of the following criteria: the annual revenue from providing digital services in a given Member State exceeds 7 million Euro, the annual number of users of such services is above 100,000, or the annual number of online contracts concluded with users in a given Member State exceeds 3,000.

This package sets out a coherent European Union approach to a digital taxation system which supports the Digital Single Market and which will feed into international discussions aiming to fix the issue at the global level. This interim tax ensures that those activities which are currently not effectively taxed would begin to generate immediate revenues for Member States. It would also help to avoid unilateral measures to tax digital activities in certain Member States which could lead to a patchwork of national responses which would be damaging for our Single Market.

3 The New Dimension of the Permanent Establishment

When the electronic commerce, first the off line, and later, the online one, becomes an important part in the activity of an entity, the question arises whether the traditional characteristics of the permanent establishment concept can be applied to the new reality of the digital economy. Especially the question arises whether it is possible to adapt the concept of *permanent establishment* to the situation of a company that offers goods and services online in a State other than their residence, through a server or a website. It is necessary to remember that the permanent establishment ensures a tax collection to the State of the territory where the benefit is obtained by a non-resident. Remember that a server (Internet Service Provider) allows users to access the network, and can be located anywhere, even without a fixed location. The web page is the instrument through which the company offers its products to the customer. Simply, the website is a combination of software and electronic data easily modifiable and transportable from one server to another (Wagh, 2013). Initially, the response was negative. Operating in the market of a State through a website does not imply the stability of the installation. Nor does it imply connection of the same with the normal exercise of the company. A website is not a fixed installation. Information is distributed through the website, but its content can be modified without difficulty.

And a server does not constitute a stable organisation under the terms of Art. 5 of the OECD Model. The only questionable case would be that of a server owned by an Internet provider. This provider performs the web hosting activity for a plurality of companies, contracting and developing *mediation* functions through computer programs.

4 The Need to Modify the Structure of the Permanent Establishment within the Framework of the Anti-elusive Requirements of the Digital Economy

The adaptation of the category of the permanent establishment to the phenomenon of the digital economy is today a necessary reaction, guided by the demand to implement measures to fight against international tax avoidance. Business models and value chains are changing fundamentally and value creation is becoming increasingly independent of physical presence in a market. A first requirement is the challenge of adapting certain concepts defined for a physical economy model to the new dimension of the digital economy. It is required reflection on whether the current Treaty Rules for taxing commercial profits are appropriate for electronic commerce. For example, and as we said, one of the first dilemmas is if the goods or merchandise concept as an object of what can be stored in facilities includes digital products or data. It is also not clear to what extent the words – storage and delivery – can apply to digital products downloaded from servers through computer networks.

Action 1 of the final BEPS report of October 2015 concluded that the perceived challenge to be addressed is the digitisation of businesses of all types and sectors rather than some idea of a digital economy that one can clearly identify and tax separately.

The problem of the taxation of the digital economy is perfectly summarised by the report of the European Commission, dated 21 September 2017, when it says: *"The current tax rules no longer fit the modern context where businesses rely heavily on hard-to-value intangible assets, data and automation, which facilitate online trading across borders with no physical presence. These issues are not confined to the digital economy and potentially impact all businesses. As a result, some businesses are present in some countries where they offer services to consumers and conclude contracts with them, taking full advantage of the infrastructure and rule of law institutions available while they are not considered present for tax purposes. This free rider position tilts the playing field in their favour compared to established businesses."*

And this, because in the context of increasing globalisation of the economy, the development of new technologies allows the different agents of economic activity to communicate in real time, and even the acquisition of goods or services through the network, which connects customers and suppliers. Likewise, the technological possibilities are giving rise to the development of innovative business models that pose new challenges from the point of view of tax control. It is difficult for the tax administrations to detect these businesses and obtain information from them.

The Executive Summary of the Final Report of Action 1 BEPS notes that the digital economy is the result of a transformative process brought by information and communication technology (ICT), which has made technologies cheaper, more powerful, and widely standardised, improving business processes and bolstering innovation across all sectors of the economy. It adds: *"Because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes. The digital economy and its business models present however some key features which are potentially relevant from a tax perspective. These features include mobility, reliance on data, network effects, the spread of multi-sided business models, a tendency toward monopoly or oligopoly and volatility. The types of business models include several varieties of e-commerce, app stores, online advertising, cloud computing, participative networked platforms, high speed trading, and* *online payment services. The digital economy has also accelerated and changed the spread of global value chains in which MNEs integrate their worldwide operations."*

The Final Report of Action 1 of BEPS mentions the so-called strategies and recommendations to address the problems of BEPS in the context of the digital economy. These strategies include, among others, modifying the list of exceptions to the definition of a permanent establishment.

For the OECD the most important modifications are the following. In the first place, those related to preparatory or auxiliary activities. The activities previously considered to be mere preparatory or auxiliary in nature for the purpose of the exceptions usually found in the definition of permanent establishment may nowadays correspond to core business activities of an enterprise, particularly in the digital economy. For example, the maintenance of a very large local warehouse in which a significant number of employees work for the purpose of a storing and delivering goods sold online to customers by an online seller of physical products (whose business model relies on the proximity to customer and the need for quick delivery to clients) would constitute a permanent establishment for that seller.

Thus, in relation to the concept of permanent establishment in the digital economy, it should be assessed whether certain activities previously considered preparatory or auxiliary for the purposes of these exceptions may constitute increasingly relevant elements of companies in the digital economy. It is necessary to examine in what circumstances these principal activities could be classified, as well as the possibility of formulating a reasonable administrative rule for these purposes. Also, it is necessary to clarify under what circumstances the fact of owning a warehouse can constitute a main activity so that it is excluded from the exceptions provided for in Art. 5 of the OECD Model Convention. In addition, it is proposed to introduce anti-fragmentation criteria for the activity in the State where the permanent establishment operates.

Therefore, the digital economy and its transformations on business models and value creation are interconnected with Action 7 of BEPS – preventing the artificial avoidance of permanent establishment status – and that means that a modification or reconfiguration of some of the permanent establishment sub-rules must be made so that the rule can fully achieve its objectives.

Precisely for that reason it was agreed to modify the definition of permanent establishment contained in Arts. 5(5) and 5(6) of the OECD Model Tax Convention to address circumstances in which artificial arrangements relating to the sales of goods or services of one company in a multinational group effectively result in the conclusion of contracts, such that sales should be treated as if they had been made by that country (Pires, 2017).

It is about dealing with situations such as those in which "a seller in line of tangible products (the proximity of customers and the need to make appropriate deliveries quickly being the essential component of the business model) have a large local warehouse in which a considerable number of employees work and use these facilities for the storage and delivery of goods or merchandise sold online to said customers". This would be an assumption that for the BEPS report it should be a permanent establishment modality. In addition, it is necessary to provide rules that prevent eligibility for exceptions to the permanent establishment status through the fragmentation of operations between the different entities of the same group.

But, Action 1 of BEPS is imprecise and does not provide decisive solutions. Suggests several options, but does not opt for any. It is possible to find in the Report of the Action 1 of BEPS the evaluation of three alternatives to the existing threshold of permanent establishment.

The first alternative is to find a new nexus based on the concept of significant economic presence. As the report says: *"This option would create a taxable presence in a country when a non-resident enterprise has a significant economic presence in a country on the basis of factors that evidence a purposeful and sustained interaction with the economy of that country via technology and other automated tools. These factors would be combined with a factor based on the revenue derived from remote transactions into the country, in order to ensure that only cases of significant economic presence are covered, limit compliance costs of the taxpayers, and provide certainty for cross-border activities."*

The second alternative is a withholding tax on certain types of digital transactions, imposed "on payments by residents and local permanent establishments of a country for goods and services purchased online from non-resident providers. This withholding tax could in theory be imposed as a standalone gross-basis final withholding tax on certain payments made to non-resident providers of goods and services ordered online or, alternatively, as a primary collection mechanism and enforcement tool to support the application of the nexus option described above, i.e. net-basis taxation" (Pires, 2017). But when dealing with this option the BEPS report withdraws the possibility based on technical issues and on specific challenges regarding the law of European Union (Pires, 2017). And, the third alternative is the introduction of an *equalization levy,* "intended to serve as a way to tax a non-resident enterprise's significant economic presence in a country. As Pires says, in order to provide clarity, certainty and equity to all stakeholders, and to avoid undue burden on small and medium-sized businesses, therefore, the equalization levy would be applied only in cases where it is determined that a non-resident enterprise has a significant economic presence" (Pires, 2017).

In summary, on the digital tax options (i.e. the digital nexus, withholding tax on certain types of digital transactions, unilateral tax changes, digital equalisation levy, etc.), the report's conclusions remain that none of the options outlined are recommended by the Task Force but it does not stop there. It is worth mentioning the proposal of a digital concept of permanent establishment and a withholding that would work similarly to the British Diverted Profit Tax for the digital economy. In the first case, the Report of February 5, 2015 points to the creation of a new concept of virtual permanent establishment. In the second case, the model would be the British tax on diverted profits, to which we have already referred.

Finally, the Interim Report of 2018, *OECD/G20 Base Erosion and Profit Shifting Project Tax Challenges Arising from Digitalization* remembers that: "The possibility to reach and interact with customers remotely through the Internet, together with the automation of some business functions have significantly reduced the need for local infrastructure and personnel to perform sales activities in a specific jurisdiction (i.e. scale without mass)"; adding: *"This is the case when the functions allocated to the staff of the local subsidiary under contractual arrangements (e.g., technical support, marketing and promotion) do not correspond to the substantive functions performed. For example, the staff of the local subsidiary may carry out substantial negotiation with customers effectively leading to the conclusion of sales. Provided the local subsidiary is not formally involved in the sales of the particular products or services of the group, these trade structures generally avoid the constitution of a dependent agent-permanent establishment in the market jurisdiction".*

On the other hand, Europe has already pushed ahead in this regard with the 2015 changes to the taxation of digital services focusing the determination of the tax based on the final market. But the taxation in the place of consumption through a Diverted Profit Tax or an equalisation levy generates many problems.[2] For business, the danger of double taxation would increase. The application of VAT on a broader range of deliveries of digital goods and services would be a better option of taxation than the proposals outlined.

The fundamental issue is whether it is possible to create a concept of digital permanent establishment. The Report of February 5, 2015 points to the creation of a new concept of virtual permanent establishment that, in principle, would only be applicable *to fully dematerialised companies* (which only sell digital goods and services, with virtual contracts, card payments, in which the only possibility of contact with the company is via the web, without physical offices or that are only secondary support, in which the residence of the seller is irrelevant).

The basis of this digital establishment would not be the physical presence, but the sufficient economic presence (tax nexus concept of *significant economic presence*).

But it is necessary to establish criteria to determine the economic presence of a digital company in another country. For example, number of days or number of transactions. This is what certain international rules provide. Par. 3 of Art. 5 of the OECD Model Convention provides that a building site, or construction or installation project constitutes permanent establishment only if it exists more than *twelve months*. However, defining criteria of degree of permanence in terms of days or months may not be feasible as well as desirable for e-commerce transaction. This is because, a website might have only a handful of transactions in certain number of days. In case of a website, a degree of permanence can be inferred by the number of

2 Equalization Levy has been defined as: "Tax levied on consideration received or receivable for any specified service under the provisions of this chapter". The levy would be under a separate self-contained code and is not part of the income tax law. The Equalization Levy would be applicable at 6% on gross consideration payable for a 'Specified Service'. 'Specified Service' is defined as follows: a) Online advertisement; b) Any provision for digital advertising space or facilities/service for the purpose of online advertisement; c) Any other Service which may be notified later.

transactions taking place on the website in that country. The number of transactions on the website is the indicator of the business activity carried on by the website with the subjects of that country.

The Report of Action 1 itself recognises that, in relation to the concept of permanent establishment in the digital economy, it should be assessed whether certain activities previously considered preparatory or auxiliary for the purposes of these exceptions may constitute increasingly relevant elements of companies in the digital economy. It points out the need to examine in what circumstances these principal activities could be classified, as well as the possibility of formulating a reasonable administrative rule for these purposes. It would try to clarify under what circumstances the fact of owning a local warehouse or warehouse can constitute a main activity so that it is excluded from the exceptions provided for in Art. 5 of the OECD Model Convention.

5 Conclusions

Therefore, the digital economy and its transformations on business models and value creation are interconnected with Action 7 – preventing the artificial avoidance of permanent establishment status – and that means that a modification or reconfiguration of some of the permanent establishment sub-rules must be made so that the rule can fully achieve its objectives.

For the OECD, the most important modifications are the following. In the first place, those related to preparatory or auxiliary activities. The activities previously considered to be mere preparatory or auxiliary in nature for the purpose of the exceptions usually found in the definition of permanent establishment may nowadays correspond to core business activities of an enterprise, particularly in the digital economy. For example, the maintenance of a very large local warehouse in which a significant number of employees work for the purpose of a storing and delivering goods sold online to customers by an online seller of physical products (whose business model relies on the proximity to customer and the need for quick delivery to clients) would constitute a permanent establishment for that seller.

Finally, it is necessary to remember that Action 15 of the BEPS Plan provides for the development of a *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI), to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties.

The multilateral instrument of BEPS Action 15 is a key part of the OECD's effort toward implementation of the recommended measures. The instrument will implement the tax treaty related BEPS measures into existing bilateral or regional tax treaties. Currently more than 3,000 of such treaties are in force. Bilateral renegotiations of these treaties in the conventional ways would potentially take decades and would therefore hamper the swift implementation of the treaty related BEPS measures. The multilateral instrument could potentially lead to the amendment of at least 2,000 of these treaties in the coming years and was designed to be flexible enough to accommodate the positions of different countries and jurisdictions.

The report *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* concluded that a multilateral instrument is desirable and feasible, and that negotiations for such an instrument should be convened quickly. It is about interested parties developing a multilateral instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to quickly adapt to this evolution and to streamline the implementation of the BEPS Action Plan.

On October 5, 2015, the OECD released its final report on developing a multilateral instrument to modify bilateral tax treaties (Action 15) under its BEPS Plan. And, on November 24, 2016, the OECD released the text of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) under BEPS Action 15. The text and the related explanatory statement were formally adopted by approximately 100 countries at a ceremony hosted by the OECD following the conclusion of the negotiations during the week of 21 November 2016.

On June 7, 2017, over 70 Ministers and other high-level representatives participated in the signing ceremony of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. A number of jurisdictions have also expressed their intention to sign the MLI as soon as possible and other jurisdictions are also actively working towards signature. The MLI will only enter into force after countries have ratified it and will apply for a specific tax treaty, after all parties to that treaty have ratified the instrument; and a certain period has passed to ensure clarity and legal certainty.

The tax treaty related BEPS measures covered by the multilateral instrument include elements of Action 7 on the artificial avoidance of the permanent establishment. Therefore, the permanent establishment rules can be adopted by countries through the MLI. The various measures outlined in the final 2015 BEPS Action 7 Report are currently being implemented in a number of existing tax treaties through the MLI, as well as in the course of bilateral tax treaty negotiations. Based on the provisional positions of the jurisdictions that have signed the MLI. However, it is estimated that the changes recommended under Action 7 will only be implemented in a fairly limited number of bilateral treaty relationships.

Some countries have indicated that they will not adopt these rules in their treaties due to either the factor not being a risk for their jurisdiction due to domestic legislation, or due to the lack of clarity on the profit that must be attributed to permanent establishment rules. Further guidance and clarity on profit attribution would lead to more jurisdictions gaining comfort on adopting these new standards.

The OECD Secretariat is developing a toolkit for Application of the Multilateral Instrument for BEPS Tax Treaty Related Measures that will include innovative tools to facilitate the application of the Multilateral Instrument to existing tax treaties. The MLI currently includes the MLI Matching Database and this will assist in determining whether an in-force tax treaty between countries has been modified by the countries' later decision to sign and ratify the MLI. The database matches information provided by tax treaty signatories on their MLI positions.

For the revised dependent agent/permanent establishment definition [Art. 5(5) of the OECD Model], it is estimated that, based on the positions taken so far, this revised definition would apply to around 17% of the 1,246 tax agreements currently covered by the MLI (approximately 206 bilateral tax agreements).

For the revised provision defining specific-activity exemptions [Art. 5(4) of the OECD Model]: It is estimated that, based on the positions taken so far, this revised provision would apply to around 22% (approximately 277 bilateral tax agreements).

Furthermore, the adoption rate of the new permanent establishment definition may also increase over time as governments will base treaty negotiations on the 2017 OECD Model incorporating those changes. The OECD Model has long served as the basis for the negotiation of bilateral tax treaties, and the expectation is that countries will continue to draw on the OECD Model for future tax treaty negotiations.

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Exemption of Polish Local Government Units and their Unions from Corporate Income Tax – The Fundamentals, Evolution of Solutions and Legal Framework

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Abstract

Local government units and their unions as income earning legal entities are subject to the provisions of the Act on corporate income tax. Being subject to income tax law translates also to the opportunity of benefiting from tax privileges established by the law. The establishment and application of tax preferences on income of local government units and their unions is an important instrument in supporting their efforts to perform important – in social and economic terms – public tasks. Tax privileges also serve an important protective function with regard to the public funds being managed by local government units and their unions. To ascertain the fundamentals and the scope of the regulatory law regarding subjective and objective tax exemptions addressed to local government units and their unions, as well as the way in which these regulations evolve, the tax legislation and judicial practice were analysed and the reference literature was reviewed with the application of the dogmatic-legal and empirical methods. The hypothesis on the conditional nature of tax exemption and the need for strict interpretation thereof was proven to be correct. The inability to apply such exemptions in metropolitan unions, which can be interpreted as discriminatory, was evaluated critically. Moreover, it has been proven that the provision of statutory income tax exemption thresholds to local government units and their unions is an overly complicated process since the Act income tax incorporates references to the provisions of the Act on the income of local government units which do not conclusively determine the revenue sources of these entities.

Keywords

local government; source of income; income tax; tax exemptions

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Ofiarska, M. Exemption of Polish Local Government Units and their Unions from Corporate Income Tax – The Fundamentals, Evolution of Solutions and Legal Framework. In: Hulkó, G. and Vybíral, R. eds., *European Financial Law in Times of Crisis of the European Union*. Budapest: Dialóg Campus. 2019. pp. 457–466. DOI: https://doi.org/10.36250/00749.43

1 Introduction

Local government units (LGU) and unions of LGUs may conduct business activity. Communes are also authorised to conduct business activity extending the tasks of public utility nature [Cf. Art. 9(2) of the Act of 08.03.1990], however only in the cases specified in a separate act. The introduction, by the legislator, of the restriction within the scope of conducting business activity by communes through specification, in particular, of the legal framework in which it may occur is determined by the fact that the aim and sense of existence of a local government are specific public considerations. Conducting of a business activity cannot overshadow the public objectives or excessively involve the activity of communes, whereas not without significance is the fact that specific public tasks imposed on communes are related to organisation and creation of conditions for business activity conducted by other entities (the judgement of the Voivodeship Administrative Court in Olsztyn of 08.09.2011, I SA/OI458/11). A poviat cannot conduct any business activity exceeding the tasks of a public utility nature [Cf. Art. 6(2) of the Act of 05.06.1998].

The tasks performed by an LGU are to satisfy the needs of the local government community and, thus, the nature of the task is public. Performance of such tasks is regulated by provisions of public law and private law, but in any case, this means the necessity for the LGU to be guided by the common good rather than any individual interest. The funds allocated by LGUs and the unions of LGUs to financing of public tasks are public funds, regardless of whether they come from public law sources (e.g. taxes, fees, grants and subsidies) or private law sources (e.g. incomes from tenancy and lease agreements and other agreements of a similar nature, dividends on account of property rights held). The public finance sector units include LGUs and unions of LGUs. Being in possession of these funds, they include them in their budgets, i.e. public financial plans. This is required by the provisions of the Public Finance Act of 27.08.2009 (*Journal of Laws,* 2017 item 2077; Ofiarska, 2017: 158).

The amounts of public funds devoted to performance of public tasks are limited in relation to the needs. The hypothesis has been verified that exemption of the incomes of LGUs and their unions from taxation is the action of a rational legislator aiming at protection of the incomes due to their specific intended purpose. Simultaneously, it has been emphasised that the statutory conditions shaping exemptions from taxation should be interpreted in a strict manner. Pursuant to the standards adopted in Art. 167 of the Constitution of the Republic of Poland of 02.04.1997 (*Journal of Laws,* No. 78, item 483, as amended), the state is obliged to shape the system of LGU incomes in such a manner that is suitable (proper) for the tasks assigned to them. The establishment of tax exemptions targeted at LGUs and their unions should not be understood narrowly as a tax advantage, but more widely, as an element of a systemic solution, the aim of which is to maintain proper relations between incomes of these entities and the scope of their tasks performed in the public interest.

Using the dogmatic legal and empirical methods, the legislation has been examined within the scope of taxation of the incomes of legal entities as well as court decisions and selected items of literature in order to establish the essence, the scope and the main evolution directions of legal regulations concerning the subjective and objective exemptions targeted at LGUs and their unions. It has been demonstrated that the legislator established two categories of exemptions (subjective and objective), but their scopes and aims of use are different. They do not form a specific coherent whole. Through exemption from taxation, the limits of taxation are set, which are determined not only by fiscal objectives, but also by economic, social and political needs (Ofiarski, 2013: 21).

2 Subjective Exemption from Taxation

The provisions of Art. 6(1)(6) of the Corporate Income Tax Act of 15.02.1992 (*Journal of Laws,* 2017 item 2343, as amended, hereinafter: CITA) were added on 01.01.1993, thus, already after the effective date of the provisions of this Act. In the period from 01.01.1993 to 31.12.1994, communes and unions of communes were exempted from income tax, yet only within the scope of their own incomes. From 01.01.1995 to 31.12.1998, the exemption was limited only to communes within the scope of their own incomes. In connection with the introduction of poviat local governments and voivodeship local governments from 01.01.1999, the exemption from taxation under consideration covered all categories of LGUs (communes, poviats, voivodeships) not only with regard to their own incomes, but also all types of incomes mentioned in the provisions of the Local Government Unit Income Act. In this version, the provisions of Art. 6(1)(6) of the Corporate Income Tax Act have already been in force for 20 years.

Pursuant to Art. 6(1)(6) of CITA, LGUs are exempted from this tax within the scope of incomes specified in the provisions of the Local Government Unit Income Act of 13.11.2013 (*Journal of Laws,* 2017 item 1453, as amended, hereinafter: LGUIA). The limits of this exemption are set by the scope of the term "local government unit" as well as the catalogue of incomes mentioned in LGUIA. The interpretation of the provision of Art. 6(1)(6) of CITA, as the provision introducing exemption from taxation, should be conducted in a strict manner (Brzeziński, 2013: 48). In tax law, the result of interpretation of law cannot change the scope of taxation, the determination of which belongs solely to the sovereign rights and duties of the state establishing tax legislation (Brolik, 2014: 59).

The constitutional standard formulated in Art. 217 of the Constitution of the Republic of Poland permits for establishment of categories of entities exempted from taxes by means of a law. The subjective category in the situation under consideration is the LGU, yet no legal definition of it has been formulated in any legal act. The Constitution of the Republic of Poland uses the terms "territorial unit" [Art. 15(2)], "local government" [Art. 16(2), Art. 62(1), Art. 94, Art. 107(1), Art. 123(1), Art. 146(2), Art. 148(6)] and "local government unit" (chapter VII of the Constitution of the Republic of Poland entitled *Local Government*). The literature has correctly considered that the above mentioned terms have different semantic scopes (Chmielnicki, 2004: 142).

The ordinary acts mention specific types of entities which belong to the general category of LGU, e.g. in Art. 2(1) of LGUIA or in Art. 1(2) of the Act of 24.07.1998 on the introduction of basic three-tier territorial division of the state (*Journal of Laws,* no. 96, item 603, as amended). Communes, poviats and voivodeships have the legal status of an LGU. The legislator is consequent and, in other legal acts, distinguishes LGUs from other entities included in the local government sector, e.g. Art. 1(2) of the Act of 07.10.1992 on regional accounting chambers (*Journal of Laws,* 2016 item 561) except for LGUs also mentions the following unions: metropolitan unions, inter-communal unions, commune associations, associations of communes and poviats, poviat unions, poviat and commune unions, poviat associations, local government organisational units. The LGU unions and associations are not LGUs and, thus, cannot be covered with the subjective exemption specified under Art. 6(1)(6) of CITA (*Journal of Laws,* 2016 item 561). Neither can the metropolitan union be established based on the Act of 09.03.2017 on the metropolitan union in the Silesian Voivodeship (*Journal of Laws,* 2017 item 730). The metropolitan union is the association of the communes of the Silesian Voivodeship, characterised by the existence of strong functional links and advanced urbanisation processes, located on the spatially coherent area, which is inhabited by at least 2,000,000 citizens. It is not a municipal union within the meaning of systemic local government acts and the regulations on inter-communal unions, unions of poviats or poviats and communes shall not be applied to it, even respectively. Interchangeable treatment of LGUs and LGU unions is not permissible also due to the fact that there are no such provisions in the Tax Act as the ones included in Art. 4(2) of the PFA stipulating that the provisions of the act concerning LGUs are respectively applied to metropolitan unions as well as unions of communes and poviats.

Neither are LGUs the auxiliary commune units (villages, districts, housing estates and other), which shall only be treated as components of communes. Outside communes, they have no independent legal existence and, thus, cannot be treated as taxpayers exempted from taxation. For the same reasons, other units that cannot be equated with LGUs are the organisational units created pursuant to a certain scheme enabling their operation, having assets and human resources at their disposal, participating in business transactions and, in spite of no legal personality, being a fiscal and legal subject in the corporate income tax. Local government budgetary establishments are organisational units of LGUs, but, at the same time, are entities separated from LGUs and do not enjoy the exemption from corporate income tax (the judgement of the Voivodeship Administrative Court in Gdańsk of 08.02.2007, I SA/Gd 590/06).

Pursuant to Art. 6(1)(6) of the CITA, incomes of LGUs are exempted from taxation and, thus, the exemption cannot include the incomes obtained by LGUs e.g. from privatisation of the LGU assets or sale of securities. The provisions of the PFA, in the category of "public funds", distinguish "public incomes" and "public revenues". Nevertheless, in the provisions of the CITA, the terms "income" and "revenue" are treated by the legislator in such a manner as if they were of a synonymous nature. In particular, Art. 22(1) of the CITA may be indicated, pursuant to which income tax on income from capital gain (e.g. for the share in profits of legal entities, for withdrawal of a partner from a company, for transformations, mergers or divisions of entities), from dividends and other revenues (incomes) for participation in profits of legal entities whose registered office or management board are located in the territory of the Republic of Poland are determined at the rate of 19% of the obtained revenue (income). Pursuant to Art. 6(1)(6) of the CITA, if such incomes (revenues) are obtained by LGUs, they should be exempted from taxation (e.g. the individual interpretation of 07.02.2018 issued by the Director of the National Tax Information, 0111-KDIB1-1.4010.145.2017.2.MG).

The above formulated conclusion shall not, nevertheless, be adopted without any reservations. Evoking the "incomes" of an LGU in Art. 6(1)(6) of the CITA, the legislator makes a reference, within this scope, to the provisions of the LGUIA. This means that the scope of this term is determined otherwise than in the provisions of the LGUIA. Art. 3(1–2) of the LGUIA mentions the types of LGU incomes, which include (the so called regular incomes): own incomes, general subsidies, targeted grants from the state budget, shares in personal income tax and corporate income tax receipts. Pursuant to Art. 3(3) of the LGUIA, LGU incomes may also include (the so called additional incomes): non-returnable funds from foreign sources, funds from the EU budget, other funds specified in separate regulations. In this case, the catalogue is of an open nature (Ruśkowski and Salachna, 2004: 94), because other incomes are specified by a separate act to which the legislator refers in Art. 6(1)(6) of the CITA. A question arises whether the exemption from taxation also applies to other LGU incomes which are not mentioned by the LGUIA and, thus, whether the reference to Art. 6(1)(6) of the CITA should be understood narrowly and include only the provisions of the LGUIA or broadly refer also to other acts regulating the types of LGU incomes. A characteristic feature of many regulations included in the LGUIA is their framework (general) nature (e.g. the act mentions only several types of targeted grants, the principles and procedure of granting which are regulated by separate acts). Art. 4–6 of the LGUIA include catalogues of own income sources of the respective communes, poviats and voivodeships. None of these catalogues includes a full list of all types of incomes and, thus, these are open catalogues. Such nature of the catalogues is proven by the expressions used by the legislator, like e.g. "receipts from other fees constituting the incomes of a commune (poviat) paid based on separate regulations", "incomes from financial penalties and fines determined in separate regulations", "other incomes due to a commune (poviat, voivodeship) based on separate regulations".

In conclusion, based on the provisions of Art. 6(1)(6) of the CITA and the provisions of the LGUIA, it is not possible to determine explicitly the limits of exempting LGU incomes from taxation. Systematic analysis of many separate acts is necessary within this scope, whereas, in the provisions of the LGUIA, the legislator does not refer to any specific acts, but only uses a very general statement "separate regulations", which, in practice, may not only mean legal acts of a statutory rank, but also the secondary legislation in the form of regulations of the Council of Ministers and individual ministers.

3 Objective Exemption from Taxation

Pursuant to Art. 17(1)(4) of the CITA, the unions of LGUs have been exempted from taxation, however only in the part intended for these units. In this version, the provisions of the Tax Act have been in force since 01.01.1999 and an amendment to it was connected with the reform of the local government in Poland involving the establishment of poviats and voivodeships as new categories of LGUs. In the period from 01.10.1995 to 31.12.1998, all incomes of commune unions in the part intended for communes were subject to exemption.

The legislator has consequently assumed, since the moment of introducing this exemption, that the object of exemption may be exclusively the incomes of an LGU union in the part intended for LGUs being members of the union. A different point of view has also been expressed in the doctrine, according to which exemption from taxation also covers the incomes of an LGU union for any LGU and, thus, it does not even have to be a member of the specific LGU union (Mariański et al., 2011: 417). Nevertheless, it is difficult to accept this point of view as the content of Art. 17(1)(4g) of the CITA includes the phrase "for these LGUs", i.e. being members of the specific LGU union which allocates its incomes to them. The incomes of an LGU union transferred to another entity, e.g. a joint stock company created by an LGU, are not subject to exemption because such an entity cannot be a member of the LGU union (Judgement of the Voivodeship Administrative Court in Gliwice of 12.01.2012, I SA/GL 1081/11).

Pursuant to Art. 17(1a)(2) of the CITA, the exemption from taxation under consideration does not apply to incomes, regardless of the time of obtaining them, spent on any other purposes than the needs of LGUs being members of the LGU union. Furthermore, pursuant to Art. 17(1b) of the CITA, the exemption from taxation shall apply if the income is allocated to – and regardless of the date – spent on the needs of LGUs being members of the LGU union, including on the purchase of tangible and intangible assets used directly to meet these needs, as well as on payment of taxes not constituting the cost of obtaining revenues. Using by the legislator of the qualifying expression "including also for the purchase of tangible and intangible assets used directly to meet these needs" in the above quoted provision suggests an example enumeration of the circumstances (grounds) being the basis for exemption (the judgement of the Supreme Administrative Court of 18.08.2004, FSK 207/04). This means that the provision also covers various, uncategorised (except for the case explicitly separated by the legislator) expenses if only they are ultimately targeted at the achievement of specific objectives specified therein (the judgement of the Supreme Administrative Court of 17.12.2008, II FSK 1399/07).

The manner of interpretation of the provisions of Art. 17(1)(4g) of the CITA by tax authorities has evolved specifically. Initially, tax authorities interpreted the statutory expression "in the part intended for LGUs" very narrowly, considering that only the part of incomes of LGU unions allocated directly to the needs of LGUs being its members may be subject to exemption. The right to exemption from taxation of these incomes of an LGU union, which the LGU union allocated to its own needs was refused (e.g. the letter of the Tax Chamber in Bydgoszcz of 14.01.2008, ITPB3/423-127/07/AM). In subsequent years, tax authorities began to treat the statutory expression "in the part intended for LGUs" more flexibly. The change in the manner of understanding the statutory expression was influenced by the decisions of administrative courts (e.g. the judgement of the Voivodeship Administrative Court in Krakow of 16.11.2007, I SA/Kr 805/07). A tendency developed, according to which both expenses financing the general costs of an LGU union which performs the public tasks of LGUs creating the union as a whole, as well as expenses of the LGU union connected with its activity involving directly the performance of public tasks within the scope of the activity of the LGU creating the union should be exempted from corporate income tax. It was considered that the expenses incurred for financing of the general costs of the LGU union established by LGUs, as well as the expenses connected with its activity are the expenses intended for these LGUs. It was emphasised, at the same time, that it is not right to equate the expression "allocation" with "transfer" of the incomes of LGU unions because, in practice, this leads to limitation of the tax exemption only in the part of the incomes which were directly transferred for the benefit of the LGU creating the union. Such an interpretation would cause exclusion from the possibility of tax exemption of the funds indirectly allocated to the needs of the LGU creating the union (e.g. the individual interpretation of 17.04.2018 issued by the Director of the National Tax Information, 0111-KDIB1-2.4010.95.2018.1.PH.). Official interpretations appeared which excessively extended the limits of the exemption from taxation under consideration, e.g. regarding exemption of the income of an LGU union from a financial prize received in a competition organised by the Voivodeship Fund for Environmental Protection and Water Management subsequently allocated as a whole to the needs of the LGU being members of the union related to the purchase of coffee machines and a sound system (e.g. the letter of the Tax Chamber in Bydgoszcz of 21.01.2015, ITPB3/423-572/14/KK). Another example was permitting of an exemption from taxation of the income of an LGU union allocated to the purchase of the service related to the organisation of the opening ceremony of a bus station building (e.g. the letter of the Tax Chamber in Katowice of 16.12.2003, IBPBI/2/423-1194/13/PP) or the income of an LGU union allocated to financing of the general costs of the LGU union's activity (maintenance of the registered seat, offices, administration, payment of subsistence allowances for the LGU union's governing bodies) (e.g. the letter of the Tax Chamber in Katowice of 18.02.2013, IBPBI/2/423- 1441/12/CzP).

A general expression “incomes of an LGU union” is used in the content of Art. 17(1)(4g) of the CITA. These may be incomes from public law and private law sources obtained by the individual LGU union. The sources of incomes of LGU units are determined in their statutes, whereas planned incomes and expenses – in the budget resolutions of these unions. Sometimes the statutes of LGUs contain a factual mistake because, the expression “the incomes of the union include” are followed by the list of incomes and revenues within one catalogue (Ofiarska, 2012: 324), whereas these are separate semantic categories within the meaning of the provisions of the PFA. Most frequently, statutes of LGU unions mention the following sources of incomes: membership fees; receipts from the assets, establishments and devices of the union; shares of the union in companies and other business undertakings; donations, inheritances and bequests; grants and subsidies; incomes from the activity of the union; other incomes and benefits.

The nature of exemption from taxation specified in Art. 17(1)(4g) of the CITA is internally complex. In spite of a commonly accepted view about its objective nature, it is a mixed exemption, i.e. a subjective and objective one. It applies only to a group of addresses determined by the hypothesis of the norm included in this provision and, at the same time, it refers only to a category of incomes strictly specified by the legislator. The exemption cannot be classified as subjective because this would lead to the conclusion that any income generated by an LGU union and invested in its activity would be an income allocated to the LGU creating it. Such an interpretation would be inconsistent with the literal wording of the provision and would lead to the conclusion that the fragment is redundant. The content of the provision explicitly determines the inclusion of only a specific part of incomes of an LGU union within its scope, i.e. the income which is not intended for the LGU creating it and is used for the activity of the LGU union itself cannot be covered with the exemption from taxation (the judgement of the Supreme Administrative Court of 09.11.2016, II FSK 3346/14). Currently, a critical assessment of the interpretation activity of tax authorities within this scope is noticeable in the decisions of administrative courts. The need of interpreting this provision introducing the exemption from taxation in a very precise and strict manner is emphasised, whereas the role of an interpretative authority should not be replacement of the legislator (the judgement of the Supreme Administrative Court of 09.11.2016, II FSK 3214/14).

4 Conclusion

Exemption from taxation of LGU incomes (subjective exemption) has a wider scope than exemption of the incomes of LGU unions (subjective and objective exemption). The first one covers all incomes of LGUs regardless of their source of origin (public law or private law) or the manner of spending. The second exemption is limited only to this part of the incomes of LGU unions which was allocated to LGUs being members of the union. Tax exemptions constructed in this manner do not protect all incomes included in the budgets of LGUs or LGU unions from taxation. In particular, the scope of these exemptions does not cover incomes or revenues obtained by local government budgetary establishments, being the organisational units separated from LGUs and their unions, settling with the respective budget through payment of the surplus of current assets. Local government budgetary establishments are organisational units established by the decision making bodies of LGUs and LGU unions for performance of specific public tasks satisfying the needs of local and regional communities. Formally, local government budgetary establishments, in spite of their lack of legal personality, are taxpayers of the corporate income tax.

The hypothesis which has been positively verified is that exemption from taxation of the incomes of LGUs and their unions is not only a narrowly understood tax privilege, but it also performs a protective function for the resources of public funds being at the disposal of these entities intended for performance of public tasks. Such an exemption may be treated as an important construction element of the constitutional and statutory mechanism assuring the adequate share of LGUs in public incomes in relation to the scope of public tasks assigned to them for performance.

Assessment of the applicable legal solutions concerning exemptions of LGUs and their unions from taxation as well as problems related to their practical application justify filing of specific motions de lege ferenda. The principle of equal treatment of entities being in a similar situation to LGUs and their unions, demands their equality in the aspect of exemption of their incomes from taxation. LGU unions should benefit from tax exemption within the same scope as the LGU creating them.

Another postulate refers to the introduction of a comparable exemption from taxation of the incomes of a metropolitan union. In the current legal situation, the entity is not covered with the subjective exemption specified in Art. 6(1)(6) of the CITA or the subjective and objective exemption regulated in Art. 17(1)(4g) of the CITA. Incomes of the metropolitan union, similarly to incomes of LGUs, are allocated to performance of public tasks and, thus, should also benefit from a tax exemption.

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Exemption of Heritage Properties in Poland from Property Tax – The Fundamentals, Evolution of Solutions and Legal Framework

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Abstract

Protection of historic properties is a public task which in Poland is performed by state bodies and local authorities. It consists in, inter alia, provision of legal, organisational and financial conditions which allow for long-term protection, restoration, utilisation and maintenance of heritage buildings. Provision of tax preferences towards historic properties is an important financial incentive for entities engaged in historic preservation and operating outside the public finance sector (in particular non-governmental organisations and natural persons). To determine the nature and scope of the tax preference, a systemic analysis of the Act on protection and maintenance of historical monuments and the Act on taxes and local fees is required. To ascertain the fundamentals and the scope of the regulatory law regarding heritage property tax exemption, as well as the way in which the legal regulations have developed, the tax legislation and judicial practice were analysed and the reference literature was reviewed with the application of the dogmatic-legal and empirical methods. The hypothesis on the conditional nature of the tax exemption was proven to be correct. Concurrently, it was shown that the fulfilment of statutory tax exemption conditions makes the taxpayer eligible for the tax incentive regardless of his/her legal status and involvement in other activities.

Keywords

property; heritage building; property tax; tax exemption

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1 Introduction

Preservation of national heritage is a public task performed in Poland by central state authorities and local governments, including commune/municipality governments (e.g. by subsidising restoration works on art and architecture) (Ofiarska, 2015: 30–38) and includes, among other things, ensuring legal, organisational, and financial conditions which allow permanent preservation of national heritage, as well as its use and maintenance. The list of the commune/municipality own tasks under Art. 7 of the Act concerning commune/municipality government (Act of 08.03.1990) includes, among other things, preservation and care of the national heritage. The scope and forms of preservation are regulated by the Act concerning preservation and care of the national heritage (Act of 23.07.2003); however, the list of forms of preservation under Art. 7 thereof does not include tax exemption. Tax exemptions may, on the other hand, be results of using a specific form of preservation; therefore, they are secondary thereto. In case of property tax exemption, it is necessary that the property in question be entered individually in a register of national heritage beforehand, i.e. that a specific form of preservation be applied.

The state is obliged to create necessary conditions for proper preservation of the national heritage, which is "a common good" (Zalasińska, 2012: 57). Introducing and applying preferences in taxation of heritage properties (tax exemptions) may be an efficient tool which supports actions of entities possessing the properties and getting involved in the process of preservation. To determine the essence and scope of tax exemption, it is necessary to conduct a systemic analysis of the Act concerning preservation and care of the national heritage and the Act concerning local taxes and fees (Act of 12.01.1991, hereinafter: ALTF). Legal acts and the case law, as well as selected publications were examined using legal-dogmatic and empirical methods to determine the essence, scope, and main tendencies of evolution of legal regulations concerning exemption of heritage properties from property tax. The hypothesis on the conditional nature of this exemption has been confirmed. At the same time, it was shown that meeting statutory conditions of exemption by a tax payer means, it is possible to use this tax privilege regardless the taxpayer's legal status and possible other operations conducted by the taxpayer at the same time, i.e. outside the heritage property in question.

2 The Notion of a Heritage Property

Pursuant to Art. 3(1) and (2) of the APC (Act concerning the preservation and conservation of the national heritage), a heritage property is a real property, a part of a real property, or a complex of real properties, created by men or related to their activities, being an evidence of a past epoch or event, the preservation of which stands in social interest owing to its historical, artistic, or scientific value. The notion of a "historical value" may not be limited to great age. The expression "evidence of a past epoch or event" may also pertain to objects which are not from distant times (the judgement of the Voivodeship Administrative Court in Gdańsk of 01.10.2014, II SA/Gd 397/14). Intangible value (tradition of a place) may not be the only justification for entering an object located in an area concerned in the register of national heritage if the object fails to meet the remaining criteria listed in the statutory definition of a piece of national heritage. The properties and exceptional values for which an object or area are entered to a register of national heritage should be demonstrated in the architectonic or spatial substance (the judgement of the Voivodeship Administrative Court in Warsaw of 07.04.2009, I SA/Wa 93/09). In the category of heritage properties, an archaeological property is distinguished in Art. 3(4) of APC, which is a heritage property and a surface, underground, or underwater remains of human existence and activities, consisting of cultural accumulations containing products or traces thereof.

An open catalogue of heritage properties is provided for under Art. 6(1)(1) of the APC; it includes cultural landscapes; urban, rural, and construction complexes; defensive structures; technical structures, in particular mines, mills, power plants, and other industrial facilities; cemeteries; parks, gardens, and other forms of designed greenery; places commemorating historical events or work of eminent people or institutions. The catalogue is open, as the list of heritage properties is preceded with "in particular". That means that heritage properties may also include other properties which are not listed in the regulation; however, they should meet general conditions of a piece of national heritage listed in Art. 3(1) and (2) of the APC. The statutory catalogue of heritage properties may be divided into two categories. The first includes spatial heritage properties (e.g. cultural landscapes, urban, rural, and construction complexes); the other one includes individual heritage properties (architectural and construction structures). What is protected in spatial heritage properties is values contained in a specific spatial layout. As regards individual heritage properties, what is protected is values included in their substance (the judgement of the Supreme Administrative Court of 19.05.2011, II OSK 848/10).

3 General Tax Exemptions for Heritage Properties

Using various forms of preservation of heritage properties is related to a significant interference of public administration in the ownership title to a property (Drela, 2004: 183–200), consisting, in particular, in limitations of using a property (Chaciński, 2012: 23; Krzyżanowska, 2008: 85–98). By applying preservation usually applied to heritage properties, special requirements are imposed on a property which are supposed to increase its security. The purpose of tax exemption is to compensate the owner of a heritage property for special obligations and limitations of using the property which result, in particular, in limitations of economic use of the property and earning profit on it (the judgement of the Voivodeship Administrative Court in Łódź of 08.01.2016, I SA/Łd 470/15). Under Art. 7(1)(6) of the ALTF, property tax exemptions may be applied to lands or buildings entered individually in the register of national heritage on condition they are maintained and preserved in line with the provisions on preservation of the national heritage, except for parts used for economic operations. Therefore, it is a conditional exemption; it includes three conditions which entitle a property to be exempt from tax: individual entry in the register of national heritage, maintaining and preserving the property in line with legal regulations, and refraining from economic operations using the property. To apply tax exemption, all statutory conditions must be met (the judgement of the Supreme Administrative Court of 13.10.2016, II FSK 2487/14).

In the meaning of substantive law, entering a heritage property in the register makes it a heritage property in a formal sense and gives it increased care. The legal nature of the entry in the register of national heritage is complex and consists of two actions, i.e. the decision on the entry in the register of national heritage and a material and technical action consisting in entering information in the register. The conditions of entering a property in the register of national heritage are premises which have to be met, as determined from the position of the authority in an administrative decision (Zalasińska, 2008: 323). The exemption specified under Art. 7(1) (6) of the ALTF pertains only to an object of taxation which has been "entered in the register of national heritage individually". The reason is the construction of property tax, as lands and buildings are separate objects of taxation. That means that the expression "entered individually" requires a separate entry in the register of national heritage for a land or a building in order to have each of those properties exempt from tax (the judgement of the Voivodeship Administrative Court in Gliwice of 15.07.2010, I SA/GI 358/10). That regulation does not justify a conclusion that entering a building in the register of national heritage automatically results in recognising the land below as a heritage property entered in the register, which would form the basis for applying tax exemption to the land (the judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 12.12.2008, I SA/Go 720/08).

A necessary condition which justifies tax exemption is "maintaining and preserving a property" in line with the regulations on the preservation of the national heritage. The legislator has not defined the notions of "maintenance" and "preservation"; however, they are used in statutory regulations in specific contexts, e.g. pursuant to Art. 5(3) and Art. 102(1) of the APC, a property should be kept in the best condition possible. Preservation may be understood as "preservation works" and "preservation examinations", which, pursuant to Art. 3(6) and (9) of the APC, include, as applicable, actions aimed at exhibiting artistic and aesthetic values of a piece of national heritage (including, if necessary, replacing or recreating a part thereof) and documenting those works; or actions aimed at determining the history and function of a piece of national heritage, materials and technologies used to produce it, and the condition of the piece, as well as works aiming at drawing up a diagnosis, design and schedule of preservation works and, if needed, restoration works, as well. To have properties entered individually into the register of national heritage exempt from tax, it is not sufficient that the taxpayer performs any type of works at the property. What is important is whether the taxpayer maintains and preserves the property in line with regulations on the preservation of the national heritage rather than perform any maintenance or preservation procedures (the judgement of the Voivodeship Administrative Court in Wrocław of 21.09.2017, I SA/Wr 134/17). Works consisting in "maintenance and preservation" do not, in particular, include mending holes in the roof, gathering and moving rubble out of the property, hacking off loose patches of plaster from the elevation, making an agreement concerning cleaning services, removing snow and employing security staff in a building (the judgement of the Voivodeship Administrative Court in Łódź of 19.05.2016, I SA/Łd 468/15).

Maintaining and preserving a heritage property requires due and far-reaching care and actions adequate to hazards in place. It includes not only keeping the technical condition which would not lead to a total destruction of a property but also preservation of the values of the building which decided about the entry in the register of national heritage (the judgement of the Voivodeship Administrative Court in Gliwice of 15.02.2017, I SA/GI 1287/16). Maintaining and preserving a heritage property concerns each fiscal year; a failure to meet that condition in a fiscal year concerned results in taxation of a heritage property according to general principles (the judgement of the Voivodeship Administrative Court in Opole of 24.11.2010, I SA/Op 547/10). The control of observing and applying the regulations concerning "maintenance and preservation" of heritage properties is conducted by preservation supervision bodies; the issue whether and to what extent the condition of applying tax exemption has been met is a competence of tax authorities (the judgement of the Voivodeship Administrative Court in Olsztyn of 07.09.2017, I SA/OI 359/17).

Properties or parts thereof used for economic operations may not be exempt from tax. The general expression of "economic operations" used in Art. 7(1) (6) of the ALTF means economic operations as understood in the Entrepreneurs' Law Act (Act of 06.03.2018). They mean organised gainful operations conducted in one's own name and in a continuous manner (e.g. commercial, service, manufacturing and construction operations). However, it should be emphasised that for the purpose of property taxation, economic operations do not include, pursuant to Art. 1a(2) of the ALTF, agricultural or forester operations; renting guest rooms to tourists in residential buildings in rural areas by people with a permanent place of residence in a commune located in that area if the number of rooms for rent does not exceed five; and sale, by farmers, of plant and animal products processed in a non-industrial manner. Conducting operations of that type in a heritage property does not deprive it of the right to be exempt from property tax. *A contrario,* conducting other types of economic operations in a heritage property or a part thereof eliminates the possibility of applying tax exemption to the whole or a part of a property used for economic operations, regardless from whether the operations are conducted by the owner or a secondary possessor, e.g. a tenant or a lessor (the judgement of the Voivodeship Administrative Court in Łódź of 25.02.2014, I SA/Łd 1438/13).

An opinion was expressed in the literature that "economic operations are conducted" on a land or in a building when the possessor actually performs, in a land or in a building, actions being parts of economic operations he conducts. Lands or buildings should be recognised as occupied for economic operations when the operations are conducted directly there, as well as when they are a subject of economic transactions (Wołowiec, 2014: 38). A radical opinion was also expressed that allowing the public to see a heritage property for a fee excludes the possibility of property tax exemption (Radzikowski, 2010: 16). In this case, one characteristic of economic operations was emphasised, i.e. its gainful nature. However, it is also necessary that all statutory characteristics of the operations be present at the same time, i.e. they have to be conducted in one's own name and in a continuous manner. According to the court's opinion, economic operations are not conducted in a heritage property if certain activities are performed only incidentally (the judgement of the Supreme Administrative Court of 11.10.2017, II FSK 2394/15).

If, in an industrial building entered in the register of national heritage, works are conducted consisting in a reconstruction, addition, or expansion for the purpose of adapting the property to rent of separate facilities as a part of economic operations, this results in economic operations conducted in a building. Parts of the building created as a result of those construction works may not be exempt from tax as, upon commencing the works, the industrial building has lost the conditions necessary for tax exemption (the judgement of the Voivodeship Administrative Court in Szczecin of 09.08.2017, I SA/Sz 479/17). Renovation and construction works are typical elements of economic operations; therefore, there may be no doubt that a building is related to economic operations also during construction works. It is only when the roof is permanently and completely removed from a building and the building is permanently and completely uncovered and unlimited from the top that the building stops to be a building or even a structure within the meaning of construction law; therefore, it may not be an object of property taxation (the judgement of the Voivodeship Administrative Court in Białystok of 08.03.2017, I SA/Bk 1003/16). When a taxpayer occupies a flat in a heritage tenement house to satisfy personal residential needs of the taxpayer and their family, that may not be classified as economic operations. On the other hand, offering flats as a part of payable hotel services results in a loss of the right to tax exemption of a respective part of a heritage tenement house (the judgement of the Voivodeship Administrative Court in Krakow of 22.10.2015, I SA/Kr 1022/15).

In conclusion, an individual entry of a specific property (land, building) in the register of national heritage does not mean, on its own, an automatic exemption from property tax. Having determined, in tax proceedings, that a property in question is entered in the register of national heritage, a tax authority should examine whether the other statutory conditions are met which justify the application of tax exemption (the judgement of the Voivodeship Administrative Court in Poznań of 07.07.2010, III SA/Po 302/10). The construction of the tax exemption regulated under Art. 7(1) (6) of ALTF means that the activity of tax authorities in this area does not depend on a request of a tax payer or their position in the case (the judgement of the Voivodeship Administrative Court in Wrocław of 21.09.2017, I SA/Wr 134/17). If a tax authority has determined that all conditions that justify the discussed tax exemption have been met, it is obliged to apply the exemption. In this meaning, the exemption regulated in Art. 7(1) (6) of the ALTF is obligatory. The violation of at least one condition justifying the application of the discussed exemption from property tax to a heritage property results in a loss of the right to the exemption and means that a tax authority will determine the amount of property tax by its decision, based on a declaration submitted by a tax payer who is a natural person (the judgement of the Voivodeship Administrative Court in Opole of 03.06.2013, II SA/Op 52/13). If the taxpayer exempt from that tax up to date was a legal person or an organisational entity with no legal personality, they are obliged to calculate property tax on their own starting from the first day of the month following the month in which the conditions justifying tax exemptions were not met.

4 Special Tax Exemption of Heritage Properties

Pursuant to Art. 1b(1) of the ALTF, tax reliefs and exemptions granted to churches and religious associations are regulated under separate acts. Tax exemptions of heritage properties are regulated under acts governing the relationships of a specific church or religious association with Poland. At present, 12 acts are applicable which regulate relationships between Poland and the Catholic Church, the Evangelical Reformed Church, the Union of Christian Baptists, the Catholic Mariavite Church, the Evangelical Church of the Augsburg Confession, the Old Catholic Mariavite Church, the Pentecostal Church, the Seventh-Day Adventist Church, the Polish Orthodox Church, the Methodist Church, the Polish-Catholic Church, and the Jewish Communities. The doctrine calls such tax exemptions negative financing, which consists in public authorities refraining from collecting all or a part of due public fees as a result of the religious legal status of a taxpayer (Stanisławski, 2011: 73).

Each act provides for standard regulations concerning tax exemption of a property or a part thereof allotted for residential purposes of clergymen and order members if:

a) a property is entered into the register of national heritage;
b) it serves as boarding houses at schools and seminaries, houses of contemplative orders, formation houses of orders, and houses of retired priests (nuns);
c) it is located in buildings of diocesan and bishopric curias, general and provincial order boards, in the Secretariat of the Primate of Poland and in the Secretariat of the Conference of the Polish Episcopate [cf. Art. 55(5) of the Act of 17.05.1989].

In another case, a tax exemption was applied to properties or parts thereof, allotted for residential purposes of clergymen and deacons if:

a) properties were entered in the register of national heritage;
b) they serve as houses of retired priests or are located in buildings which are a seat of a Church Bishop [cf. Art. 19(4) of the Act of 13.05.1994].

As compared to the subjective scope of the exemption introduced based on Art. 7(1) (6) of the ALTF, which pertains to all lands and buildings meeting the conditions specified therein, exemptions provided for in acts regulating the relationship between Poland and various churches and religious associations have been limited only to properties or parts thereof which are "allotted for residential purposes". That is not a typical objective exemption, as its construction includes a subjective element, i.e. properties or parts thereof should be allotted for residential purposes of clergymen and order members. The doctrine has a critical opinion on the use, by the legislator, of the expression "allotted for residential purposes"; at the same time, it is emphasised that a desired solution would be the use of an explicit expression of "residential buildings or parts thereof" (Pahl, 2008: 96–98).

An entry, in the register, of a property or a part thereof "allotted for residential purposes", which is a condition of a property tax exemption, is not accompanied with additional conditions, e.g. the obligation to maintain and preserve buildings in line with regulations concerning the preservation of the national heritage. An essential condition, apart from the entry in the register of national heritage, is using a property or a part thereof for residential purposes. In principle, the residential function of discussed church properties should be performed with regard to clergymen; however, the buildings may also be occupied by families of clergymen (that concerns only those churches or religious associations where clergymen may have families, e.g. properties may be occupied by priests' widows [cf. Art. 33(3) of the Act of 30.06.1995]. With regard to other heritage properties (lands and buildings), churches and religious associations use a general tax exemption under Art. 7(1) (6) of the ALTF on conditions provided for therein (Patyk, 2008: 184).

5 Conclusion

The conditions for exempting heritage properties from tax provided for in the Act concerning local taxes and fees as well as in separate acts regulating the relationships between Poland and separate churches and religious associations have not changed since 30.01.1991, i.e. the moment when the current ALTF entered into force. That means that the legislator is consistent in that area and that the stability of introduced fiscal and legal regulations should motivate the possessors of heritage properties to take actions aimed at keeping their properties in the best possible condition and to provide others with the access to their properties, including experts trained to conduct appropriate works on a heritage property, e.g. scientific or preservation works. Exemptions of heritage properties from tax should supplement different legal forms of preservation. In a longer term, keeping a heritage property in the best possible condition means using it for public good due to its values, e.g. historical or scientific ones.

Applying tax exemptions to heritage properties should not be found equivalent only to decreasing budgetary receipts on a specific public duty being property tax. Maintaining and preserving a heritage property requires that its possessor exercise due care. That is related to the obligation of making large expenses and refraining from operations putting the historical and cultural value of the property at risk, including economic operations in the property. Lost profits of the possessor of a heritage property are partly compensated for by the amount of tax exemption.

By examining the conditions allowing the application of tax exemptions to heritage properties, it has been demonstrated that such exemptions should not be recognised only as tax privileges. They supplement an administrative-legal form of preservation of heritage properties, i.e. entry in the register of national heritage. Using this form of preservation is related to a significant limitation of ownership rights to a heritage property (Ruszkiewicz, 2009: 102). Tax exemptions of heritage properties motivate possessors to take specific desired actions and, at the same time, partly compensate them for profit lost due to limitations of use.

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Evolution of the Taxation of Wind Power Plants in the Polish Tax Law

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Abstract

The general purpose of the article is to present in a comparative perspective how the principles of the taxation of wind power plants have evolved. In the Polish tax law, over the past several years, the legislature has undertaken considerable efforts to modify those principles. The lack of the stability of tax legislation may prove to be one of the main reasons for discouraging economic operators from pursuing such investments. Most evidently, the lawmakers do not have a clear vision of a coherent and permanent legal framework in this aspect. The purpose of this article is to present how the principles of the taxation of wind power plants in Poland have evolved. Perhaps the wider experience of other European countries in this regard will help to develop a model of the taxation of wind power plants not only in Poland but also in other East and Central European Union Countries.

Keywords

wind power plants; property tax; Polish tax law

1 Introduction

There is a growing interest in renewable energy sources (solar energy, wind energy) both in Poland and in other EU member states. Aside from expenditures on implementation of such investments, energy companies – already at the planning stages – take into

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account possible tax burdens involving assets used for this purpose. In the Polish legal system, property tax is of key importance. Unfortunately, in recent years, the Polish tax legislation regarding facilities and structures used for wind power generation (wind power plants) has resembled a weather vane. Undoubtedly, this whole situation does not make operators willing to invest in assets to generate power from renewable sources.

The lack of the stability of tax legislation may prove to be one of the main reasons for discouraging economic operators from pursuing such investments. The constant changes in the regulations regarding the taxation of wind power plants seem absolutely incomprehensible. Most evidently, the lawmakers do not have any vision of a coherent and permanent legal framework in that respect; at the same time, they are also very susceptible to local governments of communes and municipalities lobbying for increasing their tax revenues as well as to taxpayers who, for obvious reasons, want optimal circumstances to operate this controlled economic activity.

Apart from the foregoing, one also has to note how amendments are introduced to the laws and regulations which provide for imposing a property tax on wind power plants – they are an academic example of how not to make tax laws. In Poland, over the past several years, it has become a disgraceful standard to amend the legislation on local taxes when adopting other laws. Although it is understandable that the legislature amends a certain provision of the tax law by specifying it directly in an amending act, it is difficult to approve of establishing public law rights and obligations indirectly, i.e. by changing definitions in other laws and regulations, to which the lawmakers refer (e.g. a change in the definition of a "work" (in Polish: obiekt budowlany) in the Polish Construction Law Act of 07.06.1994), although sometimes there is even no such reference; nonetheless, a specific provision affects the tax obligations (and rights). A perfect example of this is the Polish Act of 20.05.2016 on Investments in Wind Power Plants (hereinafter: WPI Act) (*Journal of Laws,* 2016, item 961, as amended) which introduced the definition of a "wind power plant" (in Polish: *elektrownia wiatrowa*), thus modifying the Polish Construction Law and containing a transitional provision on imposing a property tax on wind power plants after 1 January 2017. Hardly any time had passed from the introduction of the new regulations on taxation of wind power plants until new bills to amend them appeared on the horizon. Currently, i.e. as of May 2018, the Sejm is discussing the bill of 19.02.2018 on amending the Act on Renewable Energy Sources and certain other acts (document no. 2412) which – does not amend the Tax Law, but rather the Wind Power Investment Act and the Construction Law.

The purpose of this article is to present how the principles of the taxation of wind power plants in Poland have evolved. Perhaps this experience and analyses will help to develop a new model of taxation of wind power plants and avoid the errors made by the polish legislator by other EU countries.

2 Wind Power Plant Taxation in Poland till September 2005

The Act of 12.01.1991 on taxes and local fees (hereinafter: UPOL Act) (*Journal of Laws,* 2017, item 1751, as amended), since its entry into force, does not contain any legal regulations that would directly treat taxation of wind farms. Certainly, such constructions are not classical buildings, and thus should be considered in terms of potential buildings related to running a business. The application of the provisions regulating the real estate tax was hindered by the lack of a legal definition of the term "building". It was only from 01.01.2003, as a result of the amendment to the Polish law by the Act of 30.10.2002 changing the act on taxes and local fees, when the polish legislator introduced the explanations of the terms used in the UPOL Act. Among them was the definition of "building". It applies invariably till today – being regulated in Art. 1a par. 1 point 2 of this Act. This stipulates that the building is a building structure within the meaning of construction law, which is not a building or a small architecture structure, as well as a construction device within the meaning of the construction law, which provides the facility to be used in accordance with its purpose.

In this context, it should be assumed that a building subject to real estate tax is a building object or a construction device within the meaning of the construction law. Therefore, the taxation of wind farms should be assessed on the basis of these provisions (Etel et al., 2005: 185). In the analysed period, the concept of a building object included: a building with installations and technical devices; a building constituting a technical and functional unit together with installations and devices, as well as a small architecture facility.[3]

The provisions of the construction law, in particular those to which the legislator referred in the UPOL Act, were not mentioning the wind farms until the end of September 2005. Nevertheless, bearing in mind that the building was a technical and utilitarian structure with installations and equipment, it was assumed that both the strictly constructional elements of the power plant (foundation, mast) and not having such character (rotor, gondola, control computer, etc.) were subject to real estate tax. The construction was to be considered as a building with installations and devices enabling it to be used as intended. Therefore, it was not entitled to "limit" a building object only to building parts. Thus, the owner of the construction object was obliged to pay the value tax of all elements constituting the wind farm.

[3] This definition was valid in Poland until 28.06.2015.

3 Taxation of Wind Power Plants from 1 October 2005 to 31 December 2016

The taxation rules for wind power plants presented above underwent fundamental changes upon the entry into force of the Act of 28.07.2005 on the change of the Construction Law and amendments to some other acts (*Journal of Laws,* No. 163, item 1364). This act gave a new meaning to the concept of "building" as defined in Art. 3 point 3 of the Construction Law Act, stating that they are, among others, construction parts of technical equipment (of boilers, industrial furnaces, wind farms and other devices). The amendment resulted, among others, from the fact that until its introduction in the jurisprudence of administrative courts there were judgments, according to which the construction for the purposes of taxation was the entire wind farm consisting of building and non-construction parts, which constituted one technical and utilitarian entity.[4] In fact, only the amendment to the construction law, entering directly into Art. 3 point 3 of the Construction Law, the expression construction parts of wind farms, determined the change of the ruling line [Dowgier, 2016: 8; the judgement of NSA of 5 January 2010 (II FSK 1101/08)]. Thus, in view of the meaning of this provision, it was considered that the construction in the case of wind farms are only parts of the construction of technical equipment [judgement of NSA of 16.12.2009 (II FSK 1184/08)]. As a result, the tax base in property tax did not include the value of other elements constituting the wind farm.

4 Taxation of Wind Power Plants from 1 January 2017

The WPI Act in Art. 2 point 1 introduced the legal definition of the term "wind power plant" into the Polish legal order. It is a building within the meaning of the construction law, consisting at least of a foundation, tower and technical elements, with a capacity greater than the power of micro-installations within the meaning of Art. 2 point 19 of the Act of 20.02.2015 on renewable energy sources (*Journal of Laws,* items 478 and 2365; *Journal of Laws,* 2016, item 925). It should be emphasised, that the indicated act did not directly make any change to the provisions of the UPOL Act. Nevertheless, bearing in mind that for a building within the meaning of the Construction Law, an "entire" wind farm started to be considered for tax reasons as all its construction elements without the possibility to limit it only to the classical "building" part. This topic provokes passionate discussions in science and practice – it is the subject of relatively numerous, heterogeneous analyses (Etel, 2017: 13–19; Malinowski and Małecka,

[4] See the judgment of WSA in Szczecin from 04.01.2009 r. (I SA/Sz 882/04) and judgment of NSA from 18.01.2007 (II FSK 51/06).

2017: 6) and interpretations.[5] It is connected above all with a several-fold increase in property tax on this category of construction works.

Starting from 1 January 2017, in order to determine the correct way of wind power plant taxation, it was necessary to compare, up to three different acts, like the UPOL Act, construction law and WPI Act. The definition of a wind farm adopted on the ground of the last legal act is considered to be a systemic one (Dowgier, 2016: 8). Although, this does not mean that the definitions contained in the above mentioned acts do not matter to the real estate tax because they regulate issues other than taxation (Pahl, 2017b: 33–40).

Bearing that in mind, it should be assumed that if in the provisions of the UPOL Act there is a reference to the provisions of the construction law, it is necessary to apply the standards contained therein for the purposes of taxation. Going further, if the legislator in the provisions of the WPI Act when defining a wind power plant indicates that it is a building within the meaning of the provisions of the construction law there is no doubt that it is a building referred to in Art. 3 point 3 of the Construction Law and the in the same time the construction referred to in Art. 2 par. 1 point 3 in relation to Art. 1a par. 1 point 2 of the UPOL Act. It is irrelevant that this regulation does not explicitly mention wind power plants. It should be noted that according to Art. 3 point 3 of the Construction Law, the term "building" should be understood as any construction object that is not a building or a small architecture object, as linear objects, airports, bridges, etc. and foundations for machines and devices, as technically separate parts of items that make up the whole unit.

Changing of the meaning of Art. 3 point 3 of the Construction Law, implemented by the WPI Act is an important proof of a change in the taxation rules, since the legislator by using this act has removed from the law the expression related to the construction parts of wind power plants. This argument was also noticed by the judges of the Administrative Court in Bydgoszcz in the judgment of 21.02.2017 (I SA/Bd 866/16). According to the Court: "Against the interpretation that only the construction parts of wind farms are a building, speaks the fact that in Art. 3 point 3 of the construction law the term 'wind power plants' was removed from the fragment that stipulated before that: 'as well as construction parts of technical equipment (boilers, industrial furnaces, wind farms, nuclear power plants and other devices)'. One cannot also agree that the deletion of the phrase 'wind power plants' has not changed anything, because the catalogue of technical equipment parts is still open, due to the use in Art. 3 point 3 of the expression 'other devices'. By deleting from Art. 3 point 3 of the construction law the expression 'wind power plants' the legislator wanted to change the existing wind farm division into the construction and non-construction part so that the entire wind farm would be a building."

[5] A different view than the one resulting from the law was expressed in the interpretation issued on 03.11.2016 (mark: FP.310.1.1.2016.2) by the commune administrator of the city of Zgorzelec, repeated in the interpretation of the Commune of the city of Puck of 02.12.2016 (F.B.310.2.2016MW).

The presented way of interpretation is compatible with the judgment of the Constitutional Tribunal (TK P 33/09), in which it was indicated that only the buildings listed expressis verbis in Art. 3 point 3 of the Construction Law, or in other provisions of this Act or in the Annex to it, can be considered, together with its installations and other related devices, a construction object according to Art. 3 point 1 of this Act. It should be noted that Art. 2 of WPI Act, that is defining the wind power plants, indicates that it is a building within the meaning of the provisions of construction law, consisting at least of the foundation, tower and technical elements. Therefore, a building within the meaning of this provision is a complete facility, as the legislator lists the components of a wind power plant without limiting them only to building parts. At the same time, the above mentioned new definition of a building in construction law removed the technical equipment (e.g. a wind power plant) from the general definition of the building. It is difficult to conclude that these changes do not affect the understanding of the building both for the needs of the construction process and tax law. The status of a wind farm as a construction is therefore co-decided by the provisions of the UPOL Act, Construction Law and WPI Act.

When interpreting the UPOL Act in the context of taxation of wind power plants, it is necessary to pay attention to Art. 9 point 3 of the WPI Act, which amended the annex to the Construction Law, where the 29th category of construction objects includes freestanding chimneys and masts as well as wind power plants. It should be emphasised that the annex to the Construction Law is an immanent part of this Act. It is not a separate legal act, but an inseparable element defining the categories of construction objects. The legislator does not indicate in this provision or in any other act that a construction (building) is only the construction part of a wind power plant. It is difficult, therefore, to accept the view that, starting from 1 January 2017, following the adoption of the WPI Act in the area of taxation of this type of objects "nothing has changed".[6]

The most important argument in favour of the adopted concept of taxing "entire" wind power plants is Art. 17 of the WPI Act. This provision stipulates that from the date of entry into force of the Act of 31.12.2016, the real estate tax relating to a wind power plant is determined and collected in accordance with the regulations in force before the Act enters into force. The legislator, through the content of this provision, expresses the will to change the existing taxation rules for wind farms. The said provision should be read in such a way that from 16.06.2016 (the date of entry into force of the WPI Act) a wind farm is a building within the meaning of the construction law, but until the end of 2016 it is subject to taxation on the "old" rules. However, from 1 January 2017, it is subject to taxation as a complete object. There is therefore no reason to decompose the wind power plant into building and non-construction parts (technical). Professor L. Etel notes that the legislator "was aware" of what he was doing, because the tax consequences were considered at the stage of creating regulations and were

6 See more in Pahl, 2017: 101.

accepted by the parliament through the adoption of the act. For these reasons, it is not reasonable to claim that the change in wind power plant taxation rules after 01.01.2017 was not a conscious act made by the legislator (Etel, 2017: 14).

The presented position regarding changes in the taxation of wind power plants from 01.01.2017 is justified by a historical interpretation, which the legislator refers to in the justification for the project of the WPI Act. As it seems, this provision was introduced primarily for tax reasons – in order to release some non-construction wind farms from real estate tax. This amendment resulted, among others, from the fact that until its introduction in the jurisprudence of administrative courts there were judgments, according to which the building for the purposes of taxation was the entire wind farm consisting of construction parts and non-construction parts, which constituted the entire technical-utility [judgement of the Administrative Court, WSA in Szczecin of 04.01.2009 (I SA/Sz 882/04); judgement of the Supreme Administrative Court, NSA of 18.01.2007 (II FSK 51/06)]. In fact, only the amendment to the construction law, entering directly into Art. 3 point 3 of the Construction Law, the construction parts of wind power plants, determined the change of the ruling line [Dowgier, 2016: 9; judgement of the Supreme Administrative Court, NSA of 05.01.2010 (II FSK 1101/08)].

5 Taxation of Wind Power Plants in the Draft Act on Amending the Act on Renewable Energy Sources

It has been less than a year since the entry into force of the new wind power plant taxation rules and there have already been published some proposals trying to change this new regulation. The last of these proposals does not provide a change to the tax laws but only a change to two legal acts, the WPI Act and the Construction Law. In the first of the above-mentioned acts, the legislator considers only the construction parts of a wind farm for "construction" within the meaning of the construction law. The draft provision stipulates that the Act of 20.05.2016 on Investments in Wind Power Plants (WPI Act) introduces the following changes – Art. 2 point 1 shall read as follows: "A 'wind power plant' is a renewable energy source installation consisting of a construction part constituting a building within the meaning of construction law and technical devices, including technical elements in which electricity is generated from wind energy, with a capacity greater than the power of micro-installations within the meaning of Art. 2 point 19 of the Act of 20.02.2015 on renewable energy sources (*Journal of Laws,* 2017, item 1148, 1213 and 1593; *Journal of Laws,* 2018, item 9).

Similarly, in the Construction Law, the project modifies the definition of a building indicating that in case of technical objects, like wind power plants, only the building parts are treated for construction. In addition, the draft changes the meaning of the annex to the construction law defining the categories of construction objects by stating that category 29 includes freestanding chimneys and masts, as well as construction parts of wind power plants.

The indicated changes, having a systemic character, lead to the decomposition of a wind power plant for construction and non-construction parts. This action is aimed at evidently changing the rules of taxing by real estate tax on this category of objects. At the same time, the project envisages changes to the construction law and WPI Act, planning that the changes will come into force with retrospective effect, i.e. from 1 January 2018. However, this will not violate the principle of a democratic legal state expressed in Art. 2 of the Constitution of the Republic of Poland and the resulting principle of prohibiting retroactivity of the law (lex retro non agit). It is justified by the fact that these changes in the assumption of the legislator are to reduce tax burdens, and therefore they are legal solutions beneficial for taxpayers. The project justification claims that: "The entry into force retroactively of changes concerning Art. 2 points 1 and 6 and Art. 3 point 1 of the project will automatically change the subject of taxation of property tax based on the Act on local taxes and fees. This fact will have an impact on the amount of property tax for wind farms, because this tax will be levied only on their building parts."

However, there is some misunderstanding in the legislator explanations of the anticipated effects of introducing new regulations. In the legislator's opinion: "The entry into force of the proposed regulation will not directly cause the necessity to incur expenditures from the state budget or the budget of local self-government units." The "untruth" of this statement is justified by the fact that from 2017 taxpayers pay property tax calculated on the value of the whole wind farm. Also in 2018, the tax is being paid on the same basis. It is the income of the commune's budget in which the wind farm is located. This means that the entry into force retroactively of the regulations in question will result in the need to return significant amounts of property tax. In some municipalities, overpayments on this account may reach several million zlotys.

6 Conclusion

Legal solutions concerning the taxation of wind power plants in Poland presented in this article indicate that in the Polish tax legal system, there are too frequent changes in the principles of taxation of buildings, structures, and landscape and street furniture. It is beyond any doubt that the lack of stability in the tax law discourages economic operators from investing in renewable energy sources; the last amendments even resulted in the property tax being increased several times. An advantage of the Polish solutions is imposing a single tax on components of wind power plants. For example, in other EU countries, like in France, wind power plants are subject to a special tax with only a subsidiary property tax (Etel, 2003: 30–31), and the movable and fixed parts of a wind power plant are not subject to property tax (Vernier, 2005: 33 et seq.). Meanwhile in Poland, over the last 15 years, both structural and non-structural elements of wind power plants have been taxed.

The present article may present an impulse for further reflection and comparative analyses regarding the model of wind power plant taxation. The errors and changes made by the polish legislator in the analysed field may also be an interesting case study for the other East and Central European Union Countries. The present article may also be an interesting material that could help to solve or avoid several issues related to the taxation process in most of the EU countries.

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Forecasting GDP Values as Part of the Budgetary Procedure – De Lege Lata and De Lege Ferenda Conclusions[1]

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Abstract
The objective of the article is to verify the research hypothesis that the Polish rules of fiscal policy are susceptible to manipulation with the forecast GDP size adopted in the assumptions of the Budgetary Act. Such activities undertaken by the Council of Ministers lead to the creation of fiscal illusions and pose a threat to the financial order of the state. Therefore, they require the legislator to change the shape of the fiscal policy rules or to deprive the government of its competence to prepare macroeconomic forecasts for the budgetary procedure.

Keywords
public debt; fiscal rules; fiscal illusions

1 Introduction

In modern democratic societies there are many factors that cause the maximisation of the social utility to cease to be the objective of fiscal policy. The foreseeable result of the democratic choice process is the creation of a budgetary deficit whenever loan is

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the available means for substituting taxation (Buchanan, 1997: 133). The manifestation of this problem is the progressing accumulation of debt, which has become particularly visible since the 1970s (Alesina and Perotti, 1994: 3). It justifies the introduction of fiscal policy rules to the legal order of modern states. This notion covers institutional solutions that are meant to stop politicians from the excessive increase of the scale of public expenditure (Panfil, 2016: 17). In that sense, the rules of fiscal policy should be an impulse to start a real reform of public finances aiming at decreasing the scale of their imbalance. The reality is unfortunately quite different. Public authorities focus rather on the formal execution of obligations resulting from the fiscal policy rules. They resort to various "tricks" that generate the so-called fiscal illusions, which can be exemplified by creative accounting, discretionary actions or manipulations of the value of selected macroeconomic indicators.

The objective of the article is to verify the research hypothesis, according to which the Polish rules of the fiscal policy are susceptible to manipulation with the size of the forecast gross domestic product (hereinafter: GDP). A possible confirmation of this hypothesis justifies also the attempt to prepare the recommendations of legislative changes, which would make it impossible for the Council of Ministers to create fiscal illusions in the discussed scope. During the works on the article, a dogmatic and legal analysis was applied. Reference was also made to the binding normative material, secondary sources in the literature of the subject and documents developed by the Polish and EU institutions.

2 Method of Calculating the Gross Domestic Product

GDP is one of the most important macroeconomic indicators used for illustrating the economic situation. It can be defined as the value of all goods and final services manufacture in the economy of a given country within an assumed period, e.g. within one year, expressed in market prices. In Poland the methodology of calculating GDP was regulated in the Act of 26.10.2000 on the method of calculating the value of the annual gross domestic product (*Journal of Laws,* 2000, No. 114, item 1188) (hereinafter: ACGDP). In that way, the Polish legislator has fulfilled the obligation imposed on it by Art. 216 para. 5 of the Constitution of the Republic of Poland of 2 April 1997 (*Journal of Laws,* 1997, No. 78, item 483) (hereinafter: the Constitution), since this provision includes the method of calculating the annual gross domestic product in the statutory matter.

In accordance with Arts. 2 and 3 of the ACGDP, the method of calculating the annual GDP is based on the estimation of three macroeconomic categories equal in value, which define GDP through:

1. the size of production activity – GDP is calculated in market prices and is equal to the sum of added value of domestic production units increased by taxes on products and decreased by the subsidisation on products;

2. final result of production activity – GDP is calculated as a sum of final demand, i.e. consumption, accumulation and balance of exchange of products abroad;
3. the sum of primary income – GDP is calculated as a sum of primary income of domestic units obtained by institutional sectors operating in the territory of Poland and the net primary income of the foreign sector.

In compliance with Art. 5 of the ACGDP, the President of the Central Statistical Office (hereinafter: CSO) calculates the value of the annual GDP and announces the first estimate for a given year by 15 May of the following year. This announcement takes on the form of a notice published in the Official Journal of the Republic of Poland "Monitor Polski".

It is worth highlighting that in compliance with Art. 23 para. 1 of the Act of 29.08.1995 on public statistics (*Journal of Laws,* 2018, item 997) (hereinafter: APS), the President of CSO is the central body of the state administration competent in terms of statistics. The current regulations do not provide any guarantee of this body's personal independence. The President of the CSO can be removed from his/her office at any time by the Prime Minister, who exercises supervision over him/her. The lack of specified grounds for the appeal is clearly in contrast with the principles of the European Code of Statistical Practice, mentioned in Art. 11 of the European Parliament and Council (EC) Regulation No. 223/2009 of 11 March 2009 on the European statistics (EU Official Journal*,* 2009: 164). Nevertheless, the possibilities of influencing the GDP value announced by the President of the CSO by the Council of Ministers seem illusory. On the one hand, the methodology of calculating that macroeconomic category in Poland is in line with the EU regulations. Additionally, the data in that scope are presented to the European Commission and are subject to verification by Eurostat, which minimises the risk of manipulation. On the contrary, the situation with GDP forecasts is different.

In accordance with Art. 138 para. 1 of the Act of 27.08.2009 on public finances (*Journal of Laws,* 2017, item 2077) (hereinafter: APF), the Prime Minister presents the Council of Ministers with the assumptions of the draft state budget for the following year. And at the same time, they must take into account the arrangements and the directions of action contained in the Multiannual Financial Plan of the State. The assumptions of the draft state budget include, among others, the macroeconomic assumptions, including the forecasts concerning the GDP dynamics in the coming financial year. Also Art. 141 of the APF refers to the forecasts. In compliance with that regulation, the Council of Ministers adopts a draft budgetary act and together with justifications submits it to the Sejm by 30 September of the year preceding the financial year. Such justification contains in particular the macroeconomic assumptions for the following financial year and the three consecutive years including the forecasts concerning the GDP and its components.

In practice the state macroeconomic forecasts are developed by the Macroeconomic Policy Department, which is located in the structure of the Ministry of Finances. Most importantly, there are no instruments, which from a legal point of view, would allow the verification of the reality of such forecasts, and at the same time, the reality of budgetary assumptions. As a result, the Council of Ministers can instrumentally treat the values adopted at the stage of developing the draft budgetary act and adjust them to its needs, for example, in the scope of fulfilling obligations resulting from the rules of fiscal policy.

The comparison of forecasts concerning GDP developed by the Ministry of Finances, the National Bank of Poland (NBP) and the European Commission in the years 2008–2017 yields interesting conclusions (Table 1). The former is based on the budgetary assumptions made in June of the year preceding the financial year. The NBP forecasts were taken from the GDP projections, which in the years 2008–2010 were announced in June, and in the years 2011–2017 were announced in July.[3] Whereas, the estimates of the European Commission come from economic forecasts announced in May.

The data analysis indicates that for the most part of the adopted research period, the forecasts of the Ministry of Finances was characterised by optimism greater than that of the NBP and the European Commission. The Polish Central Bank proved to be the most effective in terms of its forecasts (seven out of nine cases). In the years 2009–2017 the average deviation of the forecasts developed by the NBP, the European Commission and the Ministry of Finances from the actual GDP growth was 0.88%, 1.18% and 1.22%, respectively.

Table 1. The forecasts concerning the dynamics of the Polish GDP in the years 2009–2018 developed by selected analytical centres and the actual GDP growth in the years presented above (%)

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Forecast GDP growth										
The Ministry of Finance	5.0	0.5	3.5	4.0	2.9	2.5	3.8	3.8	3.9	3.8
NBP	4.8	1.4	4.6	3.6	2.1	3.4	3.6	3.4	3.5	3.5
European Commission	5.0	0.8	3.3	3.7	2.6	2.2	3.4	3.4	3.6	3.2
Real GDP growth	2.8	3.6	5.0	1.6	1.4	3.3	3.8	3.0	4.6	-

Source: Ministrów, 2018

3 The Polish Rules of the Fiscal Policy

The key element of the Polish rules of the fiscal policy is Art. 216 para. 5 of the Constitution. In accordance with that provision, the public debt in Poland cannot exceed the level of 60% of GDP. On the one hand, violating that limit would be tantamount to infringing the constitutional provision. Such situation should

3 The only exclusion in that scope concerns the year 2011, when the budgetary assumptions for the year 2012 were published in March. As a result, the GDP projections announced by the NBP in March 2011 were exceptionally adopted for the purpose of the analysis.

give rise to the liability of the Prime Minister and the Minister of Finances before the State Tribunal. On the other hand, it is unacceptable to adopt a budgetary act, the implementation of which would lead to the state public debt exceeding the level of 60% of GDP. The potential risk of such a situation could be evidenced by a simple summary of data contained in the justification for the draft act. Thus, with a high level of state public debt, the Council of Ministers may be interested in increasing the forecasts concerning the GDP vales in the coming financial year. In that way it would gain greater freedom in terms of shaping the primary budgetary amounts, including the public expenditures. On the surface, this solution is seemingly absurd. It exposes the Council of Ministers to the risk of violating the constitutional limit on debt in the coming financial year. From the point of view of the members of that body, the issue ceases to matter, if parliamentary elections are to take place in the coming year and the change of the current ruling camp is highly probable. In such a case, another government will be held liable for the implementation of the budgetary act and possible violation of the constitutional provision.

The constitutional limit on debt is additionally strengthened by two rules of the fiscal policy, regulated in Art. 112aa and Art. 86 of the Act of 27.08.2009 on public finances. The first of the aforementioned editorial units prescribes the so-called stabilising expenditure rule, whereas, the second – the prudential and remedial procedures.

In general, the stabilising expenditure rule makes the growth rate of the expenditures of various institutions and bodies[4] dependent on the medium-term GDP growth. The limit on expenditure for the coming financial year is, at the same time, defined on the basis of a complex algorithm (Panfil, 2014: 129), the crucial element of which is the formula contained in Art. 112aa para. 1 of the APF. After introducing some simplifications, it can be presented in the following way:

Amount of expenditures for the financial year (year x)
=
amount of expenditures from the previous year (x-1) adjusted
in accordance with the update of the average annual inflation rate forecasts
x
the level of the medium-term inflation objective determined
the Monetary Policy Council
x
(the medium-term GDP values dynamics factor
in constant prices + expenditure amount adjustment value)
+
forecast value of the discretionary actions

[4] What is meant here are the selected units of the public finances sector, and also the Bank Guarantee Fund and the funds established, entrusted or transferred to the Bank Gospodarstwa Krajowego.

The medium-term GDP values dynamics factor in constant prices is dependent on:

1. total GDP value dynamics from the last six years preceding the year x-1 (announced by the President of the Central Statistical Office on the basis of Art. 38b para. 2 of the APF);
2. the annual dynamics of GDP values in constant prices in year x-1 and in year x, forecast in the draft budgetary act for year x.

Thus, the medium-term GDP values dynamics factor encompasses the period of 8 years. As stems from the explanatory memorandum of the Act of 08.11.2013 on the change of the Act on public finances and some other acts, this is the average duration of a business cycle in Poland determined on the basis of empirical studies (Sejm Papers, 2013: 27).

The prudential and remedial procedures are a collection of quantitative and qualitative rules of the fiscal policy. Their objective is the protection of the public finances sector, and indirectly also the Polish economy against the consequences of violating the constitutional limit on debt (Panfil, 2011: 235–236). The prudential and remedial policies are initiated when the relation of the state public debt to GDP in year x-2 exceeds 55%. In such a case, the Council of Ministers adopts in year x-1 the draft budgetary act for year x, in which deficit is assumed to be absent or its level is such that ensures the decrease of State Treasury debt to GDP ratio in relation to year x-2. The prudential and remedial policies also contain a series of additional solutions, which make it easier for the government to execute the above mentioned obligation through limiting the growth of some public expenditures.

The stabilising expenditure rule and the prudential and remedial procedures relate both to the real GDP value for the previous financial years, as well as the forecasts relating to the future. In this first instance, the Council of Ministers assumes, for the purposes of both rules of the fiscal policy, the amounts provided by the CSO President. As results from the previous analysis, it can be assumed that they are in line with reality. The forecasts relating to the shaping of GDP values in the future turn out to be a significant problem. The higher the value the smaller the restrictions imposed on the Council of Ministers by the rules of the fiscal policy. This creates a certain incentive for the "optimistic" forecasting of GDP changes by the Ministry of Finances. It is worth highlighting here that the stabilising expenditure rule and the prudential and remedial procedures are connected only *ex ante,* that is at the stage of developing the draft budgetary act and its adoption. However, there are no verification mechanisms of the extent to which the objective, which the implementation of such rules was supposed to serve, is executed. Therefore, the Council of Ministers does not have to fear the consequences of overestimating the forecast GDP value at the stage of budgetary act implementation. In this respect, we can only talk about political responsibility borne within the framework of the democratic choice. Considering the scale of complexity of the discussed matter, possible manipulations of the Council of Ministers, however, are not perceived by an average voter.

4 *De Lege Ferenda* Postulates

The current shape of the Polish legislative solutions encourages the Council of Ministers to manipulate the forecast GDP value, thus contributing to the creation of fiscal illusions. Two directions of action can be indicated that would allow the limitation or elimination of this phenomenon. The first one would be an appropriate modification of the Polish rules of fiscal policy. The second one – entrusting the responsibility of developing macroeconomic forecasts to an analytical centre independent from the Council of Ministers.

By modifying the shape of the fiscal policy rules, the Polish legislator could in particular extend their binding force to the stage of budgetary act implementation or resign from referring to macroeconomic forecasts in their structure. Both solutions, however, give rise to conceptual problems that are difficult to overcome. In the literature of the subject many postulates have been developed the execution of which should contribute to increasing the effectiveness of the fiscal policy rules (Kopits and Symansky 1998: 18–19). One of them is the simplicity of the implemented solutions. This would make it easier to present to the society the motives behind the undertaken decisions and gain its support for the policies maintained by the fiscal authorities. Simplicity facilitates also the improvement of control efficiency in terms of observance of the introduced limitations. It is a truism to say that the stabilising expenditure rules and prudential and remedial procedures are characterised by a far reaching level of complexity. It seems that currently they are understandable only to the limited group of experts. De facto, the only Polish rule of fiscal policy of simple construction is the constitutional limit on debt, which in itself is not useful for operational application. The attempt to extend the binding force of the stabilising expenditure rule and the prudential and remedial procedures to the stage of budgetary act implementation would further complicate the current legal situation. This state of affairs would give the Council of Ministers further opportunities to resort to creative accounting and concealing the true state of the public finances. On the other hand, failure to execute the objective that lies at the basis of a particular fiscal policy rule is not always the effect of actions or omissions of the Council of Ministers. For example, the decreasing of the ratio of state public debt to GDP assumed in the prudential and remedial procedures may turn out to be impossible due to strong devaluation of the domestic currency and the related surge of external debt.

The concept of detaching the structure of Polish rules of fiscal policy from the macroeconomic forecasts also seems defective. In such a case, the resultant limitations would pose a serious challenge to the execution of public finances stabilising function. The reduction of public expenditures or increasing taxes in times of recession would result in further decrease of aggregated demand and increase the scale of economic downturn fluctuations. In extreme cases, a phenomenon called the "trap of structural deficit" could occur. This term describes the state of economy, in which the public authorities undertake actions that aim at decreasing the excessive deficit, which further deepens the recession (Petru, 2015: 154). The associated decrease of economic activity and tax base leads – through the feedback loop – to the secondary increase in deficit. As a result, the public authorities not only fail to achieve their objective, but also through their actions increase the problem scale.

Considering the above observations, the withdrawal of the right of the Council of Ministers to develop macroeconomic forecasts for the purposes of the budgetary procedure should be postulated. Such a decision should be accompanied by the indication of an entity that would take over such competences. In that scope, adopting various solutions is possible. The simplest would be to transfer the aforementioned competences to the NBP. This entity develops macroeconomic forecasts for the purposes of the conducted monetary policy. They could also be used for the purposes of budgetary procedure and adopt as the basis for budgetary assumptions. A big advantage of this solution would be to base the fiscal policy and the monetary policy on the same macroeconomic forecasts. At the same time, the systemic independence of the NBP would be the best guarantee for the independence of these forecasts from the influence of the Council of Ministers. However, this solution is not free of certain flaws. In the first instance, it would create a point of contention in the relations of the NBP and the Council of Ministers. In that sense, it would become another factor inhibiting the effective coordination of the fiscal and monetary policy. Additionally, there is no certainty that in a specific situation, in order to fulfil its constitutional obligations, the NBP would not start using macroeconomic forecasts in an instrumental way.

Another statutory body obliged to develop economic and social forecasts is, pursuant to Art. 25 para. 1 of the APS, the CSO President. Those forecasts, as well, could be potentially used as part of the budgetary procedure. This would, however, require a significant increase of the personal independence of the CSO President and separating him/her from the influence of the Council of Ministers. A certain model example, in that respect, could be the independence of the President of the NBP. Its basic elements include the six-year term procedure for the appointment (the Sejm at the request of the President of the Republic of Poland) and clearly defined grounds for dismissal. The change of role of the Scientific Statistical Council that support the CSO President. Currently, it plays the role of an advisory and opinion-making body. The legislator could enhance the significance of the Scientific Statistical Council by determining its composition, working procedures and competences. The latter could include approving the macroeconomic forecasts developed by the CSO President and binding as part of the budgetary procedure. The above changes would, however, require a far reaching intervention by the legislator. The model of the systemic situation of the CSO President should be changed in particular and, with the extended competences, who should function outside the framework of government administration.

Another solution could involve the establishing of an independent fiscal institution in Poland. It can be defined as a permanent agency with a statutory or executive mandate to assess publicly and independently from partisan influence the government's fiscal policies, plans and performance against macroeconomic objectives related to the long-term sustainability of public finances, short-medium-term macroeconomic stability, and other official objectives (Debrun et al., 2013: 8). This solution is applied in many countries around the world. For example, fiscal institutions operate in Belgium, Holland, Japan, Germany, the USA, Great Britain and Italy. The responsibilities of such entities include, among others, developing macroeconomic forecasts (Calmfors, Wren-Lewis, 2011: 652). Usually, they are used in assessing the reality of the government's budgetary assumptions. In some countries, however, the forecasts prepared by fiscal institutions are of binding character for the Council of Ministers at the stage of developing the draft budgetary act. It seems that this solution could be successfully transferred to the Polish legal order.

By the way, it should be mentioned that developing a draft budgetary act belongs in Poland to the constitutional prerogatives of the Council of Ministers. Its seems, however, that imposing on the government the macroeconomic forecasts developed by an independent and specialist analytical centre does not violate the constitutional provisions. The role of such forecasts would be similar to data prepared by the CSO President, which are used as part of the budgetary procedure as a source of information on the previous years. Their aim would be only to make the estimates behind the basis of the draft budgetary act more realistic, and not to influence the shape of the fiscal policy maintained by the Council of Ministers.

5 Conclusion

The analysis of the rules of fiscal policy in force in Poland confirm that their shape "encourages" the Council of Ministers to generate fiscal illusions through manipulating the macroeconomic forecasts. In this way, that body can reduce the rigor of restrictions that bind it. Moreover, the analysis of statistical data shows that government macroeconomic forecasts concerning GDP are in general more optimistic than the forecasts of other analytical centres. This situation justifies the intervention of the Polish legislator. At the same time, it is highly unlikely to solve the diagnosed problem by modifying the shape of the fiscal policy rules. Thus, the withdrawal of the right of the Council of Ministers to develop macroeconomic forecasts for the purposes of the budgetary procedure should be postulated. Such competences could be transferred to an independent analytical centre. The role could be taken on, for example, by the NBP or the CSO President. It seems, however, that the best solution would be to establish an independent fiscal institution, which would exercise a constant supervision over the methods of fiscal policy in Poland. The competences of this entity would include, among others, developing macroeconomic forecasts, which would be adopted as one of the elements of the budgetary assumptions.

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Immovable Property Tax Exemptions as a Tool of Tax Policy

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Abstract
This text is dealing with the exemptions from the immovable property tax in the Czech Republic. It brings a new classification of tax exemptions and it overviews this type of correction components. It critically analyses de lege lata regulations in the given area. The hypothesis to be confirmed or disproved is that the Immovable Property Tax Act enables the implementation of the tax policy of both state and local governments. At the end, possible regulations de lege ferenda are drafted.

Keywords
tax; property tax; correction component; tax policy

1 Introduction

At the International Conference on the Financial Law of Local Government "The Financing of Local Self-government and Its Tasks in the Light of the Regional Policy of the European Union" taken place in April 2018 in Gdansk, Poland, there were many interesting contributions. To prepare this article, I was inspired by two of them. The first one was Mariusz Popławski, who was talking about tax exemptions in local taxes as an element of state and local government tax policies (Popławski, 2018). The second was Małgorzata Wróblewska, who was more detailed in the same topic

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dealing with exemption of port infrastructure from the real estate tax (Wróblewska, 2018). The main conclusion in both of the presentations was the same: the law on local taxes does not enable the implementation of the tax policy of local governments. The State introduces property tax exemptions while bearing no economic consequences of those exemptions. Popławski generally calls for the compensation for the lost incomes of the (Polish) municipalities caused by the statutory exemptions, which are introduced in local taxes. Wróblewska, dealing more with the local issues of Gdansk, suggests abolishing exemptions for the ports.

Influenced by these two researchers and their presentations, I have decided to write a contribution to similar issues but focused on the Czech Republic. The following text is dealing with the exemptions from the immovable property tax in the Czech Republic. The main aim of the article is to bring a new classification of tax exemptions and to overview this type of correction component. It critically analyses de lege lata regulations in the given area, and in several cases offers a historical comparison. The hypothesis to be confirmed or disproved is that the Immovable Property Tax Act enables the implementation of the tax policy of both state and local governments. At the end, using the synthesis method, possible regulations de lege ferenda are drafted. At the moment, there is no scientific literature in the Czech Republic concerning these problems.

2 Property Tax Correction Components Classification

Immovable property tax in the Czech Republic is regulated by the Immovable Property Tax Act (Act No. 338/1992 Sb.). This Act provides for two taxes on immovable property: the land tax; and the tax on buildings including houses, flats/apartments and non-residential premises. Primarily, the unit/area (in terms of square metres) system is used. Only in case of agricultural land, commercial forests and ponds used for fish-farming is the ad valorem system partially used.

There are many correction components in the Immovable Property Tax Act. The most common is the exemption. The first classification of exemptions is *based on the duty to apply for the exemption in the tax return*. There are many "automatic" exemptions (the exemption is applied by the tax administrator without any duty of the taxpayer to announce or apply for the exemption: land and buildings owned by the State, municipalities, regional governments and diplomatic representatives, etc.). The same regime is in fact applied to the property not liable to tax; that is why these situations must be analysed together with the property exempted without the duty to file the tax return. For the second group of exempted property, the claims for exemptions must be made in the first tax return after acquiring the immovable property. This affects land and buildings owned by churches, schools and universities, museums, galleries and hospitals, buildings used in public passenger transport or in water management, etc.

The second possible classification is based on the fact *whether the generally exempted property is used for profit-making purposes.* There is a list of general exemptions, but if the property is used for profit-making purposes, the taxpayer loses the right for the exemption. This applies for example on land and buildings used for public interests, ecological purposes, and those under reciprocal international treaties, etc.

The third classification is based on the *duration of the exemption*. Most of the property is exempted permanently and only a limited number of land and buildings are exempted for a limited period: agricultural land returned to agriculture cultivation (5 years), woodland returned to forestry use (25 years), land and buildings affected by a natural disaster (5 years), land and buildings in special industrial zones designated as such by the Government of the Czech Republic (5 years), reconstructed cultural monuments (8 years), structures where the heating system was changed from solid fuels to a renewable energy system (solar, wind, geothermal, biomass – 5 years).

The fourth possible classification is based on the *level of making the decision on the exemption.* Some states are clever enough to know that local self-government units as the tax beneficiaries have experience and better knowledge of local circumstances to evaluate possible impacts of taxation and related exemptions. This rule is valid for the regions in Belgium and municipalities in Lithuania, Slovakia and Slovenia; in France, the decision regarding an exemption is in the hands of regions and municipalities. On the other hand, in Bulgaria, Cyprus, Finland, Greece, Ireland, Luxembourg, Germany, Spain and Sweden only the State sets the exemptions. All the other EU member states are using the mixed system, similarly to the Czech Republic (Radvan, 2012: 194–195).

Most of the exemptions in the Czech Republic are adopted by the Parliament on the state level, stated in the Immovable Property Tax Act. This Act allows the municipalities to adopt their own exemptions by a local bylaw – a generally binding ordinance. However, the list of these exemptions is also stated in the Immovable Property Tax Act and municipalities are not allowed to adopt any other exemption. There are three possible exemptions for the municipalities. When eliminating consequences of natural disaster, a municipality may fully or partly (as a percentage) exempt the property, which is located within its area and which was affected by a natural disaster, for a period of up to five years. Various types of agricultural land such as arable land, hop-gardens, vineyards, orchards and land under permanent grass can be exempted as a subsidy for the agricultural industry. As an investment incentive, immovable property in special industrial zones, designated as such by the Government of the Czech Republic, may be exempt for up to five years (Radvan, 2016: 69–82).

The fifth classification is the most common one, based on the *reason for the exemption.* I have defined five criteria applicable in the Czech Republic:

1. Public ownership – property owned by the State, region, municipality, used for diplomatic purposes, used by the army;
2. Public benefit – cultural heritage, church property including cemeteries, property owned by generally beneficial subjects and foundations, schools, universities and research institutes, museums and galleries, libraries, public archives,

hospitals, social services providers, parks, sport grounds, property used for public transportation including ports, airports, railway stations;
3. Ecological aspect – water areas excluding ponds, woodland excluding commercial forests, property used for waste management and water management including irrigation facilities, small water power plants, wind power plants, biogas power plants, geothermal facilities, biomass facilities, structures where the heating system was changed from solid fuels to a renewable energy system (solar, wind, geothermal, biomass), specially protected land and 1st zones of natural parks, land to protect animals in the fields and grass growths, woodland returned to forestry use and agricultural land returned to agriculture cultivation;
4. (Investment) incentive – land used for heat and energy distribution, agricultural land (arable land, hop-gardens, vineyards, orchards and land under permanent grass), property in special industrial zones;
5. Social reason – family houses, flats and summer houses (cottages) owned by disabled person.

2.1 Critique

As it is obvious from the text above, there are too many exemptions in the Czech Immovable Property Tax Act. Moreover, the same regime is in fact applied to the property not liable to tax. It would be clearer to state that all the property is liable to tax, with the defined exemptions. In this case, the most important is the exemption for land within the ground plan of a building (i.e. land under the building – its "footprint") and apartment block buildings, in respect of which the tax is payable on the apartments/flats and associated non-residential premises. Because of the higher coefficient for the units, land owned by the owner of the unit where the land is used together with the unit (flat and non-residential premise) should be exempted, too.

Concerning the duty to file the tax return for the exempted property, there are two theories. The first one respects the needs of the State and every taxpayer should calculate its own tax (but not pay the tax if the property is exempted) so that it is obvious what the "lost" revenue is, from the exempted property. The second approach respects the principle of efficiency, i.e. if the tax office can get the reason to exempt the property itself, there should not be any obligation of the announcement by the taxpayer. However, in several cases, it might be difficult (for example if the property is used for business purposes). It seems to be necessary to analyse every exemption and decide whether there is any other possibility to get the information for the exemption without the announcement by the taxpayer.

Dealing with time-limited exemptions, especially the reason should be analysed as it is closely connected to the time limit. Similarly, the total exempted tax duty in the period should be taken into account. More on these issues below.

Comparing the number of exemptions on the state and the local level, it is clear that the powers of municipalities are limited. Of course, the principle that taxes and fees can only be imposed by acts of Parliament, must be respected [Art. 11(5) of the Charter of Fundamental Rights and Freedoms]. But the Immovable Property Tax Act can give municipalities the same powers as they have in the Local Charges Act, i.e. they should be allowed to set exemptions in the local bylaw – a generally binding ordinance.[2]

From practice, it is obvious that existing possibilities are not used frequently. In case of a natural disaster, it is difficult to say what property or which part of the property was affected by the natural disaster (for example flats in the first floor were damaged, but flats in the fourth floor are all right). Agricultural land exemption has no sense in large cities with small number of agricultural land. The exemption of immovable property taxation as an investment incentive is very new (can be used for the first time in the taxable year of 2016 and there is not enough data for analyses), but compared to the total investment, the saved property tax is really negligible. And in all cases, it is necessary to take into account the primal function of the property tax – its fiscal function. After every natural disaster, the municipality needs higher revenues to finance the reconstructions of public property (roads, pavements, schools, libraries, etc.). Small villages with a lot of agricultural land cannot lose substantial revenue source from the agricultural land. And almost every investment in the territory of the municipality means higher costs for the municipality.

Researching the reasons for the immovable property tax exemptions, it is obvious that primarily the State is performing its policy, stating the exemptions. In most cases, the exemptions are clever, useful, and reasoned, especially in the group of public benefit exemptions (highways, roads, railroads, parks, sport grounds, cultural heritage, church property, property owned by generally beneficial subjects and foundations, schools, universities and research institutes, museums and galleries, libraries, public archives, hospitals, social services providers).

There is no reason to exempt ports, airports, railways and bus stations. Such a property has high value,[3] and it is used for business purposes, to generate profit – and high tax revenues. There is competition between the operators, especially in case of airports, bus terminals, and river ports. This competition is usually at the national level, but concerning airports, it is even international. Ultimately, the State provides public support for the operators.

The public ownership exemptions are to be changed, as well. There is no reason to exempt property owned by the State, even though one can argue that exemptions for state property are the compensations for the immovable property tax administration provided and paid by the State (and not by the municipality who is the immovable property tax beneficiary). The State owns in individual municipalities a different amount of property and then such an exemption is not fair. There is no reason to exempt property owned by regions, too. On the other hand, the exemptions of the municipal

2 Compare Art. 14(2) of the Local Charges Act.

3 E.g. Heathrow airport has a rental value of 319 million pounds. McCluskey, 2018.

(if the property is located in the territory of this municipality), diplomatic and military property seems to be clever.

Most of the ecological aspects in the immovable property tax exemptions are reasonable (water areas excluding ponds, woodland excluding commercial forests, specially protected land and 1st zones of natural parks, land to protect animals in the fields and grass growths, etc.). However, there are several issues to be solved. Especially property used for waste management and water management including irrigation facilities should not be exempted because such a property is used primarily for business purposes. The same arguments apply for all the power plants (water, wind, and biogas), "ecological" facilities (geothermal, biomass), and the land used for heat and energy distribution (from the group of incentive exemptions). There are always some stimulation programmes for more ecological heating systems and it is not necessary to support them with the tax exemptions. The same applies to woodland and agricultural land cultivations. Moreover, the property tax saved is marginal, compared to the total costs of a new heating system or a cultivation.

A very low immovable property tax might be an argument to abolish socially reasoned and investment incentive exemptions, as well. The historical experience from municipalities is evident: only several municipalities were able to find (mostly only political) reasons to exempt agricultural land (arable land, hop-gardens, vineyards, orchards and land under permanent grass) and properties in special industrial zones. Concerning the family houses, flats and summer houses (cottages) owned by disabled persons, I would prefer to cancel these exemptions because there is no fixed link between the disability and ability to pay the immovable property tax. If the tax is higher, we may think about the exemptions for the first dwelling, but there is no reason to exempt the second houses including summer houses.

3 Conclusion

There are many problems in the immovable property taxation in the Czech Republic, and the reduction of exemptions is strictly connected with the other structural components of the immovable property tax. I have tried to introduce a new classification of the immovable property tax exemptions by defining five criteria: public ownership, public benefit, ecological aspects, (investment) incentives, and social reasons. From the critical analyses of contemporary exemptions, it is obvious that there are many problematic issues and many exemptions that should be cancelled.

Primarily, it is necessary to abolish the group of property not liable to tax and to state that all the property is liable to tax. Then it is possible to define exemptions. The basic exemption should respect the principle of only one tax on each piece of land (i.e. an exemption for the land within the ground plans of a building and an exemption for apartment block buildings, in respect of which the tax is payable on the apartments/flats and associated non-residential premises). For the duty to file the tax return for the exempted property, it seems to be necessary to analyse every exemption and decide whether there is any other possibility to get the information for the exemption without an announcement by the taxpayer.

The research shows that there are too many immovable property tax exemptions and the powers of municipalities as tax beneficiaries are limited. The reflections presented in this paper confirm the hypothesis that the Immovable Property Tax Act enables the implementation of the tax policy of only the central government; however, for the local governments the same hypothesis is disproved. Popławski states that: *"Introduced statutory exemptions in local taxes should be accompanied by an obligation of the state introducing compensation for the lost incomes of the municipality"* (Popławski, 2018). Because of different conditions in Poland, I really do not think that the Czech Republic should be inspired by the Polish regulation. The most important difference is the tax administrator: while in Poland property taxes are administered by the municipality, in the Czech Republic it is the task of the State.

My suggestion is to define basic exemptions on the state level. Besides the exemption mentioned above, which is based on the principle "one piece of land – one tax", the State should set only a limited number of exemptions to promote its interests. The group of statutory exemptions should include diplomatic and military property, water areas excluding ponds, specially protected land, natural parks, cultural heritage, roads and highways, railroads. This would allow the State to implement its tax policy adequately and sufficiently. All the other exemptions should be up to the municipality as a beneficiary of the immovable property tax. The Immovable Property Tax Act should give municipalities the same powers as they have in the Local Charges Act, i.e. they should be allowed to set exemptions in the local bylaw – a generally binding ordinance. This would enable the implementation of the tax policy as well as the local (municipal) level.

Every municipality should than adopt such exemptions, those are useful and adequate for local circumstances, to get sufficient revenues. They should be aware of all three basic functions of the tax: fiscal, stimulating and regulatory. Municipalities should take into account possible public support introducing the exemptions, especially (with regard to the contemporary regulation) in the area of public transportation, "green" energy and heat and energy distribution, waste and water management, etc. Without any doubts, the exemption will always be influenced by political motivations, but the representatives of the municipalities should try to avoid these exemptions. They should also take into account the administrative burden and administrative costs related to the exemptions, especially if the amount of the immovable property tax remains the same, i.e. extremely low. Due to the number of small municipalities in the Czech Republic, tax administration will remain on the national tax authorities. That is another reason for the very limited number of exemption on both state and local level.

Any regulation of immovable property tax exemptions de lege ferenda is strictly connected with the amendments of other structural components of the immovable property tax. As the role of the immovable property tax in the Czech Republic is marginal, it is necessary to think about essential amendments. An ad valorem tax base is not a solution: it is expensive to establish, administratively demanding and time-consuming. My proposal is to set one maximum tax rate in the Act for every type of property. Municipalities should have the right to introduce their own specific tax rates below that level. As there are more than 6,250 municipalities in the Czech Republic and many of them are extremely small with a very low number of inhabitants, there should be another rate (standard rate) in the Act for those municipalities that do not set their own specific tax rates.

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The European Union Budget Revenues after Brexit

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Abstract

This paper discusses legal and financial aspects of Brexit with a main focus on conditions needed for efficient generation of the revenues of the European Union. The paper is not definitive as Brexit negotiations are not complete yet; it aims to provide an update of legal changes that shape the ability of the European Union to maintain the revenue side of the Multiannual financial framework 2014–2020. The primary purpose of this contribution is to confirm or disprove the hypothesis that in effect of Brexit the European Union will lose the revenues and that new reforms concerning new revenues are necessary. To achieve the abovementioned goal, it will be necessary to describe the issue of the revenues of the European Union and then estimate the amount that will lack in the EU's budget after Brexit.

Keywords

Brexit; revenues of the European Budget; customs union; common commercial policy

1 Introduction

By invoking Art. 50 of the Treaty on the functioning of the European Union (consolidated version from 2012, C326/01) on 29 March 2017, the UK Government has started a process of Brexit negotiations that has both legal and financial consequences on the EU budget revenues. Both the scope of changes and their magnitude can influence

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the EU's ability to fulfil legal obligations regarding ongoing and future budgetary expenditures in the multiannual perspective.

The primary purpose of this contribution is to confirm or disprove the hypothesis that in effect of Brexit the European Union will lose the revenues and that new reforms concerning new revenues are necessary. It seeks to do so by first describing the issue of the revenues of the European Union and then by estimating the amount that will lack in the EU's budget after Brexit. As the exit negotiations are not finalized yet in full, thus conclusions in this article are preliminary in their nature.

The method statement includes a literature review with respect to the impact of Brexit negotiations concerning legal changes and implications on revenue composition in financial terms. Sources of information include official documents of the EU and UK regarding the budgets of the EU and the UK respectively, plus recent joint negotiation reports of the parties concerned.

2 The Revenues of the Budget of the European Union

The issues concerning the budget of the European Union have been regulated in the Treaty on the Functioning of the European Union. According to Art. 311 of the TFUE, the European Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenues, the budget shall be financed wholly from own resources.

Revenues collected by the European Union are composed of Member States' contributions based on payments in proportion of each country's gross national income (GNI), collection of value added tax (VAT), traditional own resources (TOR) and other incidental revenues (like donations) and corrections. This article is focused on the total EU own revenues, as the nature of Brexit would impact all EU revenue line items in multiple time periods.

Current rules regarding the own resources of the European Union have been established by the Council Decision 2014/335/EU, Euratom. This Decision has been effective since 1 October 2016 after the ratification by all Member States according to their constitutional rules. The retroactive effects of the Decision 2014/335 applied from 1 January 2014 have been accounted for under the amending budget number 5/2016 adopted on 1 December 2016. The structure of the total amount of own resources by the type of own resource and by Member State is determined pursuant to the application of the rules laid down in the Council Decision on own resources and its implementing regulations. According to the Decision the total amount of own resources is capped at 1.20 % of the gross national income (GNI) of the EU. General view of EU own revenue sources is presented in Figure 1.

Table 1. Consolidated annual accounts of the European Union in EUR millions, presenting contributions from all 28 Member States EU own revenues 2009–2016

EUR m	2009	2010	2011	2012	2013	2014	2015	2016
GNI based contribution	81,978	91,178	88,442	98,061	110,194	104,688	95,355	95,578
VAT based contribution	12,795	12,517	14,763	14,871	14,019	17,462	18,328	15,859
TOR	14,002	16,065	16,528	16,087	15,467	17,137	18,649	20,439
Subtotal	108,775	119,760	119,733	129,019	139,680	139,287	132,332	131,876
Other revenue	1,762	2,568	4,944	1,900	8,579	11,338	10,554	14,311
Total revenue	110,537	122,328	124,677	130,919	148,259	150,625	142,886	146,187

Source: European Commission, 2017a

Excluding the impact of "other revenues" presented in Table 1, the total revenues amounted to EUR 131,876m for the year 2016. The report on budgetary and financial management regarding the year 2016 presents a higher number of EU revenues amounting to EUR 133,677.[2] Out of this amount, the UK has contributed EUR 17,979m (European Commission, 2017b), which is 13% of the total revenues for the year 2016. UK contribution is nonetheless the third largest after Germany (EUR 25,405m) and France (EUR 22,232m) and thus the lack of such revenue source may be hard to replace. Based on revenue data from the year 2009 to 2016 the revenues of the budget of the European Union are ranging from the level of EUR 126bn to EUR 143bn (the mean value is EUR 135bn). Thus, the contribution of the United Kingdom should be assessed, as well in order to assess the future revenue reduction impact. UK contribution from the year 2009 to 2016 ranged from EUR 10,111m as minimum in the year 2009 to EUR 21,409m as maximum in the year 2015.

As the revenues of the budget of the European Union in the period 2009 to 2016 were not the same and UK contributions also varied, we can estimate that the European Union is likely to lose from EUR 13.4bn to EUR 17.5bn revenues following Brexit. The most likely share of the UK in the total revenues is EUR 15.5bn divided by EUR 135bn, which is 11.5%. Yet this amount is underestimated, as for the purpose of calculation, legal revenue titles like surplus external aid guarantee fund, other incidental revenues, as well as surplus from previous year should be excluded (European Commission 2017a). Based on regular, recurring income contribution from Member States, the total revenues of the budget of the European Union in the years 2009 to 2016 were lower, which increases UK share to 12.2% on average (see Table 2).

2 This amount is based on the 6th amendments of the EU budget for the year 2016. Difference results from different grouping of "other revenues" and timing of EU reports.

The latest budget for the year 2017 has been amended six times during that year and each time UK contribution has been recalculated (Amending Budget No. 6 of the European Union for the financial year 2017, OJ L 21 of 25/01/2018). This makes it more difficult to track the current level of individual Member States' contributions.[3] Based on the latest 6th revision of the EU budget 2017, the contribution of the United Kingdom amounts to a high level of 16% (see Table 3).

Table 2. UK contribution to the EU budget in the year 2009 to 2016

Revenues in EUR m	2009	2010	2011	2012	2013	2014	2015	2016
UK contribution excl. rebate	10,112	14,659	13,825	16,178	17,110	14,072	21,409	17,979
Total TOR recurring	108,907	119,075	119,995	129,430	139,744	132,961	137,335	132,166
UK share	**9%**	**12%**	**12%**	**12%**	**12%**	**11%**	**16%**	**14%**

Source: European Commission, 2017b

Table 3. The contribution of the United Kingdom in 2017 to the EU total budget revenues

2017 EU budget after rev. No. 6 in EUR m	UK	EU total recurring revenues
Customs and sugar levies	3,134	20,374
VAT	3,316	16,620
GNI based resources	12,047	78,356
UK rebate	– 4,932	0
Reduction of GNI contribution to certain Member States	169	0
Total	**18,666**	**115,350**

Source: EU Monitor, 2018

3 EU Revenues during Brexit Negotiations

As the UK is a major contributor to EU revenues, a direct consequence of Brexit would be a permanent decrease of EU budget revenues. This would put more pressure on Germany as No. 1 remaining contributor of the Union, which is perhaps politically unacceptable (Kafsack, 2016). In 2016 the German Parliament has requested an

3 As of writing this article, the Consolidated annual accounts for the year 2017 have not yet been published.

economic report that shows the negative impact of Brexit on Germany as a result of potential new customs and trade barriers, which reduce German export, endanger jobs related to this market and ability of the country to contribute financially (Koenig, 2016). Therefore, during the Brexit negotiation round in December 2017, the European Union and the UK has prepared a joint report that is an initial basis for all legal, civil, trade and financial relations after Brexit (Joint report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 of negotiations under article 50 TEU on the United Kingdom's orderly withdrawal from the European Union) (EU, UK, 2017).

The core legal principle is an "all or nothing" agreement, which increases stakes of both parties to reach a mutually acceptable final agreement. A part of this report is focused on the financial settlement with the EU and thus has a direct impact on future EU budgets and the forecasted revenue level. The first component of the proposed settlement is that the United Kingdom shall contribute in full for the years 2019 and 2020 as if it has not left the European Union. Consequently, the United Kingdom shall enjoy the famous rebate as if nothing happened and reduce financial liabilities further in case any surplus exercise happened until 2020 inclusive. As part of the financial commitments incurred during this period, yet payable in the subsequent years, the amount is defined as Reste à liquider (RAL).[4] The main financial question is how to define and recognise the UK's liabilities resulting from different legal sources. A part of the negotiated results is that the United Kingdom shall not participate in sharing of liabilities after 2020, which do have their own assets, i.e. Union financial assistance loan assets. Second part is a cut-off date 31 December 2020 regarding contingent liabilities and related to legal cases, i.e. resulting from financial guarantees underwritten by the European Investment Bank (EIB), together with a sweetener provision that any financial recoveries shall be shared as well by the parties. The United Kingdom shall receive from a future EU budgets funds regarding the share of net assets of the European Coal and Steel Community in liquidation, as well as the European Investment Fund as of 31 December 2020. However, it has been agreed that the United Kingdom shall not recover any funds regarding joint programs like EGNOS, Galileo and Copernicus and only after a discussion about future usage of these satellite-based services by the UK shall be decided.

During negotiations concluded in December 2017 report legal principles for financial separation have been established. The first principle is regarding the currency of financial settlement. It has been agreed that EUR shall be that currency, which reduces any financial risk for the remaining Member States, yet increases the long-term currency risk on the UK public finances. The third is that the United Kingdom shall not finance any new commitments not requiring funding from the Member States. The European Court of Auditors shall verify the level of commitments, decommitments and any assigned revenues that will become the RAL. The United Kingdom shall contribute

[4] This clause can enable British institutions that participate in multiannual EU programs to finalise them without the need of abrupt reduction of funding.

pro-rate to the EU budget for the years 2019 and 2020, yet not more than the ratio of the own resources made available by the United Kingdom from the year 2014 to 2020 and the own resources made available by all Member States, including the UK. It has been agreed that timing of any UK payments until the end of 2020 shall be as bills fall due, not at any up-front arbitrary date. As some EU institutions personnel, like the European Union, European Defence Agency, the European Union Institute for Security Studies and the European Union Satellite Centre have offered pension as well as other post-employment benefits, the United Kingdom has to cover their share of these high value long term liabilities. The cut-off date has been agreed on 31 December 2020, yet payments shall be spread throughout the years, as any earlier one-off payment of these liabilities is highly sensitive to the real interest rate applied in the Net Present Value calculations. The UK Government estimates of financial settlement payments to the EU budget in the calendar based fiscal years have been presented in Table 4.

Table 4. EU financial settlement components and assumed payment periods in EUR bn

	Payment period	**Amount**	
		€ billion	**£ billion**
Total	**2019–2064**	41.4.	37.1
of which			
UK participation in EU annual budgets to 2020	2019–2020	18.5	16.4
Reste à liquider	2021–2028	20.2	18.2
Other net liabilities	2019–2064	2.7	2.5

Source: Chote et al., 2018

Timing of these payments is not equal and shall reduce sharply after the initial years (Figure 1). The amounts are lower than figures shown for the EU above, as they include UK's both public and private sector receipts from the EU as offsetting transactions.

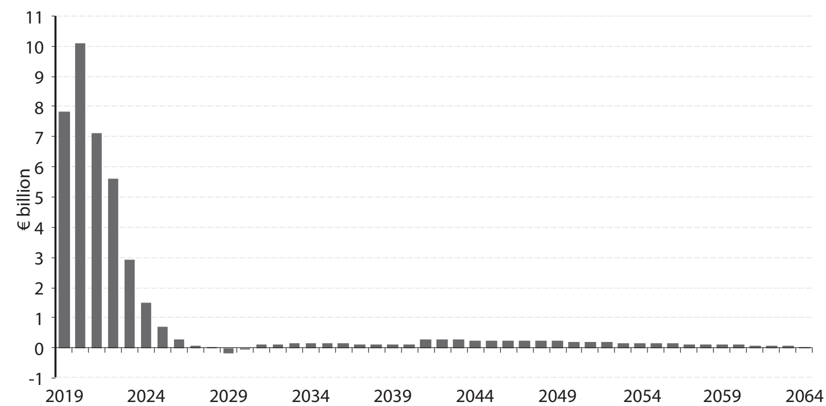

Figure 1. Chart of EU financial settlement components and assumed payment periods in EUR bn

Source: Chote et al., 2018

Exact amount of UK payments is not just pro-rata distributed among years, as the European Commission has the right to request up to five months' worth of total GNI and VAT contributions lest the UK rebates in the first quarter of the year, to take account of frontloaded Common Agricultural Policy (CAP) payments (Chote et al., 2018). In case the UK remained a full Member State, the Office for Budget Responsibility has provided initial figures until the year 2023 (Table 5).

Table 5. Total UK contributions to the EU if the UK remained an EU member

	€ billion							
	Outturn	Estimate	Forecast					
	2016	2017	2018	2019	2020	2021	2022	2023
GNI based contribution (a)	17.5	12.6	14.9	17.7	17.9	17.5	17.1	16.9
VAT payments to the EU (b)	3.6	3.3	3.4	3.4	3.4	3.5	3.6	3.7
Traditional own resources (c)	3.8	4.0	3.9	3.8	3.8	3.8	3.8	3.8
Notional contribution (d)=(a+b+c)	**24.9**	**19.8**	**22.1**	**24.9**	**25.1**	**24.8**	**24.5**	**24.3**
TOR collection costs (e)	−0.4	−0.8	−0.8	−0.8	−0.8	−0.8	−0.8	−0.8
UK abatement (f)	−6.7	−5.1	−4.8	−4.7	−5.4	−5.3	−5.2	−5.2
Gross contribution (g)=(d+e+f)	17.8	13.8	16.5	19.4	19.0	18.8	18.5	18.4
Public sector receipts from the EU (h)	−4.3	−5.6	−5.6	−6.3	−6.6	−6.6	−6.6	−6.7
Public sector net contribution (i)=(g+h)	**13.5**	**8.3**	**10.9**	**13.0**	**12.4**	**12.2**	**11.9**	**11.7**
Private sector receipts from the EU (j)	−2.8	−2.8	−1.7	−2.0	−2.0	−2.0	−2.0	−2.0
UK total net contribution (k)=(i+j)	**10.7**	**6.5**	**9.2**	**11.1**	**10.4**	**10.1**	**9.8**	**9.7**

Source: Chote et al., 2018

Based on data from Table 5 it can be seen that the gross UK contribution to the EU budget (without any receipts by the UK's public nor private sectors) varies between EUR 13.8bn for the year 2017 to 19.4bn in the year 2019, which is in the higher-level area compared to the initial simulation from Table 3, which ignores GNI growth as a factor increasing the amount of the contribution. This validates the hypothesis that UK's contributions to the EU budget is substantial and very soon the lack of these funds shall be visible both on the revenue and expenses side of EU budgets.

4 EU Budget Adjustments Proposed for the Multiannual Financial Perspective

On 2 May 2018, the European Commission adopted a draft European Union multiannual budget for 2021–2027 in the amount of EUR 1.28 bn. In the draft budget, the European Commission proposed to make the payment of EU funds dependent on compliance with the rule of law. An application regarding the suspension or limitation of funds for a given country will be submitted by the European Commission and accepted by the Member States. The budget for cohesion policy is to be reduced by approximately 7%, and for the Common Agricultural Policy by approximately 5%.

This draft has faced a lot of criticism from some of the largest EU's contributors. France protested against the 5% reduction of the Common Agricultural Policy program. The European Commission's new seven-year budget is also unacceptable for the Netherlands, as it represents a large increase in the Netherlands' EU bill. Due to Danish Prime Minister Lars Løkke Rasmussen, a "smaller EU should mean a smaller budget". He added that the European Union "cannot ask European taxpayers to pay for Brexit".

5 The Reform of the System of Own Resources of the European Union

In June 2017, the Commission adopted a Reflection Paper on the Future of the EU Finances [COM(2017) 358]. In this paper it proposed a range of options where the Own Resource should be linked more visibly to the policies of the European Union, particularly the Single Market and sustainable growth. Introducing the new Own Resources, special attention should be paid to their transparency, simplicity and stability, their consistency with the policy objectives of the European Union, their impact on competitiveness and sustainable growth and their equitable breakdown among Member States. The European Parliament adopted a Resolution on the reform of the system of the Own Resources in March 2018, highlighting the shortcomings in the present way of financing the budget and calling for discontinuation of all corrections and introduction of different new categories of Own Resources.

On 2 May 2018, the European Commission issued a proposal for a Council Decision on the system of Own Resources of the European Union [Com(2018) 325 final]. The Commission stated that the United Kingdom's withdrawal from the European Union, as well as the array of the new political priorities that have budgetary consequences call for particular attention to the architecture of the Own Resources system.

The Commission proposed to modernise the existing Own Resources system by maintaining the customs duties as Traditional Own Resources for the EU unchanged. However, the percentage the Member States retain as "collection costs" will decrease from 20% to 10%. The Own Resource based on Gross National Income are going to be kept as the balancing resource. Another aim is to simplify the Value Added Tax based on Own Resource.

The Commission also proposed to introduce a basket of new Own Resources. It would consist of a 3% call rate of the relaunched Common Consolidated Corporate Tax Base, to be phased in once the necessary legislation has been adopted, which should bring about EUR 12bn per year. Also, a 20% share of the auctioning revenue of the European Emissions Trading System, which depending on the actual carbon price, could bring EUR 3bn. Another source contemplated by the Commission is a national contribution calculated on the amount of non-recycled plastic packaging waste. The rationale for this tax is both environment protection (as oceans are flooded with plastic waste) as an incentive and also as a new source of EU own resources, which at price of EUR 0.8 per kg should bring EUR 7bn on an annual basis (European Commission, 2018).

Other goals of the Commission are to establish the principle that future revenues arising directly from EU policies should flow to the EU budget, discontinuing correction mechanisms and increase the Own Resources ceiling.

6 Conclusions

Although Brexit has been a surprise for many, this event can have a positive impact on a fundamental restructuring of EU budget own revenue sources. EU needs a solid and stable revenue streams to support multiannual framework expenditures. Thus, although the loss of UK related revenue stream is going to be painful for countries who are net EU payers through higher contributions, or recipient countries with lower EU funding level after the year 2020, it is also an opportunity to simplify the calculation of individual countries' contributions and diversification of revenue streams, which increase the stability and predictability of the EU own revenue resources. Thus, the hypothesis of an overall lower EU budget revenues level after Brexit has been confirmed. Also, the hypothesis that deep structural and spending quality building reforms regarding the EU budget expenditure side are needed after Brexit related revenue reduction is confirmed. Future co-operation with the UK should be based on fulfilling the amount of RAL, gradual payment of long-term liabilities and per usage-based payments for EU funded services that the UK continues to use, like the Galileo project and its military grade quality GPS location precision that the UK helped to create. By stronger linking of EU policies with revenue sources, including a higher level of protection of natural environment, the new legal framework proposed in May 2018 by the Commission may have a positive impact not only on the level of EU finances, but also on the air we breathe in.

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European Monetary Fund – A Further Step towards Completing the Economic and Monetary Union?

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JEL Classification: G2, H6, K0

Abstract

In this paper, the author focused on two areas. First he outlined the development of the financial assistance funds in Europe. Moving from EFSF and EFSM through ESM all the way to EMF was a long path. Will the EMF be a further step towards completing the economic and monetary union of the EU? It is the question the author tried to answer in the first part of the paper. Secondly, the author considered the position the EMF and the financial assistance funds have within the branch of financial law. Mainly, he tried to find answers to the question in which sub-policy within the public financial policy the financial assistance policy of the states (of the EU) belong and whether the public financial funds are rather of fiscal or non-fiscal nature. Having presented possible answers to these questions, the author expressed his hopes to instigate discussion among the financial law scholars on this topic.

Keywords

Monetary Union; Euro; European Monetary Fund; European Stability Mechanism; European Financial Stabilisation Mechanism; European Financial Stability Facility; financial law; European Commission

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1 Introduction

At least since 2010, the financial assistance funds in the EU[2] have become part of the crucial topics of the EU public finance. The majority of them, however, were established outside of the EU legal framework. The current steps of the European Commission and the Council of the EU targeting a deeper monetary union will are largely based on transforming the non-EU legal framework into the EU law.

Having started with the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF), moving forward to the existing European Stability Mechanism (ESM), the EU is in the process of establishing the European Monetary Fund (EMF). The goal of this paper is twofold. First, I will briefly outline the mentioned financial assistance funds in the EU, as they developed over the last decade, with an emphasis on the currently-being-shaped EMF. I also try to answer the question whether the establishment of the EMF will be a step towards completing the economic and monetary union of the EU.

Secondly, I will view the issue of financial assistance funds from the perspective of the theory of financial law. This rather theoretical part should locate the financial assistance funds in the system of financial law and should highlight the importance of further theoretical research of these funds by the financial law theorists.

2 The Development of Financial Assistance Funds in Europe

At the general level, financial assistance provided from the financial assistance funds has been made via the so-called "adjustment programmes" with the intention to restore consumer and investor confidence in the countries facing certain macroeconomic challenges. These programmes, however, are not completely new to the EU. Already in the 1970s, a legal framework was established for a so-called Medium-Term Financial Assistance, which was to help the then members of the European Economic Community having difficulties mainly with the balance of payments.[3] However, in 2009, the question of having financial assistance funds appeared hand in hand with the problems of

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2 As it is explained above, some of these funds (EFSF and EMS) are not an official part of the EU legal framework. Nevertheless, as they were designed to support the functioning of the EU monetary union, they are here classified as the "financial assistance funds in the EU *sensu largo*".

3 Compare, for instance, Regulation (EEC) No. 397/75 of the Council of 17 February 1975 concerning Community loans, or Regulation (EEC) No. 398/75 of the Council of 17 February 1975 implementing Regulation (EEC) No. 397/75 concerning Community loans. In 1981, Council Regulation (EEC) No. 682/81 was passed on adjusting the Community loan mechanism designed to support the balance of payments of Member States; in 1988, Council Regulation (EEC) No. 1969/88 was passed on establishing a single facility providing medium-term financial assistance for Member States' balances of payments, or in 2002, Council Regulation (EC) No. 332/2002 was passed on establishing a facility providing medium-term financial assistance for Member States' balances of payments.

the banking sector and the public debts of some of the euro area countries. Numerous political decisions were taken in order to preserve the integrity of the Euro.[4]

There were several measures taken as a response to the immediate challenges. Within the EU framework, the EFSM was established by means of Council Regulation No. 407/2010 [Council Regulation (EU) No. 407/2010]. The adoption of this regulation was based on Art. 122(2) of the Treaty on the Functioning of the European Union ("TFEU"), stating that: where an EU member state faces difficulties or is seriously threatened with severe difficulties or exceptional occurrences beyond its control, such a state may be granted, under certain conditions, the EU's financial assistance. The Council of the EU believed that the whole financial stability in the EU was endangered and thus it was necessary *"to respond in a coordinated, rapid and effective manner to acute difficulties"* in particular of the EU member states [Council Regulation (EU) No. 407/2010, introductory provisions]. The existing facility providing medium-financial assistance [based on Council Regulation (EC) No. 332/2002] was to remain in place. The EFSM was established as an additional source of funding to be used by the European Commission ("EC"), by means of which the EC may raise up to €60 billion in the capital market for lending to the EU state facing exceptional circumstances.[5] Such a raising up of funds was made via issuance of bonds guaranteed by the EC using the public budget of the EU as a collateral. Over the following years, there were three euro area countries who obtained financing from this facility.[6]

The other two financial assistance facilities have not been established within the EU framework. The first of the two was EFSF, which was agreed upon in 2010. EFSF, however, was only created as a temporary solution by the euro area member states. Financial assistance via this fund was provided to three euro area members.[7] EFSF has been entitled to raise funds through the issuance of its bonds on capital markets. As for the equity, the EFSF shareholders are the euro area countries (excluding the Republic of Latvia and the Republic of Lithuania).[8] The temporary solution in the form of EFSF was then accompanied by (or "merged with") the "permanent" ESM.

ESM was established as a "permanent" feature of the monetary union. The Treaty establishing the permanent crisis resolution mechanism – the ESM was signed in February 2012. The ESM Treaty entered into force in September 2012 and the ESM was inaugurated in October 2012, following ratification of the ESM Treaty by the then 17 euro area countries (EFSF, 2017: 7). ESM is thus a financial institution (organisation) set up by the euro area countries, but it is not a part of the EU. ESM raises funds by issuing money market instruments and medium and long-term debt with maturities of up to 30 years. The debt instruments being issued by the ESM are regularly nominated in Euro, but now, the ESM is preparing an issue in US Dollars, which is thought to bring

4 Compare e.g. European Commission COM (2017) 291, 31 May 2017.
5 Compare e.g. Deutsche Bundesbank, *EFSM* (Deutsche Bundesbank, s. a.).
6 Ireland, Portugal and Greece (the latter only received a short-term bridge from this fund in 2015).
7 Ireland, Portugal and Greece.
8 Latvia and Lithuania joined later directly the ESM.

more investors from abroad, mainly from the Americas. Its maximum lending capacity is €500 billion, the subscribed capital is currently nearly €705 billion, paid-in capital nearly €80.5 billion (ESM, 2017: 44). The ESM programmes have currently assisted Greece, Spain, Ireland, Cyprus and Portugal.

The ESM is now the only mechanism to finance new financial assistance programmes. As from July 2013, the EFSF may no longer engage in new financing programmes; it should continue to manage the existing programmes and the repayment of any outstanding debt (ESM, 2017: 7). Despite having been called "permanent", the ESM is not the final objective at which the economic and monetary union ("EMU") aims. In the last few years, the Council of the EU, together with the EC kept on emphasising that they support the further "deepening" of the existing incomplete EMU. There were two crucial papers issued on these issues by the EC in 2017 [COM (2017) 291 and COM (2017) 358]. As a part of this process of "deepening", the EMF is to be established.

In the following chapter, there are more details given on the role and purpose of EMF.

3 The Proposed European Monetary Fund

The EC claims that it is *"difficult and cumbersome to articulate a collective action"* when the core financial assistance fund, i.e. ESM, as an intergovernmental mechanism, lies out of the EU framework. This creates delays in the decision-making process. For instance, where there was needed to make a quick solution in July 2015 concerning the bridge-financing for Greece, EFSF had to be used instead of ESM due to the abovementioned difficult decision-making within ESM [COM (2017) 827 final: 4].

Hence, when trying to deepen the EMU, there were strong efforts to bring ESM – a bit modified – within the framework of the EU law. In general, the EMF should create a possibility to decide whether to grant financial support to a country that is not able to roll its debt because of no access to markets (Gros and Mayer, 2017). Aside from its role of providing assistance and loans to EMF member countries, the new fund should also work as a common backstop to the single resolution fund ("SRF") introduced within the so-called banking union.[9] The so-called second pillar of the banking union introduced "single resolution mechanism" ("SRM"), which shall via its board called single resolution board ("SRB") and via SRF manage the resolution of a failing bank.[10] SRF is financed via the banking sector and it should reach the target level of at least 1% of the amount of covered deposits of all credit institutions within the Banking Union

9 The Banking union is rather a set of reforms to regulation of the banking sector; it is not a "union" as a legal entity. The reforms of the bank regulation in the EU law emerged as a response to the financial and sovereign crises.

10 SRM has been established by Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010.

by 31 December 2023.[11] When the SRM was being shaped, it was clear that the funds in SRF would not suffice when another deep crisis hit. This lack of funds was to be solved via a so-called "backstop". The backstop should serve as a last-resort fund, to be activated only when the SRF was insufficient, and whose purpose was to provide *"enhanced confidence to all parties concerned with regard to the credibility of the actions to be taken by the SRB and to increase the financial capacity of the SRF"* [COM(2017) 827 final: 4].

Below, I will outline some of the core principles on which the currently being shaped EMF is to be built, as there have been outlined in the EC's proposal for a council regulation on the establishment of the EMF and in the draft statute of the EMF [COM(2017) 827 final: 4].

The EMF shall succeed (replace) the ESM. However, it shall be made a part of the EU legal framework, i.e. to be established by means of an EU regulation. The EMF should continue to provide financial stability support to EMF member states.[12] As being a part of the EU legal framework, the decision-making within the EMF should be much faster than that of ESM. The EMF should provide the common backstop for the SRF as a part of the banking union framework. The EMF should play a more direct role in the management of the programmes of financial assistance and it shall be accountable to the European Parliament and the Council of the EU for the execution of its tasks.

As for the particular parameters, the overall lending capacity should be no less than €500 billion. The initial authorised capital stock of EMF shall be nearly €705 billion. Any references in the EU law to ESM shall be construed as references to the EMF. The initial authorised capital stock is to be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be nearly €80.5.[13] As opposed to EFSM, the EU budget should not be held liable for the expenses or losses of the EMF. The main decision-making body should be a "board of directors", which *inter alia* may call in authorised unpaid capital by simple majority decision or even decide to increase the authorised stock of the EMF.

There are to be several types of supports or loans to be provided by the EMF, i.e. stability support, precautionary financial assistance, financial assistance for the re-capitalisation of credit institutions and direct loans. Bonds of an EMF member may be purchased by the EMF either on primary or secondary market. One can see a difference here from the European Central Bank, which is banned to purchase such bonds on the primary market; and can only do so on the secondary market under strict conditions (Art. 123 of the TFEU and the Court of Justice of the EU, Case No. C-62/14). The EMF may provide direct recapitalisation only if the credit institution concerned is of systemic relevance or poses a serious threat to the financial stability. Financial support to the SRB should be through credit lines or ceilings for guarantees on liabilities of the SRB. The combined amount of outstanding commitments arising from such guarantees is subject to an initial ceiling of €60 billion.

[11] As of 30 June 2018, SRF reaches ca. €24.9 billion. For more, see in SRB, 2018.

[12] A euro area country or a non-euro area country participating in the banking union.

[13] Compare Art. 8 of the proposed regulation.

Each EMF member country should appoint a governor (and an alternate governor). The governor should be a finance minister of that country. The chairperson of the board of governors shall be the president of the euro group.[14]

At the EU level, further discussion concerning the EMF regulation should take place at the European Council to be held in March 2019 and at the Sibiu Meeting to be held in May 2019.[15]

As for this part, it may be concluded that the EMF is a step towards the further integration of the EMU, as a financial assistance fund that existed out of the EU legal framework will have been brought within the realm of the EU law.

4 Financial Assistance Funds from the Financial Law Theory Perspective

Financial assistance programmes may be understood as a net of legal relationships. Despite bearing some of the "private law" aspects, these relationships generally fall within the area of public law.[16] As they are connected with public debt, financial stability and the stability of the banking sector[17] may be further classified as part of financial law. In the continental system of law, financial law is considered to be a part of public law (Mrkývka, 2014: 126; Bakeš et al., 2012: 510).

Financial assistance programmes are inextricably intertwined with public funds from which the necessary funds needed for carrying out of these programmes are obtained. These public funds are considered to be established in the "public interest" in order to achieve the goals, such as financial stability, stability of the banking sector, access of a state to the markets, or even the further existence of the Euro. May these goals be considered to be "public goods", as the term is understood by the theory of financial law? Mrkývka outlines the public goods as follows: *"A public good is everything that is generally beneficial and there is a general (society-wide, public) interest that the good exists, is provided and is ensured".* (Mrkývka, 2014: 30) The abovementioned goals of the financial assistance, such as financial stability, may be considered generally beneficial and there is a general interest that it be enhanced. Thus, the goals may be viewed as public goods. For public goods, it is typical to be financed from public funds. The public funds mentioned above – whether it was EFSF, EFSM, ESM or the currently being shaped EMF – were established by the public entities – either by the states on bilateral bases (such as EFSF or ESM) or by the EU law (EFSM, EMF) in order to serve public interest. These programmes are financed from public funds.

14 The euro group is an informal body established according to the Protocol No. 14 on the Euro Group annexed to the Treaty on European Union. However, for instance, during the negotiations concerning Greece in 2015, the euro group showed it is of high significance.

15 This paper is completed in July 2018.

16 For more on the division between the private and public law in the continental system of law, see e.g. Knapp, 1995: 264.

17 Compare the types of assistance that may be provided from the EMR.

The public funds from which the financial assistance programmes are funded are part of the "public financial policy", as the term is understood by the theory of financial law. Public policy is a policy of a public entity; it consists of all types of strategic activities targeting achievement of particular social goals. Public policy consists of several policies, including "public financial policy". The latter is sometimes described as the "policy of public financial activities" (Mrkývka, 2014: 27–29). The financial activities of a public entity usually reflect in so-called financial-law acts (Bakeš et al., 2012: 11). Within the public financial policy, usually three core sub-policies are identified, i.e. 1. budgetary policy (Mishkin, 2004: 852); 2. fiscal policy; and 3. monetary policy (Mrkývka, 2014: 30).

As the financial assistance programmes are of huge importance for the stability of the EU, they are not just a minor financial law institute not requiring a further, more detailed insight. They may be viewed as an important state policy and an area of financial law. The theory of financial law should now focus on answering the question, in which particular sub-policy of the public financial policy the policy of financial assistance programmes belongs. It is definitely not a part of the monetary policy, as these two policies have different goals and use different tools.[18] It shall also not be considered a part of the budgetary policy, as these funds are neither budget funds which the state's income flows into, nor the state expenses are covered from them.[19]

Are they thus part of the state's fiscal policy? Let us first have a look at several definitions of fiscal policy. Fiscal policy may be viewed as: *"A government's plan for deciding how much money to borrow and to collect in taxes, and how best to spend it, in order to influence the level of economic activity"* (Cambridge Dictionary) or *"policy, by means of which government carries out the income and expense programmes and intentionally influences the aggregate demand and aggregate supply"* (Mrkývka, 2014: 30) or *"fiscal policy involves decisions about government spending and taxation"* (Mishkin, 2004: 12). The ECB defines fiscal policy as follows: *"Fiscal policies have a significant impact on economic growth, macroeconomic stability and inflation. Key aspects in this respect are the level and composition of government expenditure and revenue, budget deficits and government debt"* (ECB, Fiscal policies). Analysing these definitions, it seems that the financial assistance policies may hardly be classified as part of fiscal policy. Although they are construed to deal with the problems of the states that are facing macroeconomic difficulties due to their excessive budget deficits, the financial assistance does not fit into any of the above definitions.

Hence, it seems that the financial assistance policy is rather an independent (although interconnected with the other policies) part of public financial policy, aside from the other sub-policies mentioned above. The question how to classify the financial

18 Although the asset purchase programmes carried out by the ECB in the last few years also aimed mainly at the sovereign bonds of the states that required financial assistance from the abovementioned funds.

19 If we do not consider a potential recapitalisation assistance to be a state expense (which it is, from a certain point of view).

assistance policy is however still open and waiting for a more detailed answer by other financial law theorists.

The theory of financial law distinguishes the scientific field into two core classes: 1. fiscal part; and 2. non-fiscal part (Mrkývka, 2014: 57–59). In each of these classes, there are several sub-branches of financial law. The fiscal part of financial law is believed to incorporate mainly the following sub-branches of financial law: tax law, customs law and budgetary law, where the non-fiscal part of financial law includes mainly monetary law, assays law, public banking law, public insurance law and law of financial markets. Some sub-branches of financial law are still subject to consideration whether they are part of the fiscal or non-fiscal part of financial law, such as balance law.[20]

The second question I would like to pose is a question whether regulation of financial assistance funds is rather of fiscal or non-fiscal nature. As for the differentiation between the fiscal and non-fiscal part, the financial law theory explains that the fiscal part rather deals with such relationships in which the primary object is the "flow of money", whereas in the non-fiscal part, the primary objective is regulation of the essence of money and the monetary system (Mrkývka, 2014: 57). As for the particular sub-branches, it covers some relationships that rather seem to be fiscal (flow of finance means to and from the states), but some relationships seem to be rather of non-fiscal nature (for instance, selling of the bonds issued by the public funds on the financial markets, issuance of off-balance guarantees by public funds, etc.). Some relationships are even of private law nature (such as, liability for damage of the funds, etc.).

Hence it seems that the regulation of financial assistance funds is rather a hybrid standing somewhere in between the fiscal and non-fiscal parts of the financial law. But again, the question is still open for the financial law theorists to dig deep into it.

5 Conclusion

In the first part of the paper, I outlined the development of the financial assistance funds in Europe.[21] Moving from EFSF and EFSM through ESM all the way to EMF was a long path. The question in the title of this paper reads: *"Is EMF a further step towards completing the monetary union?"* As explained in this paper, EMF brings certain change in the two intertwined areas of 1. providing of financial assistance/loans to the EMF member countries in need and 2. securing the functioning of SRF by having a function of a common backstop.

[20] Balance law (in Czech: "bilanční právo") is a term used by the theorists of the Department of Financial Law and Economics of the Faculty of Law, Brno, Masaryk University. The theorists of the Charles University of Prague rather use the term "accounting law". Nevertheless, there are several approaches to this sub-branch of law, some considering it a part of the fiscal part, some part of the non-fiscal part of the financial law, and some even understanding it to be a hybrid standing somewhere in between the two parts.

[21] I rather use the term "Europe" than "EU", as some of these funds were established out of the EU legal framework (see above).

The EMF is a step towards further integration of the EMU, as a financial assistance fund that existed out of the EU legal framework will have been brought within the realm of the EU law.

In the second part, I focused on rather theoretical questions of how to classify the financial assistance funds in the system of the financial law. Posing a question, in which particular sub-policy of the public financial policy the policy of financial assistance programmes belongs, I came to the conclusion that that the financial assistance policy rather seems to be an independent (although interconnected with the other policies) part of public financial policy. Next, asking a question whether the regulation of financial assistance funds is rather of fiscal or non-fiscal nature, I concluded that it seems that the regulation of financial assistance funds is rather a hybrid standing somewhere in between the fiscal and non-fiscal parts of the financial law. I, however, consider the answers to these questions just an incentive for other financial law researchers to focus more on this subject and possibly come to more appropriate findings.

EMF and financial assistance funds in general, are definitely legal institutes that should be further researched not only by economics and practising legal experts, but also by academic financial law scholars.

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Does the Implementation of DAC 5 Represent a Breach of Attorney Confidentiality?

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Abstract

This contribution is devoted to an issue of the correlation between anti-money laundering measures and measures combating tax evasion. This problem is widely discussed and the regulation requiring sharing tax relevant information between tax and AML authorities begins to occur. The example is the well-known directive DAC 5 and its transposition into the national legal orders which initiated the discussion about the nature of the confidentiality of the lawyer and the attorney–client privilege once again. This contribution therefore analyses the new obligation imposed on attorneys by the law implementing DAC 5 in the Czech Republic. The used scientific methods are description, analysis, induction and deduction.

Keywords

confidentiality of attorneys; DAC 5; cooperation in tax matters

1 Introduction

In the last few months in the Czech Republic, we were witnesses of a fiery discussion about an implementation of the Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU (hereinafter: DAC) as regards access to anti-

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money-laundering information by tax authorities (hereinafter: DAC 5).[2] The final result of the legislative procedure was the adoption of Act No. 94/2018 Coll. amending Act No. 80/2009 Coll., Tax Procedure Code (hereinafter: Tax Procedure Code) and expanding the scope of persons liable to provide tax relevant data to tax authorities. The problem of this implementation is the fact that this novelisation of the Tax Procedure Code goes beyond the obligation of EU member states prescribed by the DAC 5 and widens the information provided by some persons keeping a secrecy about their clients. However, with respect to attorneys, the obligation imposed on the attorneys was implemented strictly as it is prescribed by the DAC 5. Still, there is an obstinate attitude mainly of the Czech Bar Association arguing that such legislation represents a breach of specific confidentiality obligations, especially bank secrecy (Erbsová and Svecová, 2017: 9), the attorney–client privilege and the confidentiality kept in some professions.

Unfortunately, the dialogue between the members of the Chamber of Deputies, the Parliament of the Czech Republic, and affected professions' representatives lacked a rational base and substantive arguments. Moreover, even some members of the Czech Bar Association publishing their opinions had not been capable to join this debate with clear arguments supported with facts and they brought just a little bit more of contempt for the profession of attorneys in the eyes of the public. Although according to the Czech Bar Association, it is impossible to think that the breach of an attorney–client privilege and the obligation of a lawyer to maintain confidentiality is legitimate in tax matters, the legislative discussion should be based on an analysis whether this privilege and obligation could be infringed by public power just in extreme cases and whether measures tackling tax evasion is such a case (Czech Bar Association, 2017).

The purpose of this article is the assessment whether the lawyer confidentiality obligation and the attorney–client privilege should prevail over the implemented measures prescribed by the DAC 5. The used scientific methods are description, analysis, induction and deduction. The most important sources are the commentaries to the Act on advocacy, Goodsell's article *Muted Advocacy: Money Laundering and the Attorney–Client Relationship in a Post 9/11 World,* as well as Cummings's and Stepnowsky's article *My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money Laundering through Commercial Transactions.*

2 What Is the Aim of the DAC 5?

The impetus for the adoption of the mentioned novelisation of the Tax Procedure Code is the need to implement the DAC 5 not later than by 31 December 2017. DAC 5 itself is a very clear and moderate directive since Art. 1 represents only provisions substantively amending the DAC directive which is amended by the new Art. 1a prescribing that

2 This paper has been elaborated by Tomáš Sejkora within the programme "PROGRES Q02 – Publicization of Law in the European and International Context" which is realized in 2018 at the Faculty of Law of the Charles University.

every EU member state must adopt measures enabling tax authorities the access to the mechanisms, documents and information stated in Arts. 13, 30, 31 and 40 of Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (hereinafter: AML Directive). Nevertheless, this access should be granted just for the purposes of the DAC regulation implementation and for the administrative cooperation in tax matters between EU member states. Summarising that, the EU member states must provide their tax authorities with the scope and capacity to access the data gathered by obliged entities during due diligence of their clients, about beneficially ownership of legal persons or arrangements including also trusts and entities without legal capacity, and to evaluate if the obliged entities maintained the requirement to store prescribed data for the purpose of the possible control.

For the reasons mentioned above, DAC 5 interconnects selected measures prescribed by the anti-money laundering (hereinafter: AML) regulation and the cooperation in tax matters in the EU. Although, it is true that DAC regulates the general standard of the automatic exchange of information regarding the owners of payment accounts since 2016 (Recital 1 of the DAC), DAC 5 represents the first step abandoning the double-track approach in tax and AML regulation. Then, it is clear, that the aim of the DAC 5 is to facilitate the access of tax authorities to the information required for the application of AML measures, to grant suitable conditions to international cooperation in tax matters and to provide tax authorities with the larger scope of data useable while tackling tax evasion and tax avoidance (Recital 5 of the DAC). Finally, such harmonised access to the data related to the AML measures helps to overcome the different approaches adopted in EU member states since just few of them grant tax authorities such access. In addition, the DAC 5 regulation should secure the proper functioning of the internal market and also promote the detection of money laundering, corruption, financing of terrorism or different criminal activity and maximise the capacity of tax authorities to tackle tax evasion and tax avoidance [COM(2016) 452 final].

3 How the Czech Republic Transposed DAC 5?

The transposition of DAC 5 amended the Tax Procedure Code by the new wording of sec. 57 par. 3 and by the new sect. 57a. According to the first paragraph of this new section of the Tax Procedure Code, the obliged entity in the meaning defined by the act on some measures against the legalisation of proceeds from criminal activity and financing of terrorism (hereinafter: Act on AML) is obliged to provide the tax authority:

- the information gathered during the identification of its client;
- the information gathered during the due diligence of the client pursuant to the abovementioned act;
- the information about the manner of how such information was obtained; and
- relevant documents.

on the prior request of such authority. Clearly, there is no limitation of the processed data to tax authorities as it is prescribed by the DAC 5 just for the purpose of the international cooperation in tax matters, therefore, this provision exceeds the required harmonisation and enables the access of tax authorities to AML relevant data also for the purposes of national tax administration.

Still, sec. 57a par. 2 of the Tax Procedure Code mitigates these procedures on some professionals, mainly in the legal sector. Some professionals like attorneys, auditors, executors, tax advisors and notaries are obliged to provide prescribed information and documents by sec. 57a par. 1 of the Tax Procedure Code just for the purposes of international cooperation in tax matters. Moreover, the processes pursuant to the Act on AML should be similarly applied on the provision of this information to tax authorities. This condition means that the required information and data must be provided to the respective tax authority through the Czech Bar Association in case of attorneys and just after the review of the respective notification by the Czech Bar Association.

Furthermore, the provision of the requested information and documents related to the AML measures by attorneys is limited also by the obligation to identify the client and to do a due diligence of the client pursuant to the Act on AML. In particular, notaries and attorneys are considered an obliged entity by the Act on AML just if they carry out acts within safekeeping or if they carry out or should carry out acts on behalf of their clients or on their account within (sec. 2 par. 1 letter g) of the Act on AML):

a) solicitation of a purchase or a sale of immovable property or business undertaking or part thereof;
b) management of the client's money, securities, business interests or other assets, including acting on behalf of the client or on his account in connection with the establishment of payment account with a credit institution or foreign credit institution or securities account and management of such account;
c) establishment, management or operation of a trading company, business group or other similar entity, whether or not it is a legal person, as well as the acquisition and collection of funds or other valuable asset for the purpose of the establishment, management or control of such entity; or
d) direct debit, payments, transfers, deposits or withdrawals made in cash or by cashless payment, or any other action that aims to or causes the direct transfer of money.

Finally, the notary or attorney as obliged entity shall not identify the client or notify a suspicious transaction if the information is acquired from the client or about the client during or in connection with the provision of legal advice or subsequent verification of the legal status of the client, representation of the client in the proceedings before courts and, in addition, in case of an attorney, in connection with the defence of the client in criminal proceedings (sec. 27 of the Act on AML). Therefore, even in these cases, the notary or attorney will not be obliged to provide information or documents to tax authorities pursuant to sec. 57a of the Tax Procedure Code.

4 The Concept of Lawyer Confidentiality

First of all, it must be mentioned that the there is a specific concept of lawyer confidentiality in the Czech Republic which represents the mixture of an attorney–client privilege and a client–lawyer confidentiality, therefore it is not distinguished whether the fact is a part of the evidence acquired about the client by a lawyer or if the fact is protected by an ethical standard of confidentiality.[3] The obligation of an attorney to maintain confidentiality (hereinafter: confidentiality obligation) is the basic precondition for the performance of advocacy which secures the confidential relationship between attorney and his client. The confidentiality obligation is also the expression of the constitutional right to legal aid pursuant to Art. 37 of the Charter of Fundamental Rights and Freedoms when the state accepting this confidentiality grants the condition of the realisation of the right to legal aid (Svejkovský et al., 2012: 137).

The relationship between the attorney and his client is governed by the mandate type contract pursuant to which the attorney binds himself to provide the client with legal services with professional care. Due to the fact that provided legal services are usually related to public law or private law relations with the client's legal or private interest, it is necessary to secure the highest protection of the attorney–client relationship beyond the protection granted by civil law and create the environment in which the client can communicate all circumstances and information to the attorney.

The confidentiality obligation is not just an element of the right to legal aid, but also a part of other granted rights existing in a democratic society, especially the right for fair trial.[4] For example, the Czech Constitutional Court summarises that: *"Confidentiality obligation is the basic precondition for the provision of legal aid and therefore as well the condition for the functioning of a democratic society. The profession of attorney works on the confidential relationship between an attorney and a client and also on the trust in the confidentiality of a lawyer. This obligation is not the privilege of the attorney, which represents the exemption from the general binding legal order, but it is an obligation imposed on the attorney in the interest of the client and for his protection. In this meaning, the professional secrecy and its maintaining by the attorney is protected, mainly in the situation, when this obligation of the attorney could be endangered"* (Constitutional Court, II. ÚS 889/10).

Concerning the scope of the confidentiality obligation, it covers also a variety and wide scope of the circumstances which were maintained confidential. According to sec. 21 par. 1 of Act No. 85/1996 Coll., on advocacy, the attorney must maintain the confidentiality about all circumstances, which he has learned in connection with the provision of legal services. Therefore, there is no reason to distinguish the way, how such circumstance about the client's case was learned by the attorney, because he is obliged to maintain the confidentiality obligation not only about the information communicated by his client, but also about others, e.g. from respective case files, from

[3] These two concepts are known for common law based legal orders like the USA.

[4] Compare Ústavní soud [Constitutional Court], III. ÚS 83/96.

third persons, from hearings before public authorities or from the own initiative of the attorney (Uhlíř et al., 2018).

Nevertheless, the confidentiality obligation is not an absolute one, *vice versa,* it is a relative obligation, which could be waived by the written legal act of the client[5] or which could be breached by law in favour of the exercise of public power (Svejkovský et al., 2012: 137) or the attorney himself.[6] Even the international community does not consider the confidentiality obligation absolute comparing the IBA International Principles on Conduct for the Legal Profession adopted by the International Bar Association, because pursuant to Art. 4 thereof, it is legitimate to breach the confidentiality obligation by law. The reason is quite simple, the lawyer should not be a person actively participating in illegal activities of his client (International Bar Association, 2011: 6).

Also, the systematics of Act No. 85/1996 Coll. on advocacy suggest that the confidentiality obligation is not an instrument enabling attorneys to participate in an unlawful conduct of client whatever the form because the attorney is also obliged to protect and promote rights and legitimate interests of the client and to obey his instructions (sec. 16 par. 1 of Act No. 85/1996 Coll.). Nevertheless, the instruction of the client is not binding on the attorney if it is contrary to law. Similarly, *argumentum a contrario,* pursuant to sec. 16 par. 1 of Act No. 85/1996 Coll. on advocacy, the attorney is not obliged to promote the interest of his client which is not legitimate, i.e. if it is in contradiction to objective law or the respective subjective right is intended to be exercised in an abusive way by the client. This fact is remembered by the professional regulation of the Czech Bar Association since Art. 17 of the Code of Conduct (Resolution of the Czech Bar Association board of directors No. 1/1997) states that *"an attorney shall not provide untrue or misleading data or evidence with his knowledge, even on client's request".* This condition is also emphasised by the Czech Supreme Administrative Court considering such law very clear and interprets it that even the promotion of the client's interests and watching his instructions shall not result in the conscious violation of law by the attorney. For this reason, in case the attorney exercised the client's unlawful instruction, the attorney shall be liable for his participation in the illegal activity of the client. *Argumentum ad absurdum,* opposite interpretation could result into absurd consequences permitting to apply the professional confidentiality also on the crimes committed by attorneys for instance (Czech Supreme Administrative Court, 2 As 21/2011 – 166).

It is evident that the confidentiality obligation impose on the attorney the duty to maintain confidentiality when he acquires information about an illegal activity of the client. But this obligation does not permit the attorney to actively participate in such unlawful conduct of the client. This opinion is clearly described by the Czech Constitutional Court interpreting the provision of sec. 85b of Act No. 141/1961 Coll., Criminal Procedure Code. As this court stressed, *"this section is not constituted to enable offenders to abuse the confidentiality obligation of the attorney while committing the crime*

[5] Compare sec. 21 par. 2 of Act No. 85/1996 Coll. on advocacy.
[6] Compare sec. 21 par. 4 of Act No. 85/1996 Coll. on advocacy.

using the attorney's office as a cover with the knowledge of the attorney and thinking that the confidentiality obligation will protect them against the authorities involved in criminal proceedings". The office premises of the attorney including all devices cannot serve or cannot be abused for the illegal activity instead of their usage for the provision of the legal services protected by law (Constitutional Court, III. ÚS 3988/13). The Czech Constitutional Court also emphasises that the confidentiality obligation and the provision of legal services itself cannot be misused for committing an illegal activity, otherwise it will cause the inadmissible and purposeful superiority of the confidentiality obligation over values of fundamental rights and freedoms, the fulfilment which is a prior and positive duty of the state (Constitutional Court, II. ÚS 889/10).

From this perspective, it seems to be legitimate to relativise the confidentiality obligation when this instrument could result in the active participation of the attorney in the illegal activity of the client in cases settled by law. For instance, the breach of the confidentiality obligation by sec. 33 par. 3 of Act No. 120/2001 Coll., Enforcement Code follows the aim not to allow to cover some property of a liable person default with his debt by the safekeeping by an attorney. Otherwise, if the attorney aware of the enforcement proceedings for the client's debt conceals kept money subjected to the enforcement of the enforceable order, the attorney will actively participate in the unlawful conduct of the client. In the same perspective, the measures should be analysed applied pursuant to the AML regulation when the attorney has the status of the obliged entity.

Speaking about the AML regulation and the status of the attorney as the obliged entity, the following data could be considered. The peg of approximated annual value of laundered money is estimated between 1.6 trillion USD and 4.0342 trillion USD.[7] Then, for an idea, how much could an attorney be involved in cases of money laundering, a starting point could be the quantitative analysis of the cases acted upon in the Second Circuit Court of Appeal in the year 2009. In 40 cases, 4 of them was related to real estate, 3 of them was related to lawyer trust account, 23 of them was related to wire transfers, 23 of them was related to monetary instruments, 9 of them was related to shell corporations and 2 of them was related to the delivery of bulk currency. However, the lawyer was in the position of the defendant in 10% of them, then the lawyer was mentioned as facilitation or present transaction without being criminally charged in an additional 5% of 40 cases and finally, another 10% of cases required the participation of the lawyer in the transaction pursuant to law or there was high likelihood of the involvement of the lawyer (Cummings and Stepnowsky, 2011: 26–29). From this analysis, it is clear that the lawyer was somehow involved in 25% of the cases before the Second Circuit Court of Appeal in 2009. Considering the abovementioned facts and opinions, globally, the lawyers could be involved in 1 trillion USD of laundered money, regardless if wittingly or unwittingly. Moreover, the well-known Panama and

[7] According to Goodsell, the annual rate of laundered money is between 2 and 5% of GDP and the GDP pursuant to the World Bank represented 80.684 trillion USD in 2017. Goodsell, 2009: 211; Worldbank.org., 2018.

Paradise cases demonstrate that the profession of attorneys is not immune to intentional wrongdoing. Therefore, it is evident that the limitation of the confidentiality obligation in case of AML measures called the Gatekeeper initiative (Goodsell, 2009: 212) is based on the legitimate interest considering the laundered funds possibly affected by the participation of the lawyer.

Returning back to the core of this contribution, although money laundering and tax evasion are different illegal conducts, they are still linked. So far as they are quite different processes, they usually share the same sophisticated techniques of fund dissimulation, mutually support each other and furthermore they are often perpetrated through offshore jurisdictions (Froomkin, 1997: 167). Nevertheless, it is a quite difficult and long process of the AML regulation development resulting into the fact, that the most important international players started to perceive tax evasion as a predicative offence for money laundering (Spreutels and Grijseels, 2001: 3). From this point of view, if the attorney aware of the asset unlawfully acquired by his client allows him to deposit this money on the safekeeping account of the attorney or to contribute this asset as a contribution into the registered capital of a business corporation, it is not legitimate to invoke the confidentiality obligation of the involved attorney by his client or by the attorney himself. If the attorney does not know about the illegally acquired asset of his clients or this asset is acquired pursuant to law, there is no reason to make a difference between the deposition of the money on the account of the financial institution or the safekeeping account of the lawyer. All because of the aim of the attorney profession which is not helping to cover the illegal activity of clients but *vice versa* to provide the legal aid, i.e. to apply all legal instruments in favour of the client.[8] Secondly, if the attorney participates just on the legal conduct of the client, there is no risk of the sanction imposed on the client by public law authorities or the rise of the tax liability of the client *lato sensu*. Still, it must be remembered, that law cannot breach the confidentiality obligation by any legal measure. Such breach is permitted just if it is necessary and also to the extent necessary (Constitutional Court, I. ÚS 3859/13).

5 Conclusion

Without any doubt, the implementation of DAC 5 as it was done in the Czech Republic represents the breach of the confidentiality obligation of attorneys. On the other hand, the implementation of DAC 5 was the fulfilment of the obligation of the Czech Republic to the European Union, therefore, the discussion should be focused on the issue how to implement this directive while maintaining at least the minimal standard required. Likewise, it is undoubtful, that the confidentiality obligation is the essential precondition of this profession without its existence this profession will lose importance. Furthermore, it represents a part of the essential principle of the functioning of

[8] Compare sec. 16 par. 2 of Act No. 85/1996 Coll. on advocacy.

a democratic state. Still, the confidentiality obligation is not an absolute one, therefore, it is possible for some legislation rules to breach it in favour of the exercise of public power or the protection of the attorney himself. Although it is possible to breach it by law, the state should do that very carefully and just in a necessary case to the extent necessary. If the adopted legislation fulfils these two requirements, such legislation should be considered as a legitimate measure of the state.

In particular, states breach the confidentiality obligation usually just when there exists a substantial risk that the attorney will actively participate on the illegal conduct of his client, even unwittingly. Besides, it is evident that the provision of legal services cannot serve to engage the attorney in any illegal activity of the client. Considering this fact, the implementation of DAC 5 was adopted to preclude the client to abuse the legal services provided by the attorney to illegitimate tax avoidance and tax evasion. Also, from the perspective of the obligation to the European Union, DAC 5 was implemented just to the extent necessary in relation to attorneys. I am sure, that the adopted implementation of the DAC 5 is legitimate, and it would pass the safeguard that the breach of the confidentiality obligation is legitimate just in a necessary case to the extent necessary as it is settled by the Czech Constitutional Court, even if the respective European Union legislation does not exist. It could be also assumed due to the similar nature of the breach of the confidentiality obligation by the Act on AML and by the novelisation of the Tax Procedure Code implementing DAC 5. *A maiori ad minus,* if the breach of the confidentiality obligation is legitimate in case of AML measures, the similar breach of the confidentiality obligation also related to the provision of prescribed information and materials to tax authorities must be considered legitimate since tax evasion represents the predicate offence for money laundering. Moreover, when the relation of money laundering to tax evasion is so close, the measures tackling both phenomena should be adopted complexly (Tavares, 2013: 7–8).

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From Violation of the Budgetary Discipline to the Principle of Proportionality within the Assessment of the Levy for this Violation

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Abstract

This contribution deals with the problem of violation of the budgetary discipline and with the associated necessity of application of the principle of proportionality within the assessment of the levy for this violation. The main aim of this contribution is to confirm or disprove the hypothesis whether the correct approach of the application of the principle of proportionality has been chosen in the Czech legal order when assessing the amount of the levy for a violation of budgetary discipline, taking into account the situation regarding the reporting of irregularities in the violation of the subsidy conditions.

Keywords

jurisprudence; violation of the budgetary discipline; levy

1 Introduction

In the beginning, it is good to define the concept of subsidy, which forms the basis of this paper. The subsidy within the meaning of Art. 3 letter a) of Act No. 218/2000 Coll. on Budgetary Rules and on Amendments to Certain Related Acts (Budgetary Rules), as amended (hereinafter: the Budgetary Rules), means "finances provided from the state

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budget, state financial assets or the National Fund to artificial legal persons or natural persons for a specific intended purpose" (Grossová, 2008: 14). But the professional legal public looks at subsidy as a general one, without intended purpose (Bakeš et al., 2012: 113).

In addition to subsidies, the Budgetary Rules speak in Art. 3 letter b) of an institute of similar designation – repayable financial assistance. This means finances of the state budget, state financial assets or the National Fund provided, except as otherwise, by the special law interest-free to artificial legal persons or natural persons for the intended purpose and their recipient is obliged to return these finances to the state budget, state financial assets or the National Fund.[2]

Havlan grasps the fundamental difference in the variability of the ownership of these public finances (Havlan, 2016: 39).

The view of the support in the form of subsidy (state subsidy) differs according to the way of thinking. Consumers perceive them as a factor of decreasing or increasing of prices, economists regard them in the traditional sense as a state intervention of Keynesian character (Jurečka, 2010: 53), lawyers as in the conduct of a state that can be allowed or illegal (Art. 174 et seq. or Arts. 107 to 109 of the Treaty on the Functioning of the European Union), etc. This paper focuses on the legal view, which is very well depicted economically by the collective of authors around Jurčík: "The basic principle of the functioning of the single market is the assessment of any state support by the state as distorting competition and the competitive environment and, in principle, the granting of public support is forbidden. Only public support conductive to the realization of certain objectives of the Community is considered to be compatible if its positive effects outweigh the negative impact on the market environment" (Jurčík, 2001: 88).

One of the principal obligations of a recipient of the subsidy is to use it under the terms of the decision to grant a subsidy or refundable financial assistance and in accordance with the purpose for which it was granted. The Budgetary Rules regulate in Art. 3 letter e) that unauthorised use of finances of the state budget, other state finances, granted from state budget, state financial assets, state fund or National Fund, means their spending by whose performance was violated the obligation stipulated by legal regulation, decision or by an agreement to provide such finances or a violation of the conditions under which the finances have been provided, a violation of the purpose or the conditions under which finances have been classified in the state budget or moved

[2] The National Fund is further defined in Art. 37 of the Budgetary Rules, as the sum of: a) finances, which entrusts the European Union to the Czech Republic for the realisation of programs or projects co-financed from the EU budget through the Structural Funds, the Cohesion Fund and the European Fisheries Fund; b) Transition Facility finances; and c) the finances of the financial mechanisms that are entrusted to the Czech Republic under international treaties, including the interest thereon. Memorandum on the establishment of the National Fund was the National Fund established on 31 December 1998 at the Ministry of Finance of the Czech Republic as the central government for the transfer of finances from the European Union intended for the Czech Republic to finance programs and projects in accordance with the relevant Financing Memorandum. For more information about the powers of the National Fund and their performance, see National Fund of the Ministry of Finance, 2015.

by budgetary measures and are in violation of the intended purpose or conditions; it is also understood if it is not possible to prove how these finances were used. The above-mentioned is one of two basic points for defining the barriers of the violation of budgetary discipline itself.

2 Violation of the Budgetary Discipline

The violation of budgetary discipline is defined in Art. 44 of the Budgetary Rules. This is a variation of situations, including, in particular, the unauthorised use or detention of public finances or violations of the obligations laid down when dealing with them (also contractual obligations). In the context of a violation of budgetary discipline, it is necessary to distinguish the pecuniary means to which it relates, as evidenced by the first two substantive facts – the unauthorised use of the finances of the state budget and other state finances and the unauthorised use or withholding of finances provided from the state budget, State Fund, National Fund or State Financial Assets by their recipient (the provisions of Art. 44 par. 1 letter a)–b) of the Budgetary Rules). The following provisions of Art. 44 par. 2 of the Budgetary Rules then divide the finances and the granted finances more closely, according to the source of their acquirement by the recipient of the subsidy (e.g. state budget finances, finances granted from the state budget and finances obtained in various ways from the National Fund).

2.1 Consequences of violation of the conditions for drawing the subsidy

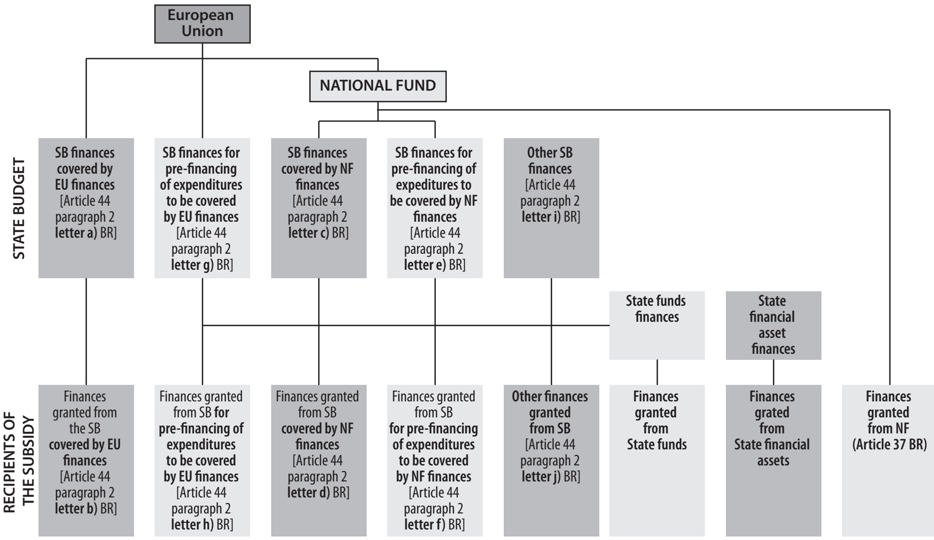
In theory, it is possible to divide the three consequences of the finding of misconduct – non-payment of the subsidy, withdrawal of subsidy and violation of budgetary discipline, including penalty. In terms of time, the consequences of the violation of subsidy rules can be divided to ex-ante and ex-post consequences of the payment of the subsidy.

The above-mentioned is of considerable significance for the state budget of the Czech Republic, as the finding of an irregularity[3] in the subsidy paid out (granted) from the European funds will retrospectively lead to the termination of the process and the co-financing or subsidisation of a specific European money case will not occur. This exerts pressure on the financial administration to investigate the impetus received from the subsidy provider and, in the event of their verification, to remedy to the state budget affected by the irregularity primarily through the assessment of the levy for violation of budgetary discipline, respectively penalty for delay with its payment, on the beneficiary of the subsidy.

3 See National Fund of the Ministry of Finance, 2015.

2.2 Distribution of European finances in the Czech Republic

European finances have already been mentioned several times, so these are European Union finances that go to the Member States through the National Fund and are used to co-finance subsidy projects. These finances are provided through a rather complicated system with a number of control elements. The Budgetary Rules specify in Art. 44 par. 2 the different types of finances with respect to their source and use, as follows:



Source: Compiled by the author.

2.3 Irregularities

In a situation when the finances are provided to recipients of the subsidy from the European Union funds, they must be prepared for a number of control activities. A lot of authorities are eligible to control whether the recipient of subsidy complies with all its obligations (e.g. the purpose of the subsidy, deadlines, etc.) and the laws (in most cases, in particular, the rules for public procurement). If the audit authority, which is the Ministry of Finance of the Czech Republic, finds during its control activity a certain error, it must, simply said, report this as a so-called irregularity. The control of irregularities, therefore, occurs within the above-mentioned systems and, moreover, at all stages of the granting of the subsidy, i.e. from the European Commission through the payment and certification bodies to the governing bodies or the organisational units of the state up to the recipient of the subsidy, or even through the intermediaries.

In this multi-level system with dozens of controlling institutions or bodies, irregularities can easily arise. However, it is not the legal power of the decision that will result in financing of the subsidy to the state budget, but a preliminary notice of irregularity, which may be purely formal, only sufficient to limit the supply of finances to the state budget from the European Union funds.

Thus, the state budget will always lose "money from the European Union" when the irregularity is reported, after which the financial administration, respectively later the court, decides whether the recipient of the subsidy has committed a violation of budgetary discipline and whether it is thus obliged to pay the levy for the violation, that would result in a partial compensation of reported irregularity.

2.4 Violation of budgetary discipline and the principle of proportionality

However, in the exercise of its powers to administer levies for violation of budgetary discipline,[4] the financial administration, in addition to the difficulties with reported irregularities, also has to deal with another problem area, taking into account the principle of proportionality. In the relatively recent period, the idea that in the event of a violation of budgetary discipline, the levy will be assessed in the amount in which the budget discipline has been violated, has been hold. In their first decisions at the turn of the years 2013 and 2014, the administrative courts have begun to promote the idea of taking into account the principle of proportionality in relation to the nature and seriousness of the violation of the budgetary discipline. This principle has been further developed and incorporated into the decision-making process of the administrative courts (and consequently the financial administration) over time, which resulted in the considerable fragmentation of this decision-making process, and in some cases even the Supreme Administrative Court has assessed the tensions between the proper management of public property and violation of the budgetary discipline in favour of good governance, unfortunately, in the author's opinion, not according to the law[5] (see judgment No. 2 Afs 142/2016 – 32 of 30 March 2017 or judgment No. 2 Afs 208/2016 – 52 of 14 July 2017).

In the next part of the thesis, the author will focus on this case law area, namely the principle of proportionality and the necessity of its application by the financial administration when deciding on the assessment of levy for violation of the budgetary discipline. As the Supreme Administrative Court summarised in its resolution No. 1 Afs 291/2017 – 24 of 29 November 2017 in the case of the City of Krnov (hereinafter: the Resolution), which brought the case to the Extended Senate of

4 The administration of the levies for violation of the budgetary discipline and penalties are executed according to Art. 44a par. 1 of the Budgetary Rules by the tax administration, and so procedurally in accordance with Act No. 280/2009 Coll., Tax Code, as amended.

5 The author considers that even a formal misconduct is a violation of budgetary discipline, with only the amount of the levy for that violation being a manifestation of proportionality taking into account all the facts of the case and its implications.

the Supreme Administrative Court, this area has undergone considerable changes in recent years, mainly due to the case law of the administrative courts, and the Supreme Administrative Court itself is not united in its decision-making in the area where several approaches to the principle of proportionality can be found in its judgments.

2.5 The judicial concept of proportionality and related issues

In the case solving of the Resolution, the recipient of the subsidy violated the condition (submission of the application for the grant of the approval), which the parties agreed in the decision to grant the subsidy as a serious mistake, if not fulfilled. However, it is clear from the case law of the Supreme Administrative Court that the violation of the conditions must be assessed in the light of compliance with the purpose of granting the subsidy, which was not affected in this case according to the opinion of the Regional Court in Ostrava, and therefore, the decision of the defendant was cancelled and the case was returned to the proceeding to the defendant, Appellate Financial Directorate. The defendant lodged a cassation complaint against the judgment and the First Chamber, in its hearing, found that the existing case law relating to the subject matter was somewhat inconsistent and several opinion streams could be traced.

The first steam of opinion totally rejects the possibility of the proportionality of assessing the amount of the levy in relation to the nature and seriousness of the violation of subsidy conditions, except in cases where the violation relates only to a certain amount of the granted finances, not to the entire amount of the subsidy (particularly, the primary case law on the issue of levy for violation of the budgetary discipline, especially judgment No. 7 Afs 91/2013 – 28 of 30 May 2014 from the recent case law). In addition, there are two other streams of opinion that the assessment of the violation of budgetary discipline must be guided by the principle of proportionality. Proportionality can then be taken into account either at the stage of qualifying the process of the recipient of subsidy process under the concept of "unauthorised use of finances", or "violation of budgetary discipline" (e.g. judgment of the Supreme Administrative Court No. 4 As 117/2014 – 39 of 10 October 2014, or No. 9 As 122/2014 – 34 of 12 March 2015), or at the stage of assessment the amount of the levy (e.g. judgments of the Supreme Administrative Court No. 2 As 106/2014 – 46 of 26 September 2014 or No. 4 As 215/2014 – 40 of 5 December 2014). The first of these approaches (and the second overall) highlights the need to take into account whether the purpose of the granted subsidy was kept when using finances. Marginal errors that do not affect the purpose of granted subsidy cannot be considered as unauthorised use of finances and no levy can be imposed for violation of the budgetary discipline. In the second case, the third stream of opinion in total, the Supreme Administrative Court as violation of the budgetary discipline also identified such violations that do not affect the purpose of the granted subsidy itself. However, the lower intensity of the violation of the subsidy conditions must be taken into account when assessing the amount of the levy for the violation of budgetary discipline.

It can also be considered as undesirable the fact that many of the newer decisions of the Supreme Administrative Court disparage the abovementioned discrepancies between individual streams of opinion and mark the case law on the question of levy for the violation of budgetary discipline as totally constant. For this purpose, they usually conceal the case law that does not correspond to the opinion of the deciding senate, and without any further argumentation they indicate conclusions from that judgment as unsuited or they misinterpret them directly. However, ignoring the persisting judiciary contradictions only strengthens the uncertainty of recipients of the subsidy and subsidy providers, for whom decision-making in this area is difficult to predict. Administrative authorities endowed with scrutiny powers in the area of budgetary discipline do not have clear guidance on how they should address the identified shortcomings, which also prolongs the length of proceedings, as participants are forced to turn to administrative courts in an increasing number of cases.

In the present case, the first senate considers that the violation of the obligation arising from the decision to grant a subsidy, is also a violation which does not affect the purpose of the granted subsidy, and constitutes a violation of the budgetary discipline and justifies the assessment of a levy for its violation, but not in the full amount of the subsidy granted, but only in such amount as is proportionate to the seriousness and consequences of the particular violation.

With regard to the persisting and rather deepening contradictions between the various streams of opinion, the First Senate submitted the matter to the Extended Senate of the Supreme Administrative Court, with the following two questions:

1. Does any violation of subsidy conditions, which are not defined as less serious in the decision to grant a subsidy, constitute a violation of budgetary discipline?
2. Is any violation of the budgetary discipline within the meaning of Art. 44a par. 4 letter c), respectively letter b) of the Budgetary Rules, which relates to the entire amount of the granted subsidy, connected with the levy for the violation of budgetary discipline in the amount of the whole granted subsidy, or is the administrative authority obliged to assess the amount of the levy proportionally in the light of the seriousness of the violation found?

In the author's opinion, it is necessary to answer the first question positively, namely that any violation of subsidy conditions constitutes a violation of budgetary discipline, especially with regard to the current wording of the Budgetary Rules and its Art. 3 letter e). As regards the answer to the second question, it is also in the light of the case law that it is necessary to state that the financial authorities are required to assess the amount of the levy for a violation of budgetary discipline proportionally, taking into account the seriousness of the violation found. However, it is a question of how the Extended Senate of the Supreme Administrative Court will address the issue, but we will have to wait for this answer for a while. Even now, however, the application of the principle of proportionality brings some difficulties with regard to the above-discussed reporting irregularities.

2.6 The European dimension of the problem

In the beginning, let us compare two different forms of certain "support" to tax subjects from the state. It is a well-known fact that the assessment of violation of the statutory conditions for granting deductible items to research and development within the meaning of Art. 34 of Act No. 586/1992 Coll. on Income Tax, as amended (hereinafter: the Income Tax Act), is very strict on the part of the court, as an assessment of other tax advantages. Even less formal misconduct ends with the impossibility of exercising this tax advantage (Snopková, 2016). There is no entitlement to a tax advantage, just like the subsidy granting. With regard to the deductible item for research and development, the courts usually confirm the decision of the tax administrator to withdraw the right to this tax advantage, but in the case of the levy for violation of the budgetary discipline this starts to be the opposite, because the courts confirm the assessment of the levy in full amount of the violation of budget discipline only in particularly justifiable cases, as described above. The fundamental difference between these two "supports" is also the extent of statutory regulation. The deductible item to research and development is governed by a few provisions of the Income Tax Act, while the violation of budgetary discipline and all contexts of subsidy granting are contained in tens of thousands of binding legal texts at both national and European levels.

The failure to provide finances from the European Union, without waiting for a final or at least a preliminary solution by the financial authorities, unfortunately only seeks to impose a proportionate amount of levy by the court,[6] but the financial administration will still be driven by an attempt to "punish" the recipient of the subsidy for the loss of the state budget by the levy equal to 100% of the amount of granted subsidy. In the other case, although the goal to be met by the deductible item to support research and development is achieved, the budget from which the finances are going to be withdrawn, without depending on the nature of the misconduct, is the budget of the taxpayer.[7] For this reason, according to the author's opinion, the violation of budgetary discipline should be treated in the same way as assessing the justification of the deductible item to research and development from the tax base. The court therefore seeks to protect the recipient of the subsidy against transferring direct consequences of the reporting of irregularities from the state, respectively state budget, to this recipient, because in many cases there are marginal misconducts, which are inappropriate with the consequences of non-granting of subsidies to which the recipients are often dependent.

[6] See the Resolution.

[7] The case law of the Supreme Administrative Court is nonetheless a little less formal than the European Commission's procedure when it finds an irregularity. Nevertheless, see judgment of the Supreme Administrative Court No. 7 Afs 39 / 2014 – 48 of 25 September 2014, (subsequently confirmed by the judgment of the Constitutional Court file No. I. ÚS 3566/2014 of 11 August 2015).

3 Conclusion

The solution to the problem is not in the power of the court or financial administration. The problem can only be solved at European level. As part of the process of identifying unconfirmed irregularities, it is necessary either to confirm or disprove these presumptions (irregularities), and only later to take concrete steps towards national budgets. Therefore, the author suggests that the subsidy should be paid out ex-post in the future, thus avoiding pre-financing of these projects. The resulting proposal will not lead to a 100% result – levies will continue to be assessed, but the risk of finding formal irregularities related to the start of the subsidy, which may also be caused by the inexperience of individual recipients of the subsidy, granting will be reduced. The problem with non-granting finances from the European Union to the state budget will not be solved by this, because it would really be necessary to change the European legislation in the sense outlined in this contribution, i.e. to wait with the final verdict of the (non)payment for the final decision of the tax administrator about the question whether the recipient of the subsidy violates the budgetary discipline or not.

The above question is related to the other issue in this contribution, namely the principle of proportionality. The author commends the decision-making practice of the administrative courts, which insist on assessing the levy for violation of the budgetary discipline in accordance with this principle, taking into account the nature and seriousness of the violation. It is inconceivable that the recipient of the subsidy should pay a levy in the amount of the granted subsidy just for a marginal violation. However, even in this case, the author believes that, according to the Budgetary Rules, this is also a violation of budgetary discipline. It is only a matter of time for the Extended Senate of the Supreme Administrative Court to decide on the matter, and hopefully, by this decision, it will help resolve at least one of the above-mentioned crucial administrative issues connected with the area of violation of the budgetary discipline.

So the hypothesis set at the beginning has be disproved from the point of view of the state budget, but on the other hand from the point of view of the recipients of the subsidy, who should not be "punished" for incorrect legislation, it has been approved.

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The Anti-abuse Rule and Related Tax Administration Principles Written in the Tax Code

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Abstract

The tendency to increasingly apply the principle of prohibition of abuse of tax law is clear in the domestic, European and international context. This paper deals with the principle of the prohibition of the abuse of tax law in terms of principles that are specified directly in the Tax Code (Act No. 280/2009 Sb.). This year, the general anti-abuse rule should become a part of the Tax Code.

Keywords

the anti-abuse rule; tax administration principles; the Tax Code

1 Introduction

In the following paper, I have asked myself to what other tax administration principles is the anti-abuse rule of tax law connected with and I attempted to answer them. The anti-abuse rule of tax law is manifested in the field of domestic jurisprudence, international and European law. It is a very up-to-date and important topic. I have used case law, expert papers and articles, and internet resources for this paper.

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2 The Principle of Legality and Its Relation to the Anti-abuse Rule

The principle of legality is undoubtedly one of the main tax administration principles and we can also say that it is the leading principle superior to the other principles. This is also evidenced by its systematic introduction in the first place among the basic tax administration principles in the Tax Code. The principle of legality is implemented in the whole area of tax administration and it cannot be related only to a particular procedure or act of a tax administrator. It cannot be subject to the other principles, for example, to the principle of urgency, and "give way" to them.

The principle of legality is regulated in Sec. (§) 5 Subsec. 1 of the Tax Code as follows: *"A tax administrator carries out the administration of taxes in accordance with the law and other legal regulations (hereinafter referred to as "legal regulations"). For the purposes of this Act, law also means an international treaty that is a part of the legal order."*

The principle of legality according to the Tax Code is related to all the activities of a tax administrator bound generally by the legal order and its constitutional foundations can be found in Art. 2 Subpar. 2 of the Charter of Fundamental Rights and Freedoms (Resolution of the Czech National Council No. 2/1993 Sb. as amended) and Art. 2 Subpar. 3 of the Constitution allowing to exercise public authority only in the cases, and within the framework of the limits and methods stipulated by law (Baxa et al., 2011: 34).

As stated in the explanatory memorandum to the Tax Code and some commentaries (Kobík and Kohoutková, 2010: 31), the principle of legality is also an expression of the constitutional principle under Art. 11, Subpar. 5 of the Charter of Fundamental Rights and Freedoms, according to which taxes and fees can be imposed only if stipulated by law.

However, the principle of legality according to the Tax Code has a much wider overlap and impact than the mentioned constitutional principle under Art. 11 Subsec. 5 of the Charter of Fundamental Rights and Freedoms, which "only" excludes the assessment of taxes and fees by the executive power (Resolution of the Constitutional Court of 21 April 2009, file no. Pl. ÚS 29/08). In compliance with the principle of legality, tax administrators are required, in addition to the laws, to comply with the administrative rules, such as directives, decrees or legal regulations of the territorial self-government. A tax administrator is not empowered to assess compliance of a legal regulation of a lower legal force with the one of a higher legal force because of the lack of legal authorisation. While administering taxes, tax administrators should therefore resolve any case of conflict of legal regulations in favour of the taxpayer in accordance with the principle of "in dubio mitius" – more leniently in case of doubt, regardless of the fact that in some cases priority is to be given to a legal regulation of lower legal force. The International and Community Law mentioned below are an exception in this aspect (Matyášová and Grossová, 2011: 21). Similarly, the Constitutional Court judged in accordance with the principle of *in dubio mitius,* as it can be inferred from its finding that where the law allows for a dual interpretation, it cannot be overlooked that in the field of public law, the state authorities can only do what they are expressly allowed to do according to the law (unlike citizens who can do anything not prohibited by law – Art. 2 Subpar. 3 and 4 of the Constitution). From this maxim follows that when imposing and collecting taxes according to the law, public authorities are required to act within the meaning of Art. 4 Subpar. 4 of the Charter of Fundamental Rights and Freedoms less strictly respecting the essence and meaning of fundamental rights and freedoms – more leniently in the case of doubt (Nález Ústavního soudu, ÚS 666/02). It is the possible conflict or identification of the boundaries between the above-mentioned principle "in dubio mitius" and the constitutional principles in Art. 2 Subpar. 2 of the Charter of Fundamental Rights and Freedoms and Art. 2 Subpar. 3 of the Constitution allowing to exercise public authority only in the cases and in the framework of limits and methods stipulated by law and the anti-abuse rule can be perceived as a fundamental issue.

2.1 Compliance with international treaties

The principle of legality is designed in the Tax Code in the way that an international treaty that is part of the legal order is considered to be a law, as well. According to Art. 10 of the Constitution, such international treaties are the declared international treaties the ratification of which was approved by the Parliament and which are binding for the Czech Republic. These international treaties become a part of the legislative reduced term "legal regulation" implemented in the Tax Code and tax administrators shall proceed in compliance with them. The above-mentioned Article of the Constitution also introduces the application priority of an international treaty in the case the international treaty regulates something else than law. In accordance with the Constitution, tax administrators shall always give priority to an international treaty over law, however, it can only be mistakenly inferred from the language interpretation of the Tax Code that an international treaty deemed to be law is equal to it even in terms of its application.

In the area of tax administration, I would like to mention the double taxation conventions as an example of international treaties in compliance with which tax administrators are obliged to proceed. The strengthening of anti-abuse rules and measures against aggressive tax planning was one of the motives for the creation of the BEPS project. These international double taxation conventions will be significantly affected by the BEPS project, i.e. the Base Erosion and Profit Shifting project in the foreseeable future. The OECD has even classified the BEPS project as the most fundamental change in the international tax rules in the past 100 years. On 8 October 2015 in Lima, ministers of finance of the G20 countries approved the final package of measures for comprehensive, coherent and coordinated reforms of the international tax rules. The Organization for Economic Cooperation and Development (OECD) launched this project in 2013.

The BEPS Action Plan, as a joint initiative of the OECD and G20, contains 15 key actions:

1. Tax challenges in the digital economy.
2. Neutralization of effects of hybrid non-transparent instruments and entities.
3. Strengthening rules for taxation of controlled foreign corporations.
4. Limiting base erosion involving interest deductions and other financial payments.
5. Countering harmful tax practices more effectively, taking into account transparency and substance.
6. Preventing the granting of treaty benefits in inappropriate circumstances.
7. Preventing the artificial avoidance of permanent establishment status.

8–10. Aligning transfer pricing outcomes with value creation.

11. Creating methodologies to collect and analyse the data on BEPS and the actions to address it.
12. Recommendations regarding the design of mandatory disclosure rules for aggressive tax planning schemes.
13. Transfer pricing documentation.
14. Making dispute resolution mechanisms more effective.
15. Development of a multilateral instrument.

Preventing the granting of treaty benefits in inappropriate circumstances and treaty abuse is the task of the BEPS action number 6. This action has already been elaborated in the final report available in the online version entitled *Preventing the Granting of Contractual Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*. This report includes changes to the OECD Model Tax Convention to prevent treaty abuse. It first addresses treaty shopping through alternative provisions that form part of a minimum standard that all countries participating in the BEPS Project have agreed to implement. It also includes specific treaty rules to address other forms of treaty abuse and ensures that tax treaties do not inadvertently prevent the application of domestic anti-abuse rules. The report finally includes changes to the OECD Model Tax Convention that clarify that tax treaties are not intended to create opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping) and to identify the tax policy considerations that countries should consider before deciding to enter into a tax treaty with another country (OECD, 2015).

Perhaps the most well-known and fundamental consequence of the BEPS project is the *Multilateral Convention to Implement Tax Related Measures to Prevent Base Erosion and Profit Shifting* (shortened as Multilateral Instrument – MLI) in relation to tax treaties. This Convention was solemnly signed on 7 June 2017 in Paris by 68 states and one of these countries was also the Czech Republic. The MLI modifies the application of thousands of bilateral tax treaties concluded to eliminate double taxation. The MLI is part of the rules against aggressive tax planning schemes using gaps and inconsistencies in the tax rules of the state and artificial profit shifting to low or zero tax jurisdictions resulting in minimum or no tax paid, primarily corporate tax of multinational groups.

Because of the international element of these structures, isolated local solutions at the national level do not work. Already before the cases of Google, Apple and Microsoft, the issue of cross-border tax optimisation, which is, of course, legal and legitimate in many cases had become a political issue. The MLI is flexible enough to respect the right to individual tax policies of the contracting states while ensuring the implementation of the relevant BEPS actions. Individual jurisdictions have the ability to implement only the minimum standards and at the same time, they have the possibility to implement optional provisions. Minimum standards include the above-mentioned rule against the abuse of bilateral treaties (Action 6 – Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) and the rules of more effective dispute resolution mechanisms (Action 14 – More Effective Dispute Resolution Mechanisms). The Czech Republic has only been implementing the mandatory minimum standards for MLI. Therefore, the expected impacts can be rather limited. The most significant change is the tightening of the anti-abuse rule (Frelich, 2017).

2.2 Compliance with Community Law

With respect to our membership in the European Union (hereinafter: EU), Art. 10a of the Constitution, according to which certain powers of the Czech authorities may be transferred to an international organisation or institution upon an international treaty, is also essential. In accordance with the ruling of the Constitutional Court of 21 February 2014, file no. Pl. ÚS 19/04, from 1 May 2004, each public authority is obliged to apply Community Law taking precedence over the Czech law if the Czech law is contrary to Community Law.

The so-called primary law of the European Union, including the attached addendums, annexes and protocols and subsequent amendments and changes are considered the founding treaties of the European Union. These founding treaties, as well as their amendments and changes, in particular the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon, as well as the individual Accession Treaties, contain basic provisions on the objectives, organisation, functioning of the EU and partially also economic law. This establishes the constitutional conditions of the functioning of the EU, which are subsequently performed in the interest of the Union by its authorities, which are equipped with legislative and administrative powers for this purpose (Borchardt, 2011: 81).

The Treaty on the Functioning of the European Union,[2] which is the source of primary law, contains the following articles that are directly related to taxes: *Art. 110, Art. 111, Art. 112, Art. 113* (The Treaty on the Functioning of the European Union).

2 For the sake of clarity, I would like to mention that the Treaty on the European Union and the Treaty on the Functioning of the European Union have the same legal force. The European Union replaced the European Community becoming its successor. Due to the Treaty of Lisbon, the European Union

The Articles above provide the basis for the harmonisation of indirect taxes. Approximation in the area of direct taxation is introduced on the basis of *Art. 115 (ex Art. 94 TEC)* mentioned below. As it concerns direct taxation, all the directives in this area shall be adopted by the Council unanimously.

It can be stated that the Treaty of Lisbon, which changed the title *Treaty establishing the European Community* to the *Treaty on the Functioning of the European Union* merely transposing the tax provision into other provisions, while their basic meaning remained the same. In addition to the above-mentioned article of the Treaty on the Functioning of the European Union, I would like to put stress on *Art. 18* (ex Art. 12 TEC) and *Art. 115* (ex Art. 94 TEC), according to which *"the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market"*. I would also like to mention *Art. 192 (ex Art. 175 TEC),*[3] *Art. 223 (ex Art. 190 Subsec. 5 TEC)*[4] *and provisions relating to freedom of movement for goods in Arts. 28–44 (ex Arts. 23–38 TEC), persons in Arts. 45–55 (ex Arts. 39–48 TEC), services in Arts. 56–62 (ex Arts. 49–55 TEC) and capital in Arts. 63–66 (ex Arts. 56–60 TEC)* (Skalická, 2010).

The principle of legality under the Tax Code, however, provides for a tax administrator to act not only in accordance with the primary law, but also with the secondary law,[5] i.e. the rules published in the Official Journal of the European Union in the case of their immediate binding character – typically European Union regulations. Regulations are undoubtedly legal acts upon which the Union authorities may intervene into the national legislation in the most effective way. However, directives, the effects of which can be divided into direct and indirect effects, are important for tax administrators, as well.

The principle of the indirect effect of the directives was first formulated by the European Court of Justice in the Case *Von Colson and Kaman (C-14/83).* This Judgment became the basis of the doctrine of the indirect effect and it was subsequently cited and extended many times (e.g. C-106/89 in the Case Marleasing, C-80/86 in the Case Kolpinghuis, C-334/92 in the Case Wagner Merit). The doctrine of

gained a legal personality. The Treaty of Lisbon also changed the name of the European Court of Justice to the Court of Justice of the European Union.

3 By way of derogation from the decision-making procedure stipulated in Art. 192, Subsec. 1, without prejudice to Art. 114, in accordance with a special legislative procedure and upon consultation with the European Parliament, the European Economic and Social Committee and the Committee of the Regions, the Council shall adopt the regulations of mainly fiscal character.

4 Upon its own initiative, the European Parliament shall, in the form of a special legislative procedure determine the regulations and general conditions governing the performance of the duties of its members upon consulting it with the Commission and approval of the Council. All the rules and conditions regarding the tax treatment of the existing or former members require unanimity in the Council.

5 A secondary law can be defined as the law arising from performance of powers entrusted to the EU authorities.

indirect effect requires the national law to be interpreted in a certain way, while keeping the condition that a national rule is capable of such an interpretation when the indirect effect is to be used. If the national interpretative techniques allow for the interpretation of the national provision in several ways, the administrative authority and the court shall use the interpretation which is the closest to the meaning and purpose of the corresponding Community Provision. If a provision of law is unclear, vague or it is not defined, it cannot be determined whether it is contrary to a certain directive or not. Consequently, the principle of the indirect effect of Community Law can never be *contra legem*. This may also be to the detriment of a taxpayer though. The obligation to interpret the national law in accordance with a directive is a priori conditional upon the existence of the national provision which is ambiguous, allowing for several interpretations, while at least one of the possible interpretations of the law is in accordance with the Directive (Rozsudek Nejvyššího správníh soudu, 5 Afs 68/2009). It can be said that European Union law and the case law of the Court of Justice of the European Union constitute a mandatory explanatory guide for the application of the Czech law, which was adopted to implement the law of the Union not only in the case of the administrative courts, but also the administrative authorities.

I would like to mention one of the most discussed directives regulating tax-abuse, in particular Directive (EU) 2016/1164 adopted by the Council laying down rules against anti-tax avoidance (the Anti-Tax Avoidance Directive, ATAD).

Art. 6 of this directive sets out the general anti-abuse rule (GAAR). Under this rule, the transactions which are not real are not taken into account for the purpose of calculating tax liability, as the main reason or one of the main reasons for their realisation is obtaining a tax advantage which hampers the object or purpose of the relevant tax law. Despite all the efforts to cut down aggressive tax planning schemes, companies can be expected to continue finding out ways to achieve tax advantage by profit shifting through artificial transactions without economic substance. Therefore, the directive introduces the general anti-abuse rule providing a tax administrator with the possibility of not taking such an artificial transactions into account.[6]

The Directive is to be transposed by EU Member States by the end of 2018. The need of the explicit anti-abuse rule in the legal order of the Czech Republic is based on the requirement of the European Union to prove the fulfilment of the obligations imposed by the European Union law when it comes to the implementation of European Union legislation by the Czech Republic. In the case of maintaining the existing legal situation where the general anti-abuse rule is not explicitly enacted in the tax legislation, although it can be considered an implicit part of it, there would be a conflict with the formal requirements for the proper implementation of EU law and it would mean a breach of the obligations of the Czech Republic arising from EU law. It can be stated that the legal implementation of this rule is necessary.

6 Implementace směrnice EU proti vyhýbání se daňovým povinnostem do českého právního řádu, 2017.

Specifically regarding the abuse of right within the framework of the case law of the Court of Justice of the European Union, the Judgment in Case C-255/02 Halifax is of fundamental importance for the interpretation and application of provisions of the EU law. Without wishing to define in detail other relevant case law in the chosen area, it is obvious that the Supreme Administrative Court (hereinafter: SAC) and subsequently the Constitutional Court of the Czech Republic had been "inspired" while applying the abuse of tax law, especially by the jurisprudence of the Court of Justice of the European Union.

From the older decisions of the SAC in which it confirmed the abuse of tax law in the given cases, I would like to mention, for example, Judgment No. 5 Afs 53/2008-70 and 7 Afs 45/2008-44. Cases of abuse of tax law concerned both the income tax and value added tax, but the SAC made statements also concerning abuse of rights in the area of the Tax Code (e.g. Judgment No. 8 Aps 2/2007-6, 1 Afs 50/2007-06 and 2 Afs 101/2007-49). In some older cases, the SAC adjudged the conduct as a dissimulated legal act under Sec. (§) 2, Subsec. 7 of Act No. 337/1992 Sb. as a circumvention of law (Šefl, 2009).

Following the last mention of the so-called dissimulated legal act, I would like to continue with the next tax administration principle, which is worth mentioning in the context of abuse of rights, i.e. the very principle of the so-called material truth.

3 The Principle of Material Truth

This principle is expressed in Sec. (§) 8 Subsec. 3 of the Tax Code as follows:

> *"A tax administrator shall follow the actual content of the legal act or other facts decisive for tax administration."*

According to this principle, the actual content of a legal act shall always be a priority for a tax administrator. In connection with this principle, the burden of proof thereof shall be borne fully by a tax administrator, who has to prove that a legal act is a dissimulated legal act.

As stated in the explanatory memorandum of the Tax Code, in addition to the formal concealment of a specific legal act, the scope of this principle affects even the cases where it is necessary to examine the actual content of the given fact decisive for tax administration. It is assumed that the economically justifiable behaviour, from which individual facts and legal acts result, is defined in individual substantive laws as the subject of tax (The Explanatory Memorandum of the Tax Code: 21).

The definition of the principle of material truth in the Tax Code as opposed to its original amendment according to the Act regulating Administration of Taxes and Fees (hereinafter: AATF) (Act No. 337/1992 Sb., as amended) has changed at first glance. For the sake of clarity, the diction of the principle in both legal regulations follows:

Principle of Material Truth Sec. (§) 8 Subsec. 3 of the Tax Code:

> *"A tax administrator shall follow the actual content of a legal act or other fact decisive for tax administration."*

Principle of Material Truth Sec. (§) 2 Subsec. 7 AATF:

> *"In the application of tax laws within tax management, the actual content of the legal act or other matter decisive for the determination or collection of a tax shall always be taken into account if it is obscured by a formal legal condition and it is distinct from it."*

The first change we can notice is the impact of this principle under the AATF only on tax management. Extension of this principle to tax administration in general, not just to tax proceedings is a positive change. The changes made in the text of this principle in the Tax Code is without doubt a more pregnant expression of this important tax administration principle.

Both during the period of effectiveness of the AATF and at present, it has not been possible to apply this principle to cases of the so-called circumvention of law. During the period of effectiveness of the CPSA, the SAC judged that the principle of material truth cannot affect the cases in which the manifestation and will are in agreement, i.e. the participants have a real interest in making a legal act, but they do so in order to circumvent the law. An examination of the relationship between will and manifestation of will of the parties to the legal relationship is therefore decisive for the application of this principle (Usnesení Nejvyššího správního soudu, 1 Afs 73/2004).

The relationship between this expressed principle and abuse of tax law, respectively, the application to a particular case used to be much more ambiguous. It may be noticed in one of the most well-known cases when the SAC established the concept of abuse of law in tax matters (Rozsudek Nejvyššího správního soudu, Afs 107/2004 – 48). This Judgment has been known as the *Divers*. By coincidence, it was reassessed by another senate of the same court and in the same case the court did not assess it as the abuse of rights, but a violation of the principle of material truth interpreting it more broadly than the SAC had done in the previous decision.

If the principle of material truth is interpreted more broadly as an act of concealing the essence of a transaction as such, it will not be necessary to discuss the abuse of tax law and use the existing principle enshrined in the Tax Code. However, in the above-mentioned ruling of 2007, the SAC identified a clear boundary between a dissimulated legal act and circumvention of law and it did not accept the wider interpretation of the principle of material truth.

4 Conclusion

The SAC in the mentioned Case *Divers* adjudged that the institute of prohibition of abuse of individual rights is a material corrective of the formal concept of law through which the issue of equity is brought into the legal order. An Act, which is by its very nature general, cannot conceptually mention all the conceivable life situations that can occur during the period of its effect. As a result, it may happen that from the formal point of view certain behaviour, however, only ostensibly corresponds with the rule of law but is also felt to be manifestly unfair because, contrary to certain fundamental values and rational organisation of social relations, it causes harm to the others.

However, I see many points worth reflecting in the above-mentioned view of the abuse of rights and its application into tax law. The first one of them is the very aspect of equity or morals brought into the field of tax law. Its use can be contrary to the principle that everyone can do what is not prohibited by law. Due to the abuse of tax law, tax planning of taxpayers, which is directly permitted by law in many situations, has occurred in situations where a taxpayer often cannot be sure how the particular case would be subsequently judged by the court. The corrective of abuse of tax law on the part of the court and its use is not very foreseeable. It may therefore get into conflict with the principle of legal certainty and the principle of legitimate expectations, which is one of the principles expressly set out in the Tax Code.

According to the author, despite some controversial issues, it has been proved above that the adoption of the general anti-abuse rule is a necessary step, resulting from the latest developments in European legislation, in particular the ATAD Directive. It confirms the current administrative practice in the Czech Republic and it is in accordance with the recent legislative development in other EU countries, which have already adopted this rule into national legal orders. At the time of submitting this contribution, a concrete anti-abuse principle as a part of the Tax Code has been already discussed within the approval process.

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Local Government Financial Institution and FinTech

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Abstract
The article compares the characteristics of local government financial institutions and FinTechs in order to make an attempt to answer the question whether a local government financial institution may constitute a FinTech. The study analyses a particular case of using the business model based on blockchain technology for a local government financial institution, as well as discusses the possibility to base the functioning of such institution on the DAO concept. The article is summarised with the outline of the analyses of legal barriers concerning the creation and functioning of local government financial institutions as FinTechs.

Keywords
financial institutions; local government; FinTech; blockchain; financial innovation

1 Introduction[2]

The aim of the article is to analyse the possibilities for the establishing and functioning of local government financial institutions as FinTechs. According to the research hypothesis formulated in the study, such undertaking is possible, however in order for such institutions to be truly present on the financial market, the legislator's intervention is necessary. The article relies in particular on the dogmatic and legal method, taking

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into consideration such resources as literature, the opinions of supervisory authorities as well as different sources of law.

2 Characteristics Distinguishing Local Government Financial Institutions

Local government financial institutions, or LGFIs, do not have their legal definition and so far, their doctrinal definition has not been developed either. For the purposes of the present article (and more broadly – of the research) it can be assumed that local government financial institutions are financial institutions, i.e. entities providing financial services, constituting the exclusive ownership of a local government unit (LGU) or a group of local government units, or being totally controlled by an LGU or a group of LGUs (e.g. through the majority of votes on the general meeting).

Having adopted a model-based, theoretical perspective, it is necessary to differentiate between two basic types of local government financial institutions. The first of them includes financial institutions established and functioning based on general regulations concerning a given type of financial institution. The second type includes financial institutions established based on a special separate regulation. The best example of the first type of local government financial institutions is constituted by community banks, i.e. banks established based on appropriate regulations referring to banks by LGUs or groups of LGUs. In Poland, such banks were functioning before the Second World War.[3] Admittedly, the law which is currently in force in Poland accepts the establishing of banks on such general conditions by communities, but in practice, community banks are currently absent in Poland (some exceptions may be constituted by cooperative banks, including shares held by communities).[4]

Due to historical issues, as well as the requirements of the European Union law, community banks following such model-based approach practically do not exist nowadays in Europe (this refers to banks established and functioning based exclusively on a general regulation concerning banks in a given country). There usually exists an additional, special legal regulation (Zalcewicz, 2013: 130 et seq.). The best example

3 In the interwar period, the banks in Poland were established by inter-community unions based on the Ordinance of the President of the Republic of Poland as of March 17, 1928 on the bank law (*Journal of Laws,* No. 34, item 321), which means that these banks were established according to general rules. Single local government units did not use to establish banks. There existed community banks of a regional character (Komunalny Bank Kredytowy in Poznań, Krajowy Bank Pożyczkowy for the Poznań Voivodeship), as well as a community bank of a national character – Polski Bank Komunalny with its seat in Warsaw. See more e.g. Młynarczyk, 2005: 22 et seq.

4 The establishing of banks in Poland by LGUs based on current regulations in force constitutes a complex and controversial question from the legal point of view. In general, communities have the possibility to establish banks in the form of a joint stock company with some reservations and according to complicated interpretation of law. For this reason, it is not surprising that in practice, communities in Poland do not get involved in establishing banks. However, communities hold shares in the existing cooperative banks. See more in Zalcewicz, 2013: 262–270.

here is the German Sparkasse system,[5] the Austrian Sparkasse system (BGBl. Nr. 64/1979 as amended, hereinafter: Sparkassengesetz), or the KommuneKredit in Denmark (Act No. 383 of 3 May 2006). It is, however, worth noticing that within the German Sparkasse system, there function savings banks (Sparkassen) characteristic exclusively for this system and following the organisational and legal form of a public law institution (Anstalten öffentlichen Rechts) as well as seven national banks (Landesbanken) which have the form of a joint stock company and to which the provisions of the German Bank Law apply. Poland has a rich tradition of such separate legal regulation, as before WWII, based on the Ordinance of the President of the Republic of Poland as of October 24, 1934 (*Journal of Laws,* No. 95, item 860 as amended), a well-developed system of community savings banks was functioning in Poland.

The definition of local government financial institutions adopted in the present article is not decisive for the portfolio of financial services provided by these institutions. In practice, local government financial institutions which prevail perform the deposit and credit activity, with limited possibility to provide other financial services than taking deposits or other repayable funds from the public and granting credits for its own account. In this way, these are usually the entities satisfying the definition of a credit institution according to the European Union law.[6] Only a few of them have been excluded from the scope of application of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV) (OJ L 176, 27.06.2013: 338–436 as amended). Pursuant to Art. 2 sec. 1 of this directive, KommuneKredit from Denmark and municipal banks from the United Kingdom were excluded from its scope of application.

3 Characteristics Distinguishing FinTechs

A legal definition of FinTechs does not exist. The doctrine justifiably avoids the construction of the definitions of FinTech – what dominates it is the description of activities connected with the notion of FinTech (Szpringer, 2017: 3 et seq.). The notion is currently rather overused and some people perceive its scope very broadly.

FinTech is a new notion and is included in the notion of financial innovation.[7]

5 For example: Sparkassengesetz für Baden-Württemberg (SpG) in der Fassung der Bekanntmachung vom 19. Juli 2005 (GBI. 2005, 587, 588 as amended); Gesetz über die Berliner Sparkasse und die Umwandlung der Landesbank Berlin – Girozentrale – in eine Aktiengesellschaft (Berliner Sparkassengesetz – SpkG) Vom 28. Juni 2005 (GVBl. S. 346 as amended); Bremisches Sparkassengesetz in der Fassung der Bekanntmachung vom 12. Oktober 2005 (Brem.GBl. 2005, 555 as amended).

6 According to Art. 4.1(1) Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (OJ L 176, 27.06.2013, p. 1–337) "credit institution – means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account".

7 Cf. Avgouleas, E. who writes: "[...] *financial innovation to consist of human knowledge breakthroughs and other creative inventions, which lead to the development of: a) new financial products that enhance*

In general, it is possible to point out to the following characteristics of FinTechs:

- they are entities providing financial services;
- but they may also be the entities providing services supporting the provision of financial services;
- they use innovative solutions;
- this usually concerns technological innovations (and not social ones).

Among public entities, supervisory authorities are the most interested in the identification of FinTechs. This results from the fact that they supervise the obedience by entities conducting business activity of the restriction concerning the provision of subsequent financial services (e.g. in the EU the obligation to obtain the permission for conducting the activity of a credit institution, a payment institution or e.g. for providing brokerage services). In this way, the German supervision authority BaFin (Federal Financial Supervisory Authority) has for example prepared the list of business models qualified as conducting FinTech activity.

This refers to the following business models (Bafin.de, 2018):

- alternative payment methods;
- automated portfolio management;
- blockchain technology;
- crowdfunding (including crowdinvesting and crowdlending);
- platform for automated investment advice;
- platform for signal trading and automated order execution;
- Virtual Currency (VC);
- insurtech companies.

What is characteristic for FinTechs, it is the fact that usually they do not possess big capital and very often they are start-ups. This insufficiency of capital is to be compensated with innovative technology.

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capital allocation such as stocks, bonds, derivatives, and mutual funds; b) new organizations and processes that facilitate access to capital, including the establishment of new financial institutions, trading for a, and new forms for extension of credit; new risk-management techniques utilized to handle risk originating in financial transactions and commercial deals [...] *for example, derivatives and securitizations* [...]; *d) technological innovation utilized to improve product and processes innovation and to advance the frontiers of risk management. It comprises the use of new technology in product design and trading, improved capital allocations, including information dissemination, and in the pricing and distribution of risk. Finally, it encompasses the use of new technology in the context of essential financial infrastructure services, such as payment, clearing and settlement processes* [...]" Avgouleas, 2016: 660–661.

4 Local Government Institution Considered a FinTech?

For obvious reasons, from the historical perspective, such local government financial institutions as for example community savings institutions in Poland before WWII cannot be called FinTechs. In the period when they were functioning there were no appropriate technologies. It does not seem possible to qualify local government financial institutions currently operating in the World as FinTechs either taking into account practical aspects of their functioning or legal regulations concerning them.

Local government units as public entities have to follow the legality principle, i.e. they need to possess a legal basis for the activities undertaken by them. The lack of appropriate regulations makes their appropriate functioning difficult or even impossible. For this reason, LGUs may establish local government financial institutions or participate in them only when it is possible according to the provisions of law. FinTechs, in turn, develop according to the basic free market rule: everything which is not forbidden is allowed. This principle does not apply to such public entities as LGUs, which are not allowed, without an appropriate legal regulation, to establish FinTechs. We thus have kind of a stalemate – due to their essence, local government financial institutions and FinTechs do not seem to have anything in common and it is necessary for the legislator to act, create appropriate provisions for a local government institution to constitute a FinTech at the same time. This is undoubtedly an artificial solution, forcing the process which in the case of FinTechs occurs spontaneously, only as a result of market forces. In these countries where local government financial institutions are already active (e.g. Germany), such activities would seem pointless. However, in the countries where such institutions do not exist, e.g. in Poland, making it possible to establish local government financial institutions which could function as FinTechs seems justified. The reason is the same as when it comes to the rationality of establishing FinTechs – the opportunity to come into being on the financial market with relatively low capital committed. Deliberations whether LGUs should be active on the financial market through local government financial institutions go beyond the subject of the present article, but the historical example of community savings institutions or the success of Sparkasse in Germany demonstrate that this question should be considered. So why not take a step further and, following the latest trends, make it possible for local government units in Poland to establish local government financial institutions which could use in their activity, apart from traditional business models, also business models characteristic for FinTechs?

5 Blockchain and Local Government Financial Institutions

Among different models based on which FinTechs function, the model based on blockchain technology (more broadly – distributed ledger technology – DLT) currently prevails. However, as it has already been pointed out, it is in general difficult to find common elements of FinTechs and local government financial institutions, but one common characteristic may be found for the blockchain technology and local government financial institutions: this is the presence, in both cases, of the so called community. What is more, both for the local government as well as blockchain, the existence of a "community" is a sine qua non, necessary condition. Nevertheless, some difference can be found – it is usually characteristic for blockchain that the community is of global character, while for the local government, and thus also local government financial institution, the presence of local community would rather be typical. Blockchain technology is, however, so versatile that it can be applied also in organic systems for a specific group of people, and in this way also territorially. Using blockchain technology may bring a local government financial institution a number of benefits, connected in particular with the possibility to decentralise decision making and the democratisation ensured by DAO (decentralised autonomous organisation), the possibility to use so called tokens and in particular to apply innovative financial technologies based on blockchain. This refers not only to payments based on crypto currencies, but in particular to the possibility to use smart contracts for providing financial services.

It seems, at least in the context of the current state of development of the doctrine and legal practice connected with the blockchain technology (distributed ledger), that smart contracts should not be treated in the same way as civil law contracts. A smart contract is only some sort of a software, usually functioning within the programming environment based on blockchain.[8] In this way, the software such as a smart contract should always be accompanied by a contract concluded between the parties.

[8] Nick Szabo, the first author referring to smart contracts, wrote that "a smart contract is a set of promises, specified in digital form, including protocols within which the parties perform on these promises". He also wrote: "New institutions, and new ways to formalize the relationships that make up these institutions, are now made possible by the digital revolution. I call these new contracts "smart", because they are far more functional than their inanimate paper-based ancestors. No use of artificial intelligence is implied. A smart contract is a set of promises, specified in digital form, including protocols within which the parties perform on these promises" (Szabo, 1996). In the Solidity language, in turn, smart contract is characterised as follows: "A contract in the sense of Solidity is a collection of code (its functions) and data (its state) that resides at a specific address on the Ethereum blockchain" – see Solidity.readthedocs.io, 2018.

DAO, the most advanced form of smart contract, apart from constituting the smart contract itself, is characterised by the following features:

- collectivity/network of contracts;[9]
- decentralisation (with the possibility of its gradation);[10]
- democracy (with the possibility of gradation of this feature).

Obviously, the application of blockchain technology results in a number of problems, such as for example the unreliability of this technology, legal risks resulting in particular from the lack of appropriate regulation, supervision difficulties (in decentralised networks). For the purposes of local government financial institutions, some crucial characteristics of the blockchain technology are also superfluous and these are its global character or very high anonymity of the users.

6 Local Government Financial Institution as DAO in the FinTech Model

Applying the idea of DAO, i.e. decentralised autonomous organisation, for organising the functioning of a local government financial institution undoubtedly seems very tempting due to the already mentioned common element of the blockchain technology and LGU, which is the presence of a community. An advanced smart contract, which DAO in fact is, makes it possible to involve the local community in the organisational issues of a local government financial institution and this is based on the principles of direct democracy.[11] In this way, blockchain technology as an advanced technology may constitute the starting point for social innovation consisting in higher participation of the local community in the functioning of entities established by LGUs.

7 The Outline of Legal Barriers Connected with the Establishing and Functioning of Local Government Financial Institutions in the FinTech Business Model

The first barrier consists in the already mentioned legality principle. Local government units thus need an appropriate legal regulation in order to be able to effectively

9 This refers to the fact that complex contracts (as programs) often consist of a few less complex contracts (programs). What is more, contracts may participate in crowdsales, or even be voting members of other contracts.

10 DAO, as any other intelligent contract, is decentralised i.e. DAO as a program uses the blockchain system (e.g. the Ethereum system).

11 In principle, DAO has a central manager who decides who can be a DAO member, as well as what the voting rules are. However, this can be modified and DAO may function without a central manager.

establish FinTechs, fulfilling the conditions of a local government financial institution. However, in business trading there already exist (or it is potentially possible for them to be established) FinTechs or financial institutions with the same scope of the services provided. In this way, local government units will, as owners, compete with other private entities and in the course of this competition they will be using public capital. This may result in the violation of the principle of competition and a number of EU regulations concerning public aid. This concerns in particular Art. 18 and Arts. 101–109 of the Treaty on the Functioning of the European Union referred to in Art. 106 sec. 1 of this Treaty. Therefore, it is necessary to perform the assessment of the opportunities to apply these regulations taking into account specific legal solutions, and following the model-based approach, this for sure constitutes an important director of further in-depth study. Such assessment should be based on the extensive case law of the Court of Justice of the European Union, as well as European Commission communications. What is more, it will be necessary to consider the possibility of applying Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings, as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006: 17–25). Applying the FinTech model in the functioning of local government financial institutions will for sure make it possible to avoid the accusation of using public aid, in spite of an LGU maintaining control over such institution.

These limitations are consequently linked with the limitations resulting from public-private partnership in the case when local government financial institutions are established with the participation of private entities (in Poland this concerns the application of the Act as of 19 December 2008 on public-private partnership) (*Journal of Laws,* 2017, item 1834 as amended).

Different but equally important barriers are connected with the functioning of FinTechs in general, in particular within the public law as well as such areas as financial supervision and tax law, or the areas where public regulation overlaps with a civil one (consumer protection). If local government units were to engage public funds in FinTechs, then in the mentioned sectors there would have to exist legal regulations providing LGUs with the certainty that the operations of entities controlled by them are legal and compliant with the regulations. The current state of FinTech regulations in Poland does not provide such a guarantee. In general, in the entire European Union the level of certainty is insufficient to give such guarantees, and thus conducting the activity according to the FinTech model is connected with a high legal risk. FinTech regulations are certainly the most developed in the USA, as well as in Singapore or Japan. However, legal systems of these states differ to a large extent from the continental legal system, which prevails in the European Union.

8 Conclusion

Financial innovations, which are nowadays present most frequently under the form of so called FinTechs, constitute a chance to come into being on the financial market for those entities which are completely or partially owned by LGUs or controlled by them. Nevertheless, benefiting from such chance strictly depends on the legislators' activities as it is necessary for them to establish an appropriate legal framework. Whether to use a legal framework formed in this way is the matter of an independent decision of LGUs (as they are autonomous within the scope specified by law). Such regulation may also create an additional impulse for the broader regulation of the functioning of FinTechs, in particular in the context of state supervision, taxes and consumer protection.

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Budget Planning in the Republic of Lithuania under the Influence of European Union Law

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Abstract
The article deals with the problem of the impact of the European Union law on budget planning legal regulation in the Republic of Lithuania after accession to the European Union in 2004. Such questions, as harmonisation of annual and medium-term budget planning, changes in the budget planning process, the requirements of stability and growth pact and their implementation in the national law are analysed in the article.

Keywords
budget; budget law; budget planning; Lithuania

1 Introduction

Probably it would not be surprising to say that for Lithuania the date of 1 May 2004 was and still is a date that marked essential changes in its legal framework. Similarly to other states, within the context of European Union (hereinafter: EU) accession, Lithuania changed whole spheres of the national law framework with a view to harmonising them with EU law. There is no doubt that the present article sees the sphere of public finance as the most important, while budget law in particular and changes in it are the result of EU accession, too. For the sake of objectivity, it must be noted that changes in the Lithuanian budgetary framework were determined not so much or not only by EU membership, but rather by an urgent need for reforming the budgetary framework

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to enable it to meet the most important financial needs of the state and the needs of financing public functions (Sudavičius and Vasiliauskas, 2014: 470). It should be noted that at the time of EU accession, the relation of the amendments to the budget laws with EU laws was minimal since it is common knowledge that the budgetary framework is not part of EU Acquis. It must be stressed within the context of this paper, however, that in 2004 the Lithuanian national budget was the first Euro-integration budget that merged Lithuanian state and EU cash flows.

Although the budget of the state is the main centralised fund of financial resources through which a considerable share of the created Gross Domestic Product (hereinafter: GDP) is distributed and the establishment of which is provided for already in the Constitution of the Republic of Lithuania (hereinafter: Constitution), Lithuanian legal theorists have not analysed in principle either the budget process problem in general or the issues of the influence of EU law on budgeting. During the whole period of independent Lithuania, there have been only just a few research articles on these problems (Birmontienė, 2012: 94–119; Sudavičius, 2013: 7–19; Sudavičius and Vasiliauskas, 2014: 469–486).

The article paper, based on the analysis of existing laws and usage of the systemic, logical, comparative, critical, analytical and other methods of analysis, is aimed not only at explaining the gist of the principles of budget planning in Lithuania, but also at disclosing the influence of the EU law on these phenomena (their legal framework).

2 Harmonisation of Annual and Medium-term Budget Planning in Lithuania as an Outcome of Influence of EU Law

The problem of the introduction of long-term planning in the sphere of budget planning is not new. For many years, discussion has been going on with regard to the question of extending the budgetary period. It has been noted, inter alia, that a one-year period is too short, especially when addressing the planning and funding of investments; that an annual budget fails to meet long-term, forward-looking economic development plans, and that budgets for a longer period must be drawn up in addition to annual budgets (Sudavičius, 2013: 7). Therefore, a gradual transition to the implementation of the principles of long-term budget planning must take place. One has to admit, however, that in practice priority, for a long time, was granted exclusively to annual planning of public finances, which only resulted in the establishment and approval of annual budgets at different levels. Essential changes in the review of the principles of budget planning occurred in the second half of and late 20th century when the principle of long-term planning began gaining a strong foothold in the public finance planning practice of most states (including Lithuania). In some cases, this principle is implemented in conjunction with the principle of annual budget planning, while in other cases it even replaces annual budget planning. In any case, it is evident that the governments of most countries have been looking, more or less actively, for ways to achieve a better distribution of financial resources.

Generally, it can be stated that almost throughout the 20th century the one-year budget planning was a universally accepted rule enshrined in the national law, even at Constitutional level, Art. 129 of the Constitution stipulates: "The budget year shall start on the 1st of January and shall end on the 31st of December." Although the legal doctrine quite often featured criticism of this principle and proposals to replace (supplement) it with the principle of long-term planning of revenues and appropriations. Essential changes only came around in the late 20th century when both the EU and its Member States began to apply the principle of long-term planning in their public finance planning practice.

As for the establishment of the principle of long-term budget planning in Europe, the main reason that deserves mention is the positive experience of the EU in public finance planning and the toughening requirements for EU Member States in this sphere. Such long-term financial plans (called an EU multiannual budget in some contexts and financial perspectives in other cases) have been drawn up in the EU since 1988. Under the Treaty of Lisbon (*Official Journal,* C 306/01, 17.12.2007: 1), the multiannual financial framework has become a legally binding act. Moreover, Art. 312 of the Treaty on the Functioning of the European Union (*Official Journal,* C 326/01, 26.10.2012: 1) (hereinafter: TFEU) stipulates that: "The multiannual financial framework shall ensure that Union expenditure develops in an orderly manner and within the limits of its own resources" and "The annual budget of the Union shall comply with the multiannual financial framework", thus establishing a basis for financial discipline. Drawing up long-term financial plans in the whole EU allows the Member States to plan their long-term finances in a more efficient manner, with account of the expected financial support from the Structural Funds on the basis of the multiannual EU budget.[2]

The practice of different states allows distinguishing the following organisational/legal forms of the implementation of the principle of public finance planning for a certain period: 1. short-term planning: the planning of budget for a period of one year; 2. long-term planning: the planning for a period longer than one year; 3. short-term planning based on long-term fiscal projections; 4. short-term planning based on the general long-term plan of the whole public finance sector; and 5. annual planning based on the determination of medium-term objectives. In accordance with the legal framework in force before 2000, Lithuania was in the first group of states where budgeting was based exclusively on a one-year period.

To achieve more effective governance of financial resources, on 22 October 1998, the Seimas passed a resolution on the concept of the budget structure (*Register of Legal Acts,* i. c. 0981010REZORG982257), that initiated reform of the budget structure

[2] It should be mentioned that Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (*Official Journal,* L 306, 23.11.2011, p. 41) stimulates medium term budget planning in the Member States.

and specified the key principles of its implementation, such as: 1. “To plan the state budget for three years and to approve the same for one year;” 2. “To establish the state budget by programmes drawn up by respective appropriation managers;” 3. “From 2000, to establish municipal budgets by programmes as well;” and 4. “To introduce a transitional five-year period for the establishment of a consolidated budget during which all resources of the state and municipal budgets and funds will be combined.” The legal basis for the implementation of multiannual planning in budgeting was a law amending the Law on the Budget Structure of 11 July 2000. Art. 17(2) of the Law on the Budget Structure (*Register of Legal Acts,* i. c. 0901010ISTA000I-430) in force stipulates: “A draft of forecasted indicators of the totality of the state budget and municipal budgets for a period of three budget years shall be prepared on the basis of the Government Programme, the Stability Programme of Lithuania, the State Progress Strategy, the National Programme for the Advancement of Lithuania, [...] this Law, the Law on Fiscal Discipline, other laws and other legal acts, the country’s medium-term economic development scenario, EU financial support strategic documents, strategic plans of activities of appropriation managers and preliminary basic indicators of the state budget and municipal budgets as approved by the Government, also the programmes submitted by managers of state budget appropriations and draft estimates of the programmes.” It is obvious that from this moment Lithuanian legislation has enshrined a transition from annual budgeting to medium-term planning based on long-term objectives.

Important changes in further improvement of budget planning took place after Lithuania’s accession to the EU and the preparation of the first Convergence Programme in 2004. Point 3.1.1 of the Programme stated that: “The key medium-term objective of the fiscal policy is to achieve a cyclically-balanced government budget by ensuring the implementation of the economic policy objectives. The to-days objective is to keep the government deficit below 3 per cent of GDP, and create conditions for this deficit to consistently decline by a percentage point of GDP during later years, as required by the Law on Fiscal Discipline (*Register of Legal Acts,* i. c. 1071010ISTA00X-1316). Thus, it can be maintained that the model of medium-term budgeting based on the application of the programme method (as required by EU legislation) is gaining dominance in Lithuania as the laws establish that a draft state budget is prepared for three budget years (medium-term budget) but is approved for one budget year (annual budget) (Sudavičius and Vasiliauskas, 2014: 480–481).

The budget planning procedure is as follows: after the Government approves the three-year preliminary key budgetary targets and the draft general principles for determining maximum appropriations, the Ministry of Finance informs the appropriation managers of the estimated limits of the appropriations that could be allocated to them for three years. On receiving this information, the state budget appropriation managers draw up their strategic action plans and programmes, prepare preliminary draft programme estimates without exceeding the maximum limits for financing expenditure as indicated by the Ministry of Finance, and submit them to the Ministry of Finance. The limits of appropriations for expenditure of budgetary institutions for respective years are determined on the basis of the previous year plan and the use of appropriations for the following two years and their differentiation by separate state functions, with account of an upward-bias in macroeconomic indicators and national budget revenue, as well as the criteria set out in the Stability Programme of Lithuania, and the priority programmes and measures approved by the Government. It is evident that medium-term budgeting at present has a sufficient legal basis in Lithuania, and its shortcomings (officially identified by the National Audit Office) are in principle related to the activities of entities involved in budget planning (Sudavičius, 2013: 16).

3 Budget Planning under the Influence of the Stability and Growth Pact

With regard to the influence of EU law on the budget planning of Lithuania, attention should be drawn to the provisions of the so-called fiscal surveillance which establish an EU framework aimed at protecting the stability of the Economic and Monetary Union. This framework has its source in the so-called Stability and Growth Pact.[3] The first document enshrining budgetary surveillance of Member States was the 1992 Treaty on European Union (Maastricht Treaty). Accordingly, Art. 121 and 126 of the TFEU of 1997 lay down the principles of budgetary surveillance for Member States establishing the so-called "preventive" and "corrective" arms. The preventive arm aims to ensure sound public finance of all EU Member States over the medium term, i.e. compliance with the so-called medium-term budgetary objective, which is expressed as a balanced budget over a medium term with budget deficits close to zero or excessive. In accordance with the preventive arm, budgetary surveillance is conducted by supervising compliance of Member States with the three-year convergence (for non-euro area Member States) or stability programmes (for euro area Member States) submitted by them to the European Commission.[4] These programmes must specify how the Member States intend to attain or safeguard the achieved fiscal position over the medium term, taking into account the impact of the ageing population on the budget. The stability and convergence programmes contain the following information covering the previous and current year and at least three following years: 1. A medium-term objective representing a budgetary position of a state that safeguards against the risk of breaching the 3% of GDP threshold and ensures the long-term sustainability of public finances and the adjustment path towards the medium-term objective and the expected path of the debt ratio; 2. The underlying economic assumptions

[3] The Pact consists of the Resolution of the Amsterdam European Council of 17 June 1997 on the stability and growth pact, and two Council Regulations: Council Regulation (EC) No. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, and Council Regulation (EC) No. 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure.

[4] In 2015, Lithuania joined the euro area and submits stability programmes from this time.

(economic growth, employment, inflation and other important economic variables); 3. A description and assessment of policy measures to achieve the programme objectives; 4. An analysis of how changes in the main economic assumptions would affect the budgetary and debt position; 5. Medium-term fiscal policy objectives and their relationship with price and exchange rate stability (for non-euro area Member States). The Council examines the programmes and issues its opinion on them, based on the assessments of the European Commission and the Economic and Financial Committee. The greatest attention is devoted to the following issues: 1. Whether the economic assumptions are plausible; 2. Whether the medium-term budgetary objective contains a threshold safeguarding against excessive deficit, and the adjustment path for attaining the objective is appropriate; 3. Whether the political measures are adequate for achieving the medium-term budgetary objective; 4. What the risks of the ageing population for the long-term sustainability of public finances are; 5. Whether the economic policy strategies are in line with the broad economic policy guidelines. On noticing any inconsistencies with or deviations from these programmes, the Council may issue country-specific recommendations on the economic policy pursued by a Member State. Meanwhile, the corrective arm requires Member States to avoid excessive deficits and observe a certain public debt limit: the government deficit may not exceed 3% of GDP and public debt may not be more than 60% of GDP. If these rules are ignored, the European Commission determines whether excessive deficit is of an accidental and temporary or regular nature. On finding that the excess of the deficit indicator is not accidental, the Excessive Deficit Procedure is launched, during which a Member State must take steps to balance its budget. The EU continued to enhance budgetary surveillance and in 2011 adopted the six-pack of five European Parliament and Council regulations and one directive. This legislation introduced corrections to both the preventive and corrective arms, but with a greater focus on prevention. The key modifications relating to prevention were as follows: 1. Member States were required to present national reform programmes along with the convergence and stability programmes to the European Commission; 2. A new government expenditure growth rule was introduced, according to which government expenditure growth should not exceed potential GDP growth of the Member State concerned; 3. If a Member State fails to justify deviation from the medium-term objective, a sanction equal to 0.2% of GDP may be applied; 4. Minimum standards for Member States' budget governance were introduced, i.e. instruments were determined that must be implemented in a Member State (compulsory macroeconomic projections of the Fiscal Council and independent sources, reliability of statistical data, etc.). Amendments relating to the corrective arm were as follows: 1. The concept of "debt brake" was defined, according to which a debt brake is a situation where the average reduction of the debt/GDP ratio is 1/20 over three years; 2. The list of economic circumstances was extended for Member States to allow deviation from the medium-term objective; 3. A possibility was provided to impose sanctions at any stage of the Excessive Deficit Procedure; 4. The voting system for the imposition of sanctions was modified to make it more difficult for Member States to agree while voting and this way avoid sanctions. The reform was not limited to these modifications and the budgetary framework instruments were improved further. Here one should mention an intergovernmental agreement signed on 2 March 2012 – a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. The essence of this Treaty is expressed through a commitment to transpose the provisions of the so-called Fiscal Compact into the national law. The provisions of the Fiscal Compact to be enshrined in the national law are as follows: 1. A medium-term objective; 2. Establishment of an automatic correction mechanism in case of deviation from the medium-term objective; 3. Establishment of an independent Fiscal Council that would monitor compliance with the rules of the Fiscal Compact; 4. Restatement of the debt brake rule; 5. Establishment of coordination between Member States in issuing government securities, i.e. borrowing, obliging Member States to notify both the European Commission, the EU and the Council of any planned issues in advance. The purpose pursued when signing this Treaty was to ensure that the provisions of the Fiscal Compact are transposed into the national law of Member States by laws that have primacy over ordinary laws. Lithuania had transposed the provisions of the Fiscal Compact into the national law by a special Constitutional law on implementation of the fiscal treaty (*Register of Legal Acts,* i. c. 2014-17028). The budgetary governance framework for the whole EU is completed by the so-called Two Pack which entered into force in May 2013 and consists of two regulations of the European Parliament and of the Council which apply exclusively to euro area Member States. The key purpose of these two regulations is to enhance the budgetary surveillance mechanism in the euro area. The main provisions of this legislation are as follows: 1. The European Commission gains the right to carry out an annual review of the draft budget for the following year of each euro area Member State. Member States are obligated to present their draft budgets for the following year to the Commission by 15 October of the current year. The Commission assesses compliance of a draft budget with the Stability Programmes approved by Member States; 2. A more stringent surveillance mechanism is established for those euro area Member States which are subject to the Excessive Deficit Procedure. Each three to six months such Member States must submit detailed reports to the Commission on progress made; 3. Additional surveillance measures are introduced for euro area Member States in economic difficulty. An assessment of all the above budgetary surveillance provisions on the EU scale makes it obvious that the budget process is increasingly regulated by the EU law, and with respect to euro area Member States one can speak in principle of a centralised budgetary surveillance policy. Therefore, from this aspect the influence of EU legal provisions on national law is of sufficient importance.

4 Conclusion

For Lithuania 1 May 2004 is a date that marked essential changes in its legal framework. Similarly to other states, within the context of EU accession, Lithuania changed whole spheres of the national law framework with a view to harmonising them with EU law, including budgetary law.

As regards budget planning in terms of time, different models are possible, ranging from annual to medium-term or even long-term planning. A specific model is chosen by each subject independently, with account of its needs (in case of EU Member States, they must take also the requirements of EU legislation into consideration when solving budget planning issues). In accordance with the legal framework in force before 2000, the Republic of Lithuania was in a group of states where budget planning was based exclusively on a one-year period. Essential changes in the transition to long-term budget planning occurred following the adoption of the Seimas Resolution on the Concept of the Budget Structure on 22 October 1998 and, to implement this concept, the adoption of a law amending the Law on the Budgetary Structure of 11 July 2000 which enshrined a programme-based draft state budget preparation for three budget years. Beginning with the budget year 2014, Lithuania has introduced a new budget planning model based on the provisions of Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States. The essential feature of the new model is that beginning from 2014, forecasted indicators of a totality of the state budget and municipal budgets for a period of three budget years are approved (Art. 17(2) of the Law on the Budget Structure), and also the requirement of Art. 9 of the above Directive to adopt "a fiscal planning horizon of at least 3 years" is implemented. Also stricter requirements for compliance with three-year budgetary targets are introduced.

It seems to follow that these and other measures provided for in the Law on the Budget Structure will not only allow extending the limits of medium-term budget planning but will also ensure transparency in budget planning, improve the quality of macroeconomic and budget projections required for fiscal planning and enhance compliance of budget planning with the requirements of EU legislation.

The influence of EU legislation on the legal framework of the budgetary procedures of Lithuania is increasing steadily and allows acknowledging the existence of centralised surveillance of Member States' budgets on the EU scale, especially with respect to euro area Member States. The trends of enhancing budgetary surveillance carried out by EU institutions are expected to continue into the future.

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Legal Aspects of Tax Administration Electronisation

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Abstract

Nowadays, information and communication technologies are used in all areas of human activity. Naturally, tax administration is not an exception. There is no dispute that the introduction of such technologies has a positive performance impact in many areas. However, does the introduction of such technologies have some legal consequences as well? The aim of the paper is to identify the legal aspects arising from the usage of such technologies in tax administration.

Keywords

tax administration; electronisation; law and technologies

1 Introduction

Nowadays, tax administration is more and more influenced by information and communication technologies.[2] The influence on tax administration does not lie only in a simple replacement of paper media with electronic media. With these new technologies, new legal problems arise, some of them not imaginable before, such as data mining. Data mining is a technique of information handling, which uses a systematic analysis of a huge amount of data to discover hidden relations in the data and new information, which could be even unknown to a person to whom the data are

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2 The information and communication technologies are commonly abbreviated as "ICT".

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pertinent. As a result, data mining represents an intrusion to the privacy of the data object and, therefore, violates the protection of their privacy and personal data, which is a constitutionally protected right.

The aim of this paper is to identify various legal aspects of the tax administration electronisation.

2 Tax Administration Electronisation

As one can surmise directly from the term "tax administration electronisation", it is a term related to the administration of taxes. Standard English dictionaries[3] do not list the word "electronisation". However, it could be inferred, that it is a word derived from the word "electronic" meaning "using a computer". Electronisation could mean either a process of change or a result of such change. Therefore, first, it is necessary to define the meaning of the word for the purposes of this paper. This paper does not deal with the legal aspects of the introduction of information and communication technologies into tax administration. It does not focus on the analysis of the necessary changes of law, which must be done to electronise tax administration. Thus, in this paper, electronisation does not mean a process of change. Instead, the focus is on the legal aspects of tax administration which heavily uses information and communication technologies, i.e. the legal aspects of the result of the introduction of these technologies.

Moreover, the paper does not handle legal aspects of electronic phenomena in tax law, which are not tightly connected to tax administration, such as taxation of virtual currencies (Kohajda and Moravec, 2016: 36–46), execution upon virtual currencies or taxation of shared economy services (Tuláček, 2017a; Hrdlička, 2017; Klamo, 2017).

In this paper, the Tax Procedure Code (Act No. 280/2009 Sb.) is taken as a frame of reference for the examination of the tax administration electronisation. This act deals exhaustively with tax administration. Generally, the common tasks of tax administration, where information and communication technologies are useful, are communication (deliveries, filings, information publication and information exchange), and information handling (records keeping and information protection). The general provisions are accompanied by enforcement provisions. A fine can be imposed if a taxpayer files a submission in a non-electronic way.

Moreover, the Tax Procedure Code contains provisions on electronic auctions. In this paper, electronic auctions will not be studied in detail. However, it is necessary to mention the provision as an example of a bad approach to "electronise" a legal institute. The Tax Procedure Code contains detailed arrangements on a non-electronic auction. However, the electronic one is stipulated only in one section, which states that provisions on non-electronic auctions should be reasonably used on electronic auctions, as well (Secs. 194, 194a and 195–202 of the Tax Procedure Code). Nevertheless, it is

3 For instance, Hornby and Turnbull, 2010.

completely unclear, which provisions can be used and which are unacceptable (Tuláček, 2017c: 33–40).

3 Electronic Communication and Tax Administration

One of the most important preconditions of tax administration electronisation is an electronic communication between a taxpayer and a tax administrator. This precondition is so important that it can be considered a precondition *sine qua non*. Otherwise, it would not be possible to effectively keep files in an electronic form due to a constant need to convert them from the electronic to non-electronic form and *vice-versa*. Therefore, the law must recognise ways of electronic communication and allow both deliveries of documents from a tax administrator to a taxpayer and submissions from a taxpayer to a tax administrator.

In the private sector, e-mail is used as a general means of electronic communication. However, this does not generally apply in case of communication in tax administration since it does not hold the basic requirements of communication means usable during official delivery. E-mail is an open message readable on all relay servers, which breaks tax secrecy. Moreover, there is no built-in technology, which could provide a proof of delivery. It is not possible to just assume, that all messages sent are messages received as well.[4] Finally, there is no built-in technology, which could link an email address holder to a particular taxpayer. Therefore, e-mail in its common implementation cannot be used for official delivery and is not included in the list of delivery methods in the Tax Procedure Code (Sec. 42 of the Tax Procedure Code). However, all of these problems can be resolved. An e-mail message can be encrypted using the asymmetric cryptography algorithms such as RSA (Brookshear et al., 2013). Encryption solves two of the mentioned problems. First, it changes the character of the message from an open one to a closed one. Second, it ensures that only a valid recipient can read the message. Still, a tax administrator must somehow determine the taxpayer's email address. This problem could be solved in two ways, a mandatory registration process or mailbox provided by the government. Finally, the delivery proof problem could be solved in two ways, as well. First, the message could be perceived as delivered only after its recipient confirms the delivery with a separate message. However, this opens the possibility to avoid a delivery of an official document simply by not sending the confirmation message. Second, the state could provide a mailbox and track the delivery of such a message itself. For instance, Estonia provides e-mail mailboxes to their citizens.[5] To conclude, nowadays, it is not possible to use e-mail as a means of delivery in tax administration. Moreover, to enable this means, it would be necessary to eliminate the problems

4 In fact, such an assumption would be unconstitutional. See the decision of the Constitutional Court, ref. no. Pl. ÚS 32/15.

5 Using@eesti.ee address, cf. Eesti.ee, 2017.

mentioned above. Otherwise, this means of delivery could not be used as a standard, primary way of delivery in a low-compliance environment, where taxpayers and tax administrators do not cooperate.

Nevertheless, there is an e-mail alternative recognised by the Czech law, and that is data boxes (Act No. 300/2008 Sb.). The above-mentioned problems of e-mails do not apply to data boxes. Data boxes are accessible only to the officially identified subjects, the messages are not transferred in an open environment and the data boxes information system has a built-in functionality of proof of delivery. As a result, data boxes are the only means of an electronic delivery, which is nowadays allowed to be used in tax administration (Sec. 42 of the Tax Procedure Code).

The conclusions valid for the official delivery using e-mail do not necessarily apply to taxpayer filings. It is up to the taxpayer, whether they will use an encryption or not.[6] Moreover, there is no problem with the proof of delivery. However, there is still the identification problem, since it is usually not possible to identify the sender of an e-mail message. Though, this problem can be resolved by using an electronic signature or by confirming the filing using a different means of communication. Both approaches are used in the tax administration (par. 71(1)(a) subsec. 71(3) of the Tax Procedure Code). Therefore, it can be concluded, that e-mail is an acceptable means of communication in tax administration. However, the Financial Administration of the Czech Republic, which is a main tax administration body in the Czech Republic, refuses to accept e-mail filings, since it has not published an e-mail address of its electronic registration office. Instead, a web page address of its web filing system is published as an address of the electronic registration office.[7] Since the Tax Procedure Code does not prescribe what kind of electronic registration office should be used (par. 56(1)(b) of the Tax Procedure Code), it is not *per se* contrary to the law. However, I consider such an arrangement contradictory to the purpose of the Tax Procedure Code provision on electronic registration office, since it eliminates the usage of the most common means of electronic communication. Moreover, there is no need to exclude e-mail because e-mail messages can be processed automatically in the same way they are processed in the web filing system.

Additionally, electronic means of communication can be effectively used in mass communication, as well. By default, the Tax Procedure Code states that all information published on an official notice board should be published on the Internet, as well.[8] However, there are several kinds of information, which are currently published only on the Internet, but should be stipulated in a legal regulation instead, such as specifications of data format and structure of electronic filings.[9] Notwithstanding, this is not applicable to the publishing of form filings, distinctively a tax return. There are opinions,

[6] Under an assumption, that they file a filing which contains information only on themselves.

[7] ePodatelna, 2013–2018.

[8] Subsec. 56(2) of the Tax Procedure Code.

[9] See also Tuláček, 2018a: 359, 360.

that form filings must be published in a legal regulation, as well.[10] However, since there is a clear specification of a tax return content, there is no need to publish these forms in a legal regulation (Tuláček, 2018b). Moreover, bodies of the Financial Administration of the Czech Republic publish some information in an official instruction, which is contrary to the law (Tuláček, 2018b). To conclude, the legislation on communication means used for mass communication could be considered as going in the right direction. However, they are currently unsatisfactory and need further improvement.

4 Handling of Information and Privacy Intrusion

As identified before, the second area of legal aspects of tax administration electronisation is information handling and related privacy intrusion. In this context, it is necessary to state that legal entities and non-subjects, who are taxpayers, are entitled to privacy protection, as well. Tax administrators must overcome the information asymmetry during tax administration. Therefore, privacy intrusion is inevitable during tax administration (Tuláček, 2016: 70–71).

Since privacy intrusion is inevitable, the information must be protected accordingly during tax administration. Therefore, the Tax Procedure Code stipulates the duty of tax secrecy (sec. 52 of the Tax Procedure Code). Naturally, this duty must be held in the electronic environment, as well. This leads to a duty to secure the information and communication technologies used by tax administrators. However, it leads to an important issue of technical staff and their access rights to the tax administrators' data. In the light of this issue, there arises another issue whether the information and communication technologies administration can be outsourced or not.

The tax administration electronisation brings new approaches to data collection. Traditionally, tax administrators collected information either by collecting tax returns or by an investigation. In clearly specified cases, they could impose a record-keeping duty, as well. However, nowadays, it is possible to massively collect data on taxpayers and their economic activities. For instance, recapitulative statements (sec. 102 of the Act No. 235/2004 Sb.) and control statements (secs. 101c to 101k of the Act No. 235/2004 Sb.) allow tax administrators to collect information on all taxpayers at once and to model transactions between them. Moreover, the registration of sales (Act No. 112/2016 Sb.) allows collecting data on cash transactions in real time. As a result, tax administrators store a large quantity of data on taxpayers, which can be examined in deep detail and new information can be data-mined from the data. This new information could even be unknown to the respective taxpayers themselves (Tuláček, 2017b: 12; Gaudamuz and Cabell, 2013: 3). Therefore, a combination of the massive collection of data and usage of the data mining techniques represents a completely new way of privacy intrusion, which was unimaginable before the introduction of information and communication

[10] For instance, see Motion, 2017.

technologies to tax administration. Additionally, the data-mined information can be used to profile taxpayers, i.e. to classify them and based on this classification automatically decide on important issues related to them.

Once a tax administrator collects data, they can exchange them with other tax administrators, be it domestic or foreign. Traditionally, the information can be exchanged on request or spontaneously without any previous request (secs. 9 to 15 of the Act No. 164/2013 Sb.). The easement of handling data in electronic forms allows exchanging the information on an automatic basis. The range of automatically exchanged data gradually widens.[11] The above-mentioned issue of tax secrecy keeping arises in this context as well, especially in relation to the international information exchange.

5 Promoting and Enforcing Tax Administration

Generally, tax administration electronisation leads to a more effective performance of tax administration tasks. However, it is necessary to ensure that both tax administrators and taxpayers are able to communicate electronically to enjoy the advantages of the electronisation. This goal can be achieved in two ways. First, the electronisation can be promoted by a tax administrator. In this case, taxpayers should use the electronisation voluntarily, to get access to related advantages. Second, the electronisation can be enforced either by closing the non-electronic ways of communication or by punishing their usage.

Nowadays, enforcement by punishment is in force (subsec. 247a(2) of the Tax Procedure Code). However, in some other countries, the promotion way is the more common one. For instance, electronic filings could be handled preferentially, which could lead to faster returning of overpaid money.

The question, whether to use promotion or enforcement to achieve the desired outcome is more likely an economic, philosophical or sociological issue. However, it is an important legal question, whether the preferential treatment of compliant taxpayers is an allowed form of discrimination or not.

6 Conclusion

In this article, the legal aspects of the tax administration electronisation are examined. Tax administration electronisation is considered to be the result of introducing information and communication technologies into tax administration. In this context, there are two main groups of legal aspects, one related to communication and the other related to information handling and privacy intrusion. Moreover, there is an issue

[11] See amendments of the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

regarding the possibility of a positive discrimination of taxpayers, who voluntarily cooperate on the usage of electronic means of communication with a tax administrator.

As presented, communication has a different constraint dependent on the direction of the communication. There are other requirements for the official delivery of a document and for the filing performed by a taxpayer. Nowadays, it is not possible to use e-mail for official delivery and is *de facto* not possible to use for filing to bodies of the Financial Administration of the Czech Republic. I consider this state faulty since e-mail is the most used means of electronic communication today. Therefore, it should be possible to use it at least for the electronic filing.

There are legal issues related to mass communication, as well. Currently, the most important issue connected to mass communication is the method of publishing of the form filings and data formats and structures for electronic filings.

The issues related to the handling of information and privacy intrusion do not affect only natural persons, but all taxpayers. The introduction of information and communication technologies into tax administration brought a new way to privacy intrusion having severe legal consequences. For instance, a massive collection of information combined with data mining techniques allow tax administrators to find data, which are even unknown to the respective taxpayer. Moreover, tax administrators could use this new information to profile the taxpayers. Therefore, it is necessary to pay greater attention to the respective legal regulations. Finally, new challenges for tax secrecy keeping arise from the automatic exchange of information, where large amounts of information on taxpayers are exchanged internationally.

To conclude, increased attention must be paid to issues related to the introduction of information and communication technologies into tax administration. It is not possible to ignore them, as well as it is not possible to simply state, that a particular institute should be reasonably used in an electronic environment without further specifications or at least some idea surrounding the real implementation.

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Legal Aspects of EU Funding Related to State Organisational Units in the Czech Republic

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Abstract

State organisational units in the Czech Republic play different roles while receiving appropriations from the EU budget. The robust implementation structure was established at the national level delegating power on selected state organisational units to manage funds under shared management such as European structural and investment funds. In addition, state organisational units might be beneficiaries of projects under direct and indirect management. The paper focuses on key problems that the present system brings.

Keywords

management of EU funding; state organisational unit; simplification

1 Introduction

The goal of the paper as a whole is to identify some of the obstacles having impact on smooth financing of EU projects in the Czech Republic. The three main ways of the implementation of the EU budget will be scrutinised by the application of comparative, descriptive and analytical methods.

Initially, it is necessary to introduce key actors and their mutual relations for the proper understand of the system of funding. Therefore, a state organisational

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unit, the base stone of the state budget in the Czech Republic, will be defined and the management of EU funding shall be examined.

The second part analyses case legal issues that a state organisational unit encounters as a managing authority or a beneficiary of a project. The aim of this part is to bring readers to more real, down to the earth life of EU funding.

Finally, in May 2018 the European Commission's budget proposal 2021+ was launched and in a short time the simplification of EU financial rules "Omnibus", Regulation on the financial rules applicable to the general budget of the Union repealing Regulation (EU, Euratom) No. 966/2012 and delegated regulation (EU) No. 1268/2012 should come to force. These two undoubtedly significant moments should be commented on.

2 The System of EU Funding

There are three methods of implementation of the EU budget. First, EU projects are managed jointly by the European Commission and national authorities. Second, the European Commission manages projects directly. Finally, other delegated authorities inside or outside of the EU are appointed to manage the EU projects. Under this system, based on the EU legislation, various roles are assigned to state organisational units in the Czech Republic.

2.1 State organisational units in the Czech Republic

Rather than a general definition stipulated by law under which the state organisational unit should be ranked, there is an enumeration of organisations such as ministries and reference to other bodies considered to be state organisational units by special law. Without prejudice to its performance and responsibility, the state organisational unit is not a legal person; it is the state, so it acts as the state – the public legal person. It is an accounting unit (sec. 3 of Act No. 219/2000 Coll.). The money management is settled in budgetary rules (sec. 45 of Act No. 218/2000 Coll.). The literature mentions other important aspects concerning state organisational units. For instance, the chapters of state budget represent the sphere of activity and responsibility of state organisational units in the role of independent state budget chapters such as the Supreme Audit Office once it is stipulated by a special law (Marková and Boháč, 2007: 92–93). The state budget expenditure is used on their activities besides other things (Janošíková et al., 2016: 91). A state organisational unit is considered to be a *subordinate addressee* (Karfíková et al., 2018: 50) or semi-subordinate/semi-superior addressee of financial law regarding EU funding.

2.2 Management of EU funding

Shared management – funds are managed mostly in cooperation with member states (over two thirds of the EU budget). In other words, responsibility for conducting checks and annual audits lies mainly with national governments (Europa.eu, 2018d). For a long time only secondary legislation for each sector provided rules setting relations between the European Commission and the national authorities. There have been two legislative provisions strengthening this type of management. The first concerns the Lisbon Treaty which was signed in 2007 and took effect in 2009, Art. 317 in which the cooperation of the European Commission with the Member States and vice versa is highlighted (Syslová et al., 2010: 941). Afterwards, the 2012 Financial regulation clarifies the obligations of the Member States and the European Commission which aimed at increasing ownership for the management of the funds for the Member States (European Union, 2014: 224).

Direct management – implementation of the EU budget by programmes and funds is handled directly. It means that there is no involvement of the Member state or non-member country. Besides the European Commission, some of the tasks might be carried out by the European executive agencies.

Indirect management – the European Commission executes budget by entrusting tasks to: partner countries or to bodies designated by them, international organisations and their agencies etc.

As a result, under the definition of superior addressee as an executive power might be subsumed the European Commission, delegated body but also partly state organisational unit. However, the European Commission stays above all of them as *"the supranational subject of the financial law"* (Karfíková et al., 2018: 52).

2.3 In pursuit of a well-arranged list of programmes/funds

Any beneficiary, researcher, stakeholder would welcome a list of the programmes or funds divided according to these three methods to understand the principles of management of EU funds more profoundly and simply to have a picture about the possibilities offered. Instead, the Financial Regulation in Art. 175 specify only programmes or funds under shared management such as ESIF, the Asylum, Migration and Integration Fund (AMIF) and Internal Security Fund (ISF) and information can also be found on the EU websites (Europa.eu, 2018b).

What about directly or indirectly managed programmes? Then the only way to get it is to jump into the ocean of sectoral regulations, delegated regulations, guidelines, grant agreements etc. which is an immensely time-consuming activity. The website of the European Commission (Ec.europa.eu, 2018a) offers the list of the programmes without required classification. Enthusiasm over the creation of own list of programmes under direct and indirect management ends with the finding that one programme can be managed more than one way and a real confusion starts. Consequently, at this moment, only examples of programmes divided according to methods of implementation of the EU budget in the Czech Republic must be satisfactory. Fortunately, state organisational units are familiar with all types of management so that Connecting Europe facility, Life+, Horizon 2020 are for us well-known directly-managed programmes while Erasmus + also has activities under indirect management.

3 Case Legal Issues

A state organisational unit faces various roles while receiving EU funds as a managing authority under shared management or a beneficiary under direct and indirect management. The first two cases in subchapters 3.1 and 3.2. are typical for shared management.[2] Connecting Facility Europe CEF is in the Czech Republic the most significant directly managed programme in terms of allocation of appropriations (Ec.europa.eu, 2018c).[3] The case in subchapter 3.4 is linked to it. Life+, Horizon 2020 under direct management as well as the indirectly managed branch of Erasmus+ might be seen in subchapter 3.3, 3.4 and 3.5.

3.1 Who am I to you?

Amendment No. 367/2017 Coll. to Act No. 218/2000 Coll. on Budgetary Rules meant a breakthrough in the subsidy award procedure. With coming into force at the beginning of the year 2018, rules of administrative procedure have been partly applied on it and here comes the problem with contributory organisations financially dependent on their state organisational units in the role of a founder and a provider of subsidies (usually a line ministry) as is stipulated in budgetary rules (sec. 53 (1) and sec. 54 (1) Act No. 218/2000 Coll.) because these state organisational units do not have to be managing authorities providing EU subsidy. As a result, the founder is an unwanted intermediary

2 As for shared management, four separated implementation structures have been created. Cohesion policy with Structural and Investment Funds (ESIF) managed by the National Coordination Authority (NCA) – the Ministry of Regional Development of the CR, managing authorities – line ministries for regional development, transport, environment, agriculture, social affairs, education, home affairs, with eight operational programmes represent the most significant EU funding under shared management, followed by Common Agricultural Policy (CAP), the policy with the most effective implementation structure and low score of irregularities in the long term. The others are funds under Migration and Home Affairs (AMIF, ISF) and the Fund for European Aid to the Most Deprived (FEAD). The trend to bring the systems of management at the national level under unified methodological framework starting with the financial framework 2014–2020 with the Rural Development programme (RDP) included in ESIF may continue further. Under these circumstances, NCA besides others such as the Czech Government Office, Ministry of Finance etc. is becoming a key partner for negotiation with the EU about budget proposal 2021+.

3 It supports the development of high performing, sustainable and efficiently interconnected trans-European networks in the fields of transport, energy and digital services. As for shared management, four separated implementation structures have been created.

who does not know who is responsible for what as far as calls for proposal, award and evaluation procedure are concerned.

In brief, even though there is a system of regulations, delegated regulations directly applicable and binding in their entirety across the EU (Tomášek et al., 2013: 108; Europa.eu, 2018a) "soft law" at the EU level, guidelines at national level noted in Government Resolution No. 345/2013 for Cohesion policy, it does not seem to be enough and state organisational units prefer to follow rules set in the national budgetary legislation (Zemánek et al., 2012: 196).

3.2 You did it wrong, sorry!

Regardless of the methods of implementation of the EU budget, a subsidy provided to a beneficiary is split into several instalments in accordance with the sound financial management (Art. 310 (5) Title II Financial provisions TFEU and Chapter 7 Arts. 30–33 Regulation (EU, Euratom) No. 966/2012). These instalments are interdependent. It means that the instalment is paid once the previous instalment is audited by a managing authority. When there is something wrong, the next instalment might be reduced. Amendment 25/2015 Coll. to Act No. 218/2000 Coll. repealing sec. 44a (5) considering reduction as a levy for the breaching of budgetary discipline, adjusting sec. 14e and adding the new sec. 14f causes confusion in real life.

Interpretation of provisions in sec. 14e and sec. 14f of the Ministry of finance supported by the Court's ruling of the Supreme Administrative Court (Supreme Administrative Court, 6 Afs 270/2015-48) perceives secs. 14e and 14f separately. Under sec. 14e a provider of a subsidy (managing authority) relates irregularities to unpaid appropriations once sec. 14f is not used until the appropriations were paid. This interpretation is valid since 20 February 2015 when the above mentioned amendment came into force. Yet managing authorities prefer to reduce the next instalment rather than to ask a beneficiary to send back provided appropriations resulting from irregularities of the same instalment. From a logical point of view, their procedure seems to be more in tune with the sound financial management. Secs. 14e and 14f reflect the national practice of providing subsidies in one ex-post instalment or ex-ante instalment.

3.3 Great!! We were awarded a grant!

A state organisational unit's budget people may shine with happiness when the grant is awarded and does not include staff financing under the project. Indeed, this happens rarely.

In fact, the inflexibility of state employees' policy, salary tariffs including various bonus items on one side and limitations by strict budget provisions on the other side do not create suitable conditions for the project work in the state administration. To realise the project while the state employee is having a vacation or unpaid days off seems to be rather uncomfortable and does not make sense, as well as to hire an extra staff for the duration of the project whereas the state administration could engage its experts whose agenda fits with the aim of the project. Moreover, even though the obstacles concerning salary and budget are overcome, the limited duration of the project seems to be a problem as once the state employee for indefinite period is involved who will work on his contemporary agenda while he is working on the project. In addition, once the state administration hires somebody just for the time of the project, limited time of the work may not attract the right people or such outsourcing might be needlessly costly. The above mentioned facts may be one of the reasons why the Czech Republic belongs to EU member countries with a low rate of experts in Twinning and similar projects requesting expertise abroad for instance under European Neighbourhood Policy. No doubt that only projects with a real European added value, result-oriented projects should be supported.

3.4 The Czech entity wants to send us some money!

The situation gets even more complicated when the project is realised under the so called multi-beneficiary grant agreement which means that one of the beneficiaries is a coordinator of the project, receives grant appropriations and sends the money to the other beneficiaries (partners) of the project. To do so, beneficiaries sign a document setting financial, evaluation and audit provisions based on the rule of law of the EU member country of the coordinator.

A general template or a minimum of the conditions for such legal document was not found so far.[4] After searching in documents for Horizon 2020 and Erasmus+ the Consortium agreement,[5] Accession form, Administrative agreement, Internal cooperation agreement and surely many other agreements might be concluded meaning the same financial partnership among beneficiaries. However, perhaps the word "partnership" is booked within the EU legislation (strategic partnership, innovative partnership, public-private partnership, and financial framework partnership) that much that it is not used in this case.

Finally, questions arise when the state organisational unit in the role of a beneficiary receives funds from let us say the Spanish coordinator and the consortium agreement is concluded under the Spanish law. Is the financial relationship public or private? Are

4 Taking into account informal comments of the EC experts questioned during my study visit in the EC in July 2018, the EC does not really feel responsible for setting common rules or templates for financial partnership agreements under multibeneficiary grant agreements. On the other hand, the EC support of the EU member states sharing of their experience at the national level is apparent.

5 It is necessary to open an expert discussion over the suitability of the Consortium agreement for state organisational units as far as Act No. 219/2000 Coll., on Property of the Czech Republic, as amended is concerned.

they EU appropriations or Spanish ones? The answer has the impact on reporting, evaluation and auditing of the money sent since subsidies from the EU or the National Fund (Paying and Certifying Authority for ESIF) established within the Ministry of Finance are understood as EU appropriations according to the budgetary rules [sec. 6 (2) Act No. 218/2000 Coll.].

On top of that, the Czech budgetary law does not define a partnership. The Ministry of Finance refers to directly applicable EU legal acts and leaves the responsibility on the state organisational units in question. So far, there were noted cases when a coordinator of the EU project was a Czech entity, in one case it was a region, in the second case it was a private entity. With respect to sec. 6 (2) of the Budgetary Rules, the Ministry of Finance refused to take the appropriations to be sent to the accounts of state organisational units as the ones from abroad and left it completely on the state organisational units. In the first case, the state organisational unit backed out of the agreement, in the second one, the project is being realised as a national one.

3.5 Do you really mean abroad?

The last case which is often subject of discussion without clear results is providing appropriations abroad under the project agreement. The following questions occur regularly: What should be the legal basis of such a transfer? Is it a subsidy in the form of decision or public agreement? If it is not a public agreement, how can we ensure audit, evaluation and return of appropriations back in case of irregularities or the return of the rest of the unused allocations? According to budgetary rules sec. 7 (1), the state budget expenditure shall be a gift provided abroad and also subsidies to international organisations which is neither the case. A model example can be the grant awarded under indirect management by the National Agency for Erasmus+ to state organisational units which is requested by the Ministry of Finance whether they are entitled to realise such a type of project with foreign partners. Under the shared management of the Cohesion policy, European Territorial Cooperation Programmes are implemented. The advantage might be seen in the managing authority at national level and setting rules which provide more legal certainty to beneficiaries. Nevertheless, the matter of partnership agreement is also on the table.

Shortly, rather than the implementation structure, the legal background of the financial relationship between particular subjects of law notably a state organisational unit and other body while executing EU project under shared, direct and indirect management appears to be a matter of interest as in some cases brings law uncertainty.

4 Simplification and the Future of EU Finance

It is fair to mention that in spite of all complaints on EU funding regardless of a method of implementation, there is the endeavour to reduce administrative burden, red tape, bottlenecks for beneficiaries which were made kept for years. Question is if the same people can make things better.

The long-awaited, so-called Omnibus regulation should be presented soon. It would simplify financial rules promoting for example: the simplification for recipients of EU funds, cross reliance on audit, one set of rules to hybrid actions, more effective use of financial instruments, more flexible budget management, focus on results and streamlining of reporting, simple and leaner EU administration, citizen engagement (Ec.europa.eu, 2018a). The new financial regulation replaces two so far valid regulations which will be repealed [Regulation (EU, Euratom) No. 966/2012; Delegated Regulation (EU) No. 1268/2012].

Second, the European Commission's budget proposal 2021+ was launched at the beginning of May presented as the one which reflects lessons learned from the past and present and responds to challenges coming such as Brexit, world development, EU citizens' voice etc. seen as a "pivotal moment for our Union and opportunity for Member States and the European institutions to unite around a clear vision for the future of Europe and to show unequivocally that the Union is ready to back up its words with the actions" (Europa.eu, 2018c).

Finally, the two promoted measures will be commented on from the national point of view: simplified cost options and a combination of programmes under different types of management. Both are applicable already in this financial framework 2014–2020.

4.1 Simplified cost options

The use of simplified cost options such as flat rate financing, standard scales of unit costs and lump sum is seen by the EC as an advantage because beneficiaries do not have to spend time and resources to carry out detailed accounting and calculations of project costs when submitting reimbursement requests. However, it means that pre-financed expenditure on EU projects by the state organisational unit through the state budget is never equal to payments from the EU budget. Consequently, it distorts data presented by the Czech Statistical Office to Eurostat about the National Fiscal Policy.[6]

[6] First, the EC really sees this as a help even though it requires a lot of number crunching. The majority of beneficiaries welcomes it mainly in the private sector. Once the beneficiary is a unit of the general government sector here comes the problem explained above. The advice of the EC expert during my study visit in the EC in July 2018 was to fix it at the national level.

4.2 The combination (blending) of programmes

The combination of programmes under different types of management means that EU grants from for example the Connecting Europe Facility (CEF), Horizon 2020 are to be combined with those EU funds implemented by Member States' authorities under shared management, namely the European Structural and Investment (ESI) Funds. The management of the combination of programmes seems to be neglected. However, blending of programmes cannot be effective and successful without such an umbrella management.

5 Conclusion

The problems identified by methods of comparison, description, inductive and deductive reasoning and criticism can be seen from different points of view. The state organisational unit's perspective was chosen. For that reason, the paper analysed problems with grants and subsidies. The state organisational unit might be either a managing authority or a beneficiary. The paper shows that without the expert cooperation at the national level and the knowledge sharing with the other EU member countries resulting in setting of the legislative framework including possible amendments in budgetary, state property, salary law, the chance for creating clear conditions for the EU funds implementation wherever state organisational units are involved remains uncertain.

The European Commission must really focus on the needs of the beneficiary. Regardless of the level of implementation, once the legal aspects are difficult to understand, they are unclear and arising legal uncertainty, the beneficiary loses the motivation to implement the EU project. The topics discussed in this paper were supported by case legal issues to confront legal settings with practice. The research confirms that the EU legislation is complex and indeed does not provide single book rules to implement the EU project smoothly.

It is obvious that the European Commission is aware of the problems and the future will show whether the simplification which is a key issue of the new financial regulation, the so-called Omnibus [Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council] as well as the European Commission's budget proposal 2021+ will be successful. The European Commission seems to hand more freedom and responsibility to national authorities than ever before. It was not the aim of the paper to answer all the questions raised but to scrutinise the complexity of the EU legislation related to the EU funding so the research purpose was reached. In conclusion, as an EU citizen I only wish to have the EU strong in reasonable activities rather than in striking words.

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Do the Social Insurance Contributions Payable in Poland Constitute a Tax?

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Abstract

Among the enforced public levies in Poland, taxes and social security contributions are certainly the ones of the greatest significance. There are major similarities between them, however differences are also noticeable. On the economic level, contributions are even referred to as an "exceptional tax". The aim of the study is to determine – on the legal level – whether it is reasonable to consider the contributions payable in Poland a tax.

Keywords

tax; social security contribution

1 Introduction

There is no doubt that currently in Poland taxes are the most important component of public levies. Public levies also include social security contributions. From the beginning of the functioning of the reformed financial system of social insurance (January 1, 1999), the legal nature of contributions has been raising numerous doubts, whose number increases on a yearly basis. The aim of this study is to determine whether the social security contributions in Poland payable at present constitute a tax in legal terms.

The issue concerned with the determination whether social insurance contributions constitute a tax is not a novel research problem. In Polish literature, one may find examples of publications in which this issue is discussed to a narrower or broader

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extent.[2] It should be emphasised, however, that it is not possible to definitively resolve the dilemma once and for all. It is obvious that the answer to the question raised in the title of the study depends primarily on current legal regulations which are dynamic in character, particularly in the area of social insurance contributions. Of course, one may attempt to build a theoretical model, however it will not allow the determination of the relationship between social insurance contributions and taxes that exists here and now if we perform it in isolation from the existing regulations.

Under the current legal environment, social insurance contributions (particularly those for pension insurance) are part of a system where the amount of benefits is derived from the amount of premiums paid. However, for many years, there have been discussions on the concept of "civic pension" – the adoption of such a solution would mean that the length of the contribution period and their amount would not have any meaning for the amount of the benefit. In such a system, the legal nature of contributions would certainly be different than in the current legal situation. Therefore, in the analysis, it is important to take into account the up-to-date legislation.

2 Public Levies in the Constitution of the Republic of Poland

There is no doubt that social insurance contributions and taxes should be included among public levies. The Constitution of the Republic of Poland of April 2, 1997 (*Journal of Laws,* 1997, No. 78, item 483) in Art. 217 indicates that the imposition of taxes, other public imposts, the determination of entities, objects of taxation and tax rates, as well as the rules for granting reliefs and remissions and the category of taxpayers exempt from taxation, is effected by means of a statute.

The literal interpretation of Art. 217 leads to the conclusion that the legislator classifies taxes as part of public levies, however because of their rank they are mentioned by "name" as the only public imposition, before "other imposts". It should be emphasised that the phrase "other imposts" appears in the context of taxes. Therefore, this provision should be understood as follows: the imposition of a public levy, i.e. the tax, as well as other public imposts. This rather subtle structure is not always paid proper attention in the literature. And so, B. Banaszak, who in the commentary on Art. 217 while writing about "taxes and other imposts" (understood as public levies) "notes" that tax is one of public imposts (Banaszak, 2009: 934), whereas elsewhere he seems to contradict this – "The Constitution does not mention all types of taxes and public levies (duties, fees, surcharges)" (Banaszak, 2009: 931). The use of the conjunction "and", and at the same time not adding to the noun "imposts" the adjective "other" may give the reader the impression that he does not include taxes among public levies. In turn, J. Oniszczuk avoids the confusion in terminology as he writes about the Constitutional Tribunal's

2 See for example Wantoch-Rekowski, 2007: 349–358; Wantoch-Rekowski, 2005: 106–112; Sobczak, 1996: 51–54.

interpretative statements regarding, inter alia, the understanding of taxes and other public imposts (Oniszczuk, 2004: 982). In the following fragments of chapter XIV of his publication (entitled *Public Finances*) J. Oniszczuk consistently uses the term taxes and other public imposts.

On the other hand, A. Bień-Kacała indicates that: "Tax governance finds its normative basis in several constitutional provisions. Art. 84 determines the necessity of bearing all burdens and public responsibilities specified in the Act. The content of the tax acts is specified in Art. 217 of the Constitution of the Republic of Poland" (Bień-Kacała, 2015: 658). In the following part of her dissertation, she writes: "The basis for the imposition of taxes and other public imposts is therefore the Act" (Bień-Kacała, 2015: 659).

B. Brzeziński, who distinguishes four basic categories of public imposts (taxes, fees, surcharges and customs duties), indicates that they also include "various types of obligatory contributions for purposes considered public. However, they are treated as legal constructions different from others mainly because the proceeds from them usually do not go to the budget but are organised in a different way (e.g. they replenish the resources of special purpose funds)" (Brzeziński, 2017: 129). Thus, this unquestionable authority in the tax sphere has no doubt that social insurance contributions are included among public levies.

An interesting concept is presented by M. Niezgódka-Medek, according to whom Art. 217 mentions tax as the only constitutional example of a public impost (Babiarz et al., 2011: 71). As a rule, it is difficult to contradict this statement.

As may be seen, a rather coherent concept emerges from the presented views on the doctrine – Art. 217 of the Constitution of the Republic of Poland regulates the problem of public levies, including, among others, the taxes.

3 Public Imposts in the Light of the Provisions of the Public Finance Act

An important systematisation of public financial resources which is currently applicable in Poland results from the provisions of the Act of 27 August 2009 on public finances (*Journal of Laws,* 2017, item 2077). The broadest concept introduced in Art. 5 para. 1 is the concept of "public funds". The legislator does not explain nor define this concept.[3] All we have is an enumerative indication of what is included among public funds. First and foremost, it is required to indicate Art. 5 para. 1 point 1, according to which public funds include public revenues. The concept of "public revenues" also lacks definition – in Art. 5 para. 2, the legislator indicates which financial resources are included among public revenues. The key is Art. 5 para. 2 point 1, according to which public revenues include public imposts, including taxes, fees, contributions from the profits of state-

[3] Due to the variety of elements that make up the concept of public funds, C. Kosikowski applies the term "a mosaic of public funds" – Kosikowski, 2010: 41.

owned enterprises and sole-shareholder companies of the State Treasury and state-owned banks, as well as other cash benefits payable to the state, local government units, state earmarked funds and other units of the public finance sector pursuant to separate acts. What is significant is that this provision includes taxes and contributions among public levies. It should also be emphasised that contributions are distinguished and indicated next to taxes.

It seems that Art. 5 para. 1 of the Public Finance Act, as far as the understanding of the concept of "public tax" is concerned, cannot contradict Art. 217 of the Constitution of the Republic of Poland. And indeed it is not contradictory. It should rather be considered a more detailed general constitutional regulation.

Moving on to the analysis of doctrinal views, one should first of all recall C. Kosikowski, who points out that the Public Finance Act lists contributions among public imposts. "This particularly concerns social security contributions which constitute mandatory chargers for employers and employees" (Kosikowski, 2010: 47). A similar position is presented by E. Kornberger-Sokołowska – according to whom apart from taxes, public imposts include, inter alia, social insurance contributions paid on the basis of the provisions of the Act of 13 October 1998 on the social insurance system (Kornberger-Sokołowska, 2015: 21).

In turn, B. Kucia-Guściora points out that the act includes among public imposts, inter alia, taxes and contributions. According to the author, the common feature characterising public imposts "is the obligation to pay them to the state, local self-government units or other units of the public finance sector – i.e. their mandatory character. The list of the commented public imposts is non-exhaustive" (Kornberger-Sokołowska, 2015: 95–96). B. Kucia-Guściora also points out that public levies include all compulsory cash liabilities, which were established unilaterally in the exercise of official authority (Kornberger-Sokołowska, 2015: 96). By writing that imposts include contributions, he emphasises at the same time that although they were listed among the imposts, their definition had not been provided. "In the doctrinal definition of a contribution the feature of other public imposts is inscribed – its authoritative and public law nature. This feature allows to distinguish between public and private contributions. The commented provision suggests that also in respect of contributions, the obligation to make payments to the state, local government units, state earmarked funds and other units of the public finance sector results from separate acts." The author moreover observes that: "In addition to the public character and acting from the position of authority, one may also mention the feature of compulsion. The obligatory nature of contributions is also associated with the fact that they are incurred by the general public, which in turn involves statutorily defined amounts and collection procedures. These features also testify to the unilateral nature of setting premiums." B. Kucia-Guściora also aptly points out that: "The feature of contributions is their purposeful nature. They are intended for financing public tasks, inter alia, related to social tasks or health care. The purposeful nature of contributions is also confirmed by their beneficiary. It is pointed out, however, that in practice the contributions incurred for social or health insurance, i.e. special purpose funds, are the important ones" (Kornberger-Sokołowska, 2015: 98).

4 The Features of Tax and Contributions – Similarities

In order to determine the features that are common to social security contributions and tax, as a starting point it is necessary to establish the definition of tax. While social insurance contributions lack a normative definition,[4] tax has been defined in Art. 6 of the Act of 29 August 1997 – the Tax Ordinance (*Journal of Laws,* 2018, item 800) – according to which, tax is a public, gratuitous, compulsory and non-returnable cash benefit to the State Treasury, a voivodeship, poviat or commune, resulting from the tax act.

B. Brzeziński aptly pointed out that: "Tax is defined by listing the features attributable to this impost, distinguishing it from all or some other public levies" (Brzeziński, 2001: 30). In the literature it is even claimed that in defining tax, the legislator adopted the doctrinal and textbook features (Brzeziński et al., 2017: 49).

In turn, referring to Art. 6, A. Olesińska writes that: "The features of tax indicated in this definition as a cash payment are convergent with the tax characteristics most frequently mentioned in the tax-related literature" (Olesińska, 2009: 25). On the other hand, according to W. Wójtowicz: "All components of the definition are necessary to specify tax and distinguish it from other public revenues. The replacement of any element with another, such as the exchange of its gratuitous character into non-gratuitous, with the remaining part of the definition being unchanged, causes that this kind of revenue is no longer a tax but another kind of a public revenue" (Wójtowicz, 2009: 7).

Based on the content of Art. 6 of the Tax Ordinance, it can be assumed that the common features of social security contributions and tax include:

1. public-law character;
2. compulsory character;
3. non-refundability,
4. pecuniary character.

The first of the features common to social security contributions and tax is the public law nature of these levies.

A. Gomułowicz and J. Małecki indicate that: "The public law nature of tax results from the fact that the right to taxation, i.e. the establishment of tax obligations, remains the sole attribute of state power. The idea of tax authority is connected with the concept of state sovereignty. Tax obligation exists unconditionally, since tax is a unilateral act of power adopted in a statutory form" (Gomułowicz and Małecki, 2011: 113).

[4] There are, however, definitions in the literature, cf. e.g. Wantoch-Rekowski, 2007: 350–351.

The literature also points out that: “The public law character is seen in the actions of public law associations (state, province, poviat, commune) resulting from the fact of exercising public authority, i.e. *the empire*, not *the dominion*” (Brzeziński et al., 2017: 49). M. Popławski observes that “tax is inherently a public tribute, resulting from state power, and therefore based on public law” (Popławski, 2017: 105).

Another of the common features is compulsion which – according to W. Wójtowicz – means that “in a situation when the tax payer does not pay it voluntarily, it is possible to collect the benefit in a compulsory manner, i.e. by way of administrative execution” (Wójtowicz, 2009: 8). R. Mastalski notes that: “Compulsion is in fact one of the fundamental features of law in general and not only of the tax law” (Mastalski, 2018: 14). In turn, A. Gomułowicz and J. Małecki argue that: “Compulsion is an immanent feature of taxation. It means that there exists a relationship of dependence between the taxpayers obliged to fulfil the tax obligation and the state entitled to collect it. The state must be able to use coercion to effectively enforce tax obligations” (Gomułowicz and Małecki, 2011: 114).

The third common feature is the non-refundable character of the impost – in the literature it is aptly pointed out that the non-refundability of tax means that “the tax benefit, paid in due amount, is definitive by nature and non-refundable to the payer” (Brzeziński, 2010: 220). A similar remark is made by W. Wójtowicz: “Tax charged in accordance with the law is non-refundable. This way, tax becomes a kind of a public impost to the state or self-government” (Wójtowicz, 2009: 8). According to R. Mastalski: “Tax in its historical development has always been characterised by a very special feature – it was an individual’s performance in favour of the state or another public entity (ruler) not accompanied by mutual benefit” (Mastalski, 2018: 14).

As far as social security contributions are concerned, there is also no doubt that they are non-refundable. Of course this relates to contributions paid in the correct manner and amounts.

The fourth common feature is the pecuniary character of the imposts. In case of tax, this means that it is paid not in kind but in money. A. Gomułowicz and J. Małecki aptly observe that: “The monetary nature of tax benefits is related to the fact that tax belongs to the category of “finances”, and these in turn relate only to economic phenomena that are associated with the collection and distribution of monetary resources. Taxes do not include benefits in kind, personal services, goods and property rights. Generally speaking, tax cannot take a material form” (Gomułowicz and Małecki, 2011: 115). B. Brzeziński emphasises that the monetary nature of tax is not questioned today (Brzeziński, 2010: 132).

5 The Features of Tax and Contributions – Differences

Referring once again to Art. 6 of the Tax Ordinance, it can be assumed that features that are not common to social security contributions and tax include:

1. gratuitous character;
2. the beneficiary of the impost;
3. the legal basis for the obligation of payment/imposition of the impost.

The issue of gratuitous/non-gratuitous character of social security contributions and taxation was already the subject of a detailed analysis in the literature performed over 10 years ago (Wantoch-Rekowski, 2007: 356–357). During that time, normative regulations concerning contributions were subject to numerous alterations, also far-reaching ones. Inter alia, in practice, the second pillar of pension insurance was liquidated. Despite this, theses regarding the at least partly non-gratuitous character of social security contributions (mainly pension insurance contributions) remain valid, which clearly distinguishes this public impost from the tax – an absolutely gratuitous benefit.

The literature indicates that: "The gratuitous nature of taxation is expressed in the fact that the entity obliged to pay the tax, does not receive any mutual benefit from the beneficiary of the tax benefit in return for its payment" (Brzeziński, 2001: 30). Similarly, A. Borodo wrote: "In exchange for providing the tax, the entity that pays it does not receive direct mutual benefits from the state or local government. However, the tax payments made to the accounts of the state or local government budget are used to finance all public tasks provided for in statutes, according to the hierarchy and criteria adopted in a given period as justified by organs competent for the adoption of a budget act or budget resolution of a local government unit" (Borodo, 2010: 135). J. Głuchowski and J. Patyk accordingly pointed out that: "The gratuitous nature of taxation is based on the fact that the entity that paid it is not entitled to claim mutual benefits from the state. Tax revenues increase the total amount of budget revenues" (Głuchowski and Patyk, 2011: 11).

Considering the above, we observe that the social insurance contributions, particularly those paid for pension insurance, have a completely different character. *De lege lata,* in the defined contribution system, the amount of pension depends on the sum of contributions paid. In simple terms – in ideal conditions the sum of benefits is equal to the sum of contributions paid. Social security benefits, especially pension benefits, have the character of a mutual benefit related to previously paid contributions.

The other characteristic, which is not common to social security contributions and tax, is the beneficiary. In the area of public levies, it is important to specify the beneficiary, i.e. the entity to which they are paid. In case of tax, the beneficiary is the State Treasury, a voivodeship, a poviat or a commune. Currently, there are no voivodeship and poviat taxes in Poland (voivodeships and poviats have only shares in two state income taxes), hence in fact taxes are benefits paid to the State Treasury or the commune. In turn, social insurance contributions constitute one of the revenues of the Social Insurance Fund, which is a state special purpose fund established for the implementation of social security tasks. This is not an autonomous fund but it is related to the state budget. The method of financing social security benefits with the funding method is an alternative to solutions of a budgetary nature, thus the current legislator chose one of the two options. Therefore, it cannot be assumed that the beneficiary is the State Treasury in a situation where contributions constitute the revenue of the Social Insurance Fund.

The literature indicates that: "Tax is a benefit made to the entity authorised by the obliged entity. The authorised entity is referred to as an active entity, and this is usually the state. Active entities are also local public law unions, such as municipal or rural communes. In extraordinary cases, also international organisations are active entities" (Głuchowski and Patyk 2011: 12).

In order to complete the analysis of the characteristics of tax and social security contributions, one needs to refer to the legal basis for imposing these levies. The statutory definition of tax indicates its resulting from the "tax act". This is an interesting concept, as the Constitution of the Republic of Poland in Art. 87 para. 1 while indicating the sources of universally binding law, lists (inter alia) certain acts, however without specifying them by use of a proper adjective. The ambiguity of the concept of the tax law is emphasised in the literature. C. Kosikowski indicates that this is a normative act issued by the parliament in order to impose (establish) a tax or an impost having the characteristics of a tax and specifying its legal structure (tax rates and other activities adjusting the tax amounts) or making changes to the legal structure of tax (Kosikowski, 2006: 13). It is worth emphasising that C. Kosikowski offers an extremely broad interpretation of the concept of a tax act, as according to him it is a normative act regarding a tax or a tax-related impost. In turn, P. Bartosiewicz and J. Kulicki regard tax laws as both the laws that impose tax obligations and regulate the rights and obligations of various entities, including tax authorities, taxpayers, payers and collectors (Bartosiewicz and Kulicki, 2017: 14).

Referring to social security contributions, which were first and foremost regulated in the Act of 13 October 1998 on the social insurance system, it must be pointed out that this Act does not apply only to contributions (as the Personal Income Tax Act applies solely to this tax, the Act on local taxes and fees applies to such taxes and fees, etc.), its scope of regulation is significantly wider. One can even venture the hypothesis that although the problem of contributions occupies an important place in this legal act, it is certainly not the most important one. Contributions are one of many elements of the entire "system" that this law applies to. Therefore, I believe that social insurance contributions are regulated by a law that should not be classified as a tax act. The acceptance of the validity of this statement means that yet another difference between social security contributions and tax has been demonstrated.

6 Conclusion

B. Brzeziński indicates that: “In tax law, a tax is what this law recognises as a tax”. Nevertheless, all types of financial penalties, financial tax sanctions, interest for late payment, prolongation fees, enforcement costs, etc., are not usually regarded as a tax. All the more so this concerns various public fees, duties, compulsory social security contributions and other public imposts. Nevertheless, these levies – if the law so provides – may be imposed and collected on the basis of the provisions applicable to the imposition and collection of taxes. B. Brzeziński also points out that: “In economics, tax is usually understood more broadly than in law. For example, social insurance contributions in international statistics are considered together with income taxes on natural persons” (Brzeziński, 2017: 133).

As a result of the analysis, it was evidenced that *de lege lata,* the social insurance contributions are not a tax in Poland. Both public imposts demonstrate numerous similarities, however, several key features testify to the fact that contributions and taxes do not constitute the same public impost.

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The Exchange of Tax Information as Exemplified by the Panama–Argentina Case

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Abstract

Recently, international tax cooperation has been developing very intensively what is extremely important from the point of view of fiscal interests of states. This article deals with the transparency of the exchange of information in tax matters. This issue was presented in the case of Panama–Argentina and introduces the OECD and the WTO points of view. The main aim of the contribution is to confirm or disprove a hypothesis that the OECD regulations in the field of tax exchange information are global and coherent with the WTO law. The scientific methods of analysis, synthesis and comparison have been employed.

Keywords

the WTO; harmful tax competition; the OECD; tax; the exchange of tax information; Panama–Argentina case

1 Introduction

Recently, international tax cooperation has been developing very intensively. The reason for such concentrated concern can be the global character of modern economy and the lack of efficient taxation imposed by tax jurisdictions. Considering a historical perspective, tax regulations as a domain of sovereign administration were developed as internal regulations

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in isolation from tax regulations of other countries (Harmful Tax Competition, 1998). The advancing process of globalisation in trade and investment along with the integration of national economies have enforced a change of relations among national tax systems. At present, competition has been crossing the borders, and it results in the fact that the countries which practise harmful tax competition (tax havens) offer more favourable conditions for capital investing than national jurisdictions, and in such a way they accumulate foreign capital. Such conditions are understood as any kind of tax preferences which are aimed at gaining profit; they mainly refer to lower tax rates or their lack, tax reliefs and exemptions. Taking into account the global scale, such a situation results in disturbances in trade and investment, and it leads to an undesirable "race-to-the-bottom".

A fundamental aim of work carried out at an international level is providing a uniform standard of tax information exchange which will come as an efficient tool to fight against tax fraud and tax evasion and which will be used to increase tax transparency. This article presents the problem of tax information exchange viewed from the perspective of protecting fiscal interests of the state – not protecting taxpayers' interests related to evasion of double taxation. Considering the size of the article, the discussion is limited to mention the most valid regulations established by the OECD/G-20, and it does not refer to the initiatives undertaken by the USA and the EU in this field.

The discussed problem is of an important practical value. Considered from the OECD/G-20 point of view, tax information exchange is broadly discussed on the WTO forum, indicating the advisability of some further research on legal regulations established within each of such international organisation. This can be proved by the first dispute in the WTO, referring to financial services and tax information exchange, between Panama and Argentina. Hence, the aim of the article is to provide an answer to the following questions: are the current OECD policy in the field of tax information exchange of global character and are they efficient, that is: respected by other international organisations and states in their national governance? Are these regulations coherent with other regulations of the international law at the global level? Do they complement each other or do they function in isolation?

The article is composed of an introduction, three parts and conclusions. The first part refers to the initiatives undertaken on the OECD/G20 forum in the field of tax information exchange. The second part presents the GATS tax regulations. The third part outlines the dispute between Argentina and Panama.

2 International Tax Cooperation

The most important forum for international cooperation in the field of taxes is the Organisation of Economic Cooperation and Development (OECD). Its first significant initiative[2] was the Harmful Tax Competition: An Emerging Global Issue

[2] In 1923, the Model Tax Conventions were published under the auspices of the League of Nations. Art. 2 stated provisions which referred to tax information exchange (Model Tax Conventions, 1923).

(Harmful Tax Competition, 1998), published in 1998 by the Tax Committee at the OECD. This Report was followed by a report in June 2000 entitled *2000 Progress Report: Towards Global Tax Cooperation: Progress in Identifying and Eliminating Harmful Tax Practices*. Since then, the OECD has been systematically launching initiatives in the field of international tax cooperation which is aimed at the counteraction of unjustified transfer of profits to other countries. The other most important initiatives include Convention on Mutual Administrative Assistance in Tax Matters introduced jointly by the OECD and the Council of Europe in 1988 and amended by the Protocol in 2010 (the Convention on Mutual Administrative Assistance),[3] the Agreement on Exchange of Information on Tax Matters and its commentary (the Agreement on Exchange of Information)[4] which was adopted in 2002 and the 2002 OECD Model Tax Convention on Income and on Capital and its commentary, as updated in 2004 (Art. 26 OECD Convention) (Mączyński, 2015: 135; Mączyński, 2009: 17).

The Global Forum on Transparency and Exchange of Information for Tax Purpose (the Global Forum) and the Inclusive Framework on BEPS come as a basic stage for the OECD in the promotion of transparency and cooperation in the field of taxes. The Global Forum was established in 2000, and now it consists of approximately 150 Member States,[5] including the OECD Members and the jurisdictions which agree to follow transparency and to exchange information for tax purposes.[6]

It should be emphasised that some of the OECD countries which should be interested in quick adoption of the abovementioned standards in practice do not meet the discussed requirements. Switzerland comes as one of the examples: in this country

[3] The Convention on Mutual Administrative Assistance allows the interested parties to cooperate during all the stages of a broadly understood tax assessment and collection. It also facilitates entering into bilateral tax information exchange agreements between State Parties. At present, the Convention has been acceded by 122 jurisdictions, including the parties of all the countries of the G20, BRICS and OECD.

[4] The Agreement on Exchange of Information does not provide any obligatory legal standards, however, it includes two models to be followed by the particular countries in regulations applied in their tax law. Based on them, it is possible to enter bilateral and multilateral contracts. The Agreement plays an important role in the process of tax information exchange as a basis of 400 bilateral international agreements. It should be emphasised that among the Parties of these agreements there are also some countries which practice harmful tax competition, and this fact indicates a significant practical value of the models. In 2015 the OECD adopted the Model Protocol to the Agreement on Exchange of Information (the Model Protocol). Based on the provisions stated in the Model Protocol, jurisdictions can extend the scope of the international agreements by automatic and spontaneous tax information.

[5] The Global Forum has 15 observer countries, half of which are developing countries.

[6] It has adopted and has been promoting two standards, one of which facilitates cross-border exchange of tax-relevant information on request (the EOIR Standard), and another one which enables an automatic exchange of information on the financial accounts of non-residents (the AEOI Standard). In 2006 the Global Forum introduced Tax Cooperation Towards a Level Playing Field report, in which the notion of a level playing field was defined. It refers to fairness which all the parties are obliged to follow. In 2009, as a result of the pressure exerted by the G20 countries, the Global Forum underwent a fundamental reform which was aimed at the strengthening of the implementation of the standards developed by national jurisdictions. As a result, applying the peer review process, the Global Forum is able to monitor the implementation of the principles referring to transparency and exchange of information on request, as it has been declared by the involved parties (OECD, 2009).

legal authority to exchange information derives from bilateral tax conventions and also from the Multilateral Convention 2013. Theoretically, Switzerland guarantees the operation of the tax information exchange mechanism but in some particular situations it limits the scope of such information, because it follows strong confidentiality provisions (Global Forum on Transparency, 2016). According to a peer review of 2015, also Lichtenstein should streamline its process of tax information exchange (Global Forum on Transparency, 2015).[7] It indicates that the Global Forum systematically verifies the national legislation of the OECD countries, providing them with relevant recommendations. In the Author's opinion, however, there are not any efficient mechanisms to execute the absolute obligation of adjusting the internal law to international regulations.[8]

3 GATS Tax Regulations

WTO is an international organisation the aim of which is to liberalise trade flows and to take care of fair trade. Therefore, regulations referring to taxes are not of prevailing nature – quite the opposite: they are of rudimental character and they can be interpreted in a very broad way. They can be found in the General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS) and Agreement on Subsidies and Countervailing Measures (SCM Agreement). However, none of those Agreements provides a direct reference to the questions of harmful tax competition or transparent information exchange (Wróblewska, 2016: 13–23). Despite this fact, the specificity of the GATS regulations and their application in the sector of services allows the interested parties to settle the disputes which have not been directly stated there. It proves the universal and unique character of this Agreement. Considering the case between Argentina and Panama, the complainant referred to the violation of the GATS resolutions.[9] Therefore, the considerations presented below are limited to the regulations in question.

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7 In 2002, the OECD listed the Principality of Lichtenstein, Andorra, the Principality of Monaco among the non-cooperative jurisdictions. In 2009, as a result of some protests, the Committee on Fiscal Affairs decided to remove the abovementioned countries from the list.

8 In 2012, being aware of that weakness, the G20 countries launched an initiative on the basis of which it was decided to intensify activities against tax avoidance at the global level (Liebman et al., 2016: 102–105). As a result, the OECD/G20 adopted a Project to Address Base Erosion and Profit Shifting and in 2016 proposed the architecture of an Inclusive Framework on BEPS (the Inclusive Framework). At present, there are 118 members (OECD, 2018) who can take its provisions into consideration while entering bilateral agreements. Despite its important role, it has the character of a soft law which means that it does not have any binding force.
A more efficient method applied to implement the Inclusive Framework regulations is an instrument referred to as the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention), adopted in November 2016. It came into force on 1 July 2018.

9 The complainant also raised the violation of Art. I:1, Art. III:4 and Art. XI:1 of the GATT 1994, however, the Panel rejected that statement.

The GATS was established in 1994 at the end of the trade negotiation cycle referred to as the Uruguay Round. The Agreement entered into force on 1 January 1995, and it was the first multilateral agreement which defined the legal and contractual framework for international trade in services. According to Art. I:1 of the GATS, this Agreement applies to measures taken by the Members affecting trade in services. Trade in services is defined as the supply of services through one of the four modes listed in subparas. (a) to (d) of Art. I:2 of the GATS.[10] In general, tax issues which affect trade in services refer to the non-discrimination principle. It applies to indirect taxes on providing cross-border services, to the consumption of services and to taxation of the income earned by service providers who run their business activities or temporarily reside in the territory of any Member State. The non-discrimination principle applies to the most favoured nation (MFN) clause and the national treatment (NT) clause. With reference to Art. II:1 of the GATS, each WTO Member State must grant another member's services and service suppliers treatment no less favourable than treatment granted to like services and service suppliers of any other country. In order to decide whether the MFN clause has been violated, the same must apply when comparing with like services and service suppliers of national origin (MFN clause).

In accordance with Art. XVII:1 of the GATS, in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers' national treatment (NT clause).

Art. XIV of the GATS sets out the general exceptions from the obligations under that Agreement. The issue in this dispute relates to subpara. (c), which states that subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: 1. the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; 2. the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; 3. safety. In US-Gambling (WT/DS285/R) Panel stated that the abovementioned Article contains an illustrative list of law and regulations which are not inconsistent with the GATS provisions. It means that the Article does not

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[10] Therefore, for trade in services to exist a service must be supplied under one of those four modes. The provisions of the Agreement do not provide any legal definition of the term *service.* According to Art. I:3 (b) of the GATS, it applies to any service in any sector except for services supplied in the exercise of governmental authority, and in the sector of air transport, where it applies to the air traffic right and any other services related to the exercise of that right.

include any limitations to their types, and it allows the countries to decide freely on that question. In other words, the Member Countries are entitled to apply various treatment to services and service suppliers from third countries with regard to their own citizens. However, such freedom in treatment is not of absolute nature, and its boundaries have been defined as rejection of any regulations which could result in arbitrary or unjustified discrimination or to latent limitation of trade in services.

The Annex on Financial Services (FSA) comes as an integral part of the GATS. The text of para. 2(a) of the FSA provides notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement. This means that para. 2(a) indicates some flexibility in the application of internal regulations. The WTO law does not require the full integration of standards developed by the member countries with the GATS provisions. Furthermore, such standards may come as the violation of the obligations under the GATS, and they can be justified by the prudential reason.

4 The Argentina–Panama Dispute

The problem analysed here comes as a pattern example of a conflict between the countries which – while striving to increase their fiscal gain – present various models of economic development. It results from a longstanding tradition, and it is not conditioned by culture, because both countries belong to a similar religious circle. The problem refers to two jurisdictions which follow the principles commonly applied in other economies. In 2001, Argentina ceased to service its external debt at the amount of USD 95 billion, and it declared bankruptcy. The total debt reached an approximate level of USD 100 billion, and it was defined as the highest debt in the history of the world. Unfortunately, the bankruptcy of Argentina took place at a time of chaos on the financial markets and resulted in an increased outflow of USD deposits. Because of the lack of financial liquidity, Argentina declared bankruptcy once again in 2014 (IMF, Argentina 2017). Panama's economic situation is completely different from Argentina's. Panama has been one of the fastest-growing economies in the world (Palgrave, 2018: 937). The main service sector is based on the financial market. Since the bank secrecy and the low or zero tax rates, Panama has appeared as a regional financial centre and a tax haven.

Therefore, the dispute is defined by the Author as typical, and the way it is solved is extremely important, because it may come as a model to be followed by other countries. A direct cause of the dispute is the tightening of Argentinean legal regulations in the field of financial means transfer to the countries which practice harmful tax competition.

Despite the fact that since the 1990s, Argentina has been involved into a longstanding relation with the OECD, it has not joined that organisation yet.[11] However, it is a Member of the Global Forum and G20 which work closely and support the OECD. The Panama situation is quite similar. It belongs to the Global Forum but is not a Member of the OECD.

4.1 The background of the dispute

In 2012, Panama sued Argentina for giving it the status of a non-cooperative state for the purposes of transparent tax information exchange[12] (WT/DS 453/R). In 2013, Argentina published Decree No. 589/2013 under which cooperative states were defined. Pursuant to Art. 1 of the Decree, countries, dominions, jurisdictions, territories, associate states or special tax regimes are granted the status of cooperative for tax transparency purposes if: 1. they have signed an agreement with the Government of the Argentine Republic on the exchange of tax information or a convention for the avoidance of international double taxation with a clause of broad information exchange, provided that effective exchange of information takes place; or 2. have initiated negotiations with Argentina, which are necessary for concluding such an agreement and/or a convention.

A Panel was established in June 2013. It should be noticed that the notion of a non-cooperative state was not defined in the internal legislation, and Panama had been classified in such a way for several years.[13] In January 2014, after the establishment of the Panel, Argentina changed its status for a cooperative state, despite the fact that both parties did not enter any agreement on information exchange and on the avoidance of double taxation.[14] While Panama did not challenge the Decree directly, it challenged eight of the retaliatory measures imposed by Argentina against non-cooperative countries under the Decree. On 30 September, the Panel decided that the measures

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11 Despite that fact, Argentina has joined the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and to the OECD Declaration on International Investment and Multinational Enterprise as one of the first countries of Latin America. At present, there is a discussion going on in the OECD about the membership of six countries in the organisation: Argentina, Brazil, Bulgaria, Croatia, Peru and Romania.

12 The dispute has had a significant impact on the international community because the question of profit transfer to tax havens is a very current issue. The main interest is raised, first of all, by tax evasion and avoidance practised by companies and rich people. In 2015, 11 million documents leaked out of the Mossack Fonseca law firm in Panama (Panama Papers incident). The documents referred to confidential data about various interests run by millionaires, heads of states, famous sportsmen and criminals who established offshore companies with the assistance of Mossack Fonseca and other Panamanian companies.

13 Argentina declared annual update of the list of cooperative states.

14 There were not any negotiations initiated in this field. Argentina considered such countries as Cyprus, Gibraltar and Hong Kong non-cooperative despite the fact that they did start negotiations in the field of tax information exchange. Luxemburg and British Virgin Islands were placed on the list of cooperative countries in spite of the fact that they did not meet any OECD standards in that field.

undertaken by Argentina undermined the GATS.[15] According to Argentina, such measures were consistent with the OECD recommendations and the Financial Action Task Force, which was aimed at counteracting such activities as money laundering and terrorist financing.

On 14 April 2016, the AB reversed the Panel finding, that such defensive tax measures were inconsistent with the GATS obligations of MFN and NT clauses. That decision has been of high significance, considering the perspective of cohesion in the activities undertaken in the international field, because it indicates that the WTO countries can implement legal regulations in order to protect their fiscal systems against the practice applied in other countries which do not have transparent tax regulations.

4.2 Disputable measures

In the discussed case, Panama has challenged eight Measures referring to the market of financial services adopted by Argentina under its tax law (WT/DS453/6, 2.9). Among them, there are some which *per se* refer to taxation, and some which refer to the access to the market of financial services (Delimatsisis and Hoekman, 2017: 5). The first four measures (1–4) are focused on taxation issues, and they refer to an increase in the base for capital gains taxation with regard to capital transfer to the non-cooperative jurisdictions. The remaining Measures indicate higher costs which must be incurred by entities from non-cooperative countries, which want to operate in the Argentinian market of financial services.

In the discussed case, Panama stated that all eight Measures violated Art. II: GATS, because services and service suppliers from non-cooperative countries were treated in a less favourable way than those who came from cooperative countries. Furthermore, considering Measure 2, 3, and 4, Panama indicated the violation of Art. XVII: GATS, which included the NT clause. Argentina claimed that its legislation was consistent with the GATS, and it resembled internal regulations applied in other WTO countries. Moreover, it emphasised the fact that its tax agreements followed the UN and the OECD Model Tax Convention, which included a clause on tax information exchange. It was supposed to provide efficiency of the national tax law.

As a justification for the application of Measures 1–4 and 8, Argentina referred to Art. XIV (c) GATS on security exception. Argentina particularly argued that defensive tax measures were necessary to secure compliance with Argentina's tax law, and especially to provide prevention of deceptive and fraudulent practices which could be observed during transactions with non-cooperative countries. Argentina also emphasised that the measures it had undertaken were consistent with the recommendations of the OECD's Global Forum on counteracting harmful tax competition and providing integrity and stability of the tax system.

15 Panama claimed that the measures undertaken by Argentina affected trade of goods to a small extent.

Table 1. The disputable measures

No.	Measure description
1.	Tax treatment in the collection of gains on certain transactions involving non-cooperative countries (hereinafter withholding tax on payments of interests or remuneration).
2.	Tax treatment imposed on the entry of funds from non-cooperative countries (hereinafter presumption of unjustified increase in wealth).
3.	Valuation of transactions with entities from non-cooperative countries (hereinafter transaction valuation based on transfer prices).
4.	Criteria for applying deductions (hereinafter payment received rule for the allocation of expenditure).
5.	Measures affecting trade in reinsurance and retrocession services (hereinafter requirements relating to reinsurance services).
6.	Measures affecting trade in financial instruments (hereinafter requirements for access to the Argentine capital market).
7.	Requirements for the registration of companies, branches and shareholders of certain foreign service suppliers (hereinafter requirements for the registration of branches).
8.	Measures affecting the repatriation of investments (hereinafter foreign exchange authorisation requirements).

Source: Panel Report WT/DS453/6, 2.9

In order to settle the question of the GATS violation, it was necessary to decide whether the discussed Measures were applied to the agreement (WT/DS453/6). Having referred to the case of Canada Autos (WT/DS139/AB/R), the Panel indicated that two questions had to be examined. Firstly, was there any trade in services, as stated in Art. I:2 GATS? Secondly, did the applied Measures affect trade in service, as stated in Art. I:1 GATS? In the opinion of Argentina, the relation observed in the discussed case was merely theoretical. Therefore, the complainant had to prove that effective – and not potential – trade in services took place between the parties of the dispute or between other WTO countries and the complainant. Such a necessity did not result from the GATS resolutions. Hence, the Panel decided that all eight Measures were covered by the scope of the GATS. The key decision of the Panel however, was the one stating that Argentina, on the basis of its internal legislation, did introduce various treatment of services and service suppliers from cooperative and non-cooperative countries. As a result, each of the eight Measures violated the MFN clause. It was so because service suppliers from non-cooperative countries did not immediately and unconditionally undergo any less favourable treatment, whereas those from cooperative countries did. The difference in treatment did not result from the access to information. It was proved by the inconsistency of Argentina in qualifying jurisdictions into one of two categories.

It should be noticed that the Panel did not question the opinion of the OECD and the G20 on the influence exerted by harmful tax practice on the conditions of competition. This was negative influence, because it resulted from the lack of tax transparency, and the measures undertaken by the defendant were aimed to counteract such practice – not to strengthen its position on the market of financial services.

As a result, the Panel did not agree with the arguments presented by the defendant, according to which Measures 2, 3 and 4 were supposed to change the conditions of competition, giving privilege to services and service suppliers from Argentina.

Considering Measures 2, 3, 4, 7 and 8, Argentina referred to the chapeau of Art. XIV (c) GATS. In the Panel's opinion, Argentina proved that the undertaken Measures were necessary to provide consistency with the national law. However, the division of jurisdictions into cooperative and non-cooperative was not efficient for the requirements of the information access, because the status of the first group was granted to the countries which did not meet such requirements reciprocally. Therefore, the Panel decided that the defensive Measures gave rise to arbitrary or unjustifiable discrimination.

The case Argentina v. Panama is of crucial significance for the interpretation of the GATS for one more reason. For the first time, the Panel analysed the concept of a prudential reason resulting from para. 2(a) FSA, which had never been analysed before. Considering Measure 5 and 6, the main argument presented by Argentina was the fact that they were covered by the prudential purpose to protect financial consumers on the insurance market. In the defendant's opinion, it was necessary because reinsurance institutions insured the risk which was not known with regard to the lack of efficient information exchange. Considering the size of the reinsurance market and security of customers and the state, the following information should be known: ownership structure or the amount of invested funds in order not to generate any higher systemic risk. Additionally, there is a high probability that the sector could be used for money laundering (WT/DS453/6, 7.83). The Author of the article believes that the presented arguments were coherent and logical, and they proved the integrity and stability of the financial system.

On 15 April, the AB reversed the decision of the Panel. It is of great significance for the countries which do not agree to the lack of tax transparency in the jurisdictions practising harmful tax competition. Despite the fact that the AB changed the decision of the Panel, Argentina could not enjoy its full victory. The AB decided that 1. all eight defensive Measures imposed by Argentina were inconsistent with Art. II:1 GATS; 2. Measures 2–4 violated Art. XVII GATS but they were justified on the basis of Art. XIV (c) as necessary to provide consistency with the national law.

The arguments presented by the AB were based on the statement that services and service providers from cooperative countries were not like services and service providers from non-cooperative countries. In its appeal, Argentina stated that the Panel misinterpreted the MFN clause, indicating the similarity based on the origin. Considering the fact that the GATS analysis often referred to the systemic interpretation, Argentina proved that on the basis of the GATT MFN clause, the features of goods always come as their inseparable characteristics. Therefore, it should be assumed *per analogiam* that services are inseparably related to their providers' features, and in the discussed case there were different service providers. If we assume that the origin comes as a basic premise for the comparison of service providers, it seems that it will be advisable to compare their other features, such as the segment of the market where they belong. The AB decision is right, however, the identification of the like term of GATS and the similar term of GATT is faulty, because the aims of both agreements are different. GATS refers to trade of services and GATT refers to trade of goods. The Panel wrongly transposed the likeness term from the GATS MFN clause to the NT clause (Bhala et al., 2017: 432).

The AP agreed with the Panel's decision that para. 2(a) of the FSA should be interpreted in a broad way, and its understanding should not be limited to domestic regulations. Hence, the concept of prudential reason justifies the implementation of any national regulations in the field of financial services which violate the GATS or FSA provisions (Eskelinen and Ylönen, 2017). The Author of the article believes that this is the right interpretation, because it provides countries with a possibility of fighting against jurisdictions to which taxpayers transfer their profits.

5 Conclusion

Without any doubt the issue of trade of services and taxation is complementary. Although it is relatively easy to analyse trade *per se* and individual types of taxes, sometimes it is difficult to present the relationship between them. This results from insufficiently clear GATS regulations in this area which influences the ambiguous interpretation of the law and causes a growing number of disputes between Member States. An additional difficulty is the fact that GATS fails to address the questions of harmful tax competition and a transparent exchange of information on tax. Therefore, Member States call upon the policy of the OECD using the GATS norms.

The OECD embraces 37 State Parties from all over the world which generate 75–80% of the global volume of trade. The Global Forum functions under the auspices of the OECD and consists of 150 member states. Participation in the Global Forum is quite separate from membership of the OECD. To illustrate this point, although both Argentina and Panama belong to the Global Forum, neither of them is a member of the OECD. The OECD is a global organisation which means that its tax policy is also of this nature. This is justified in the number of initiatives carried out in the scope of the exchange of information and cooperation in this field. In my opinion, the OECD regulations in the field of tax exchange information seem to be global and the OECD is attempting to create an effective tax policy. The problem is that each Member State interprets its contents differently which is why conflicts about values occur in the forum of the WTO. In the Panama–Argentina case, the value concerned is market protection, the definition of which is understood differently by each party. Panama defines this as protecting the interests of the state, which manifests in a lack of transparent tax exchange regulations which leads to transfers of funds by non-residents. Argentina, on the other hand, treats the transparency of the exchange of information in tax matters as a guarantee to increase budgetary income and to protect the consumer on the financial services market. I believe that a solution to conflicts of values can only happen through a strengthened tax policy no matter if this takes places in the forum of the OECD or of the WTO. The best outcome would be to do so on the level of both organisations. It is essential not to treat this policy as a soft law.

The Panama–Argentina case illustrates the problem of using unclear jurisdictions for tax avoidance and evasion as well as money laundering. The lack of effective exchange of information is one of the key criteria in determining harmful tax practices. The decision of the Panel undermines the coherence of the WTO regulations with the OECD tax policy in the scope of transparency. This means that the WTO initially approved the use of the GATS to achieve particular interest which are at odds with the policy aims of the OECD. Therefore, it is correct that this decision was then reversed by the AB by finally stating that Argentina did not violate the MFN clause in the GATS. In order to implement the Global Forum initiative, Argentina committed itself to introduce internal tax regulations, which were questioned by the Panel. Undoubtedly Argentina was not consistent in dividing jurisdictions into cooperative and non-cooperative. However, being a State Party of the Global Forum (as Panama also is), it is evident that it is obliged to do so. I am convinced that the conflict of norms created by the international organisations is only possible to eliminate when the policy of these organisations will take preference over their regulations and therefore when they will find a common aim to aspire to.

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Tax on Extraction of Certain Minerals and the Mining Fee as a Category of Budget Revenue in Poland

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Abstract
The subject of this article is to present the general principles concerning the operation of tax on certain minerals extraction (also called mining tax) and mining fee in Poland. The purpose of the study is to determine the extent to which the indicated public impositions related to the extraction of certain minerals supply the state budget or the municipality budget, respectively, and to assess the current legal situation in Poland in this respect. The basic research method is the analysis of legal sources, taking into account the views of the doctrine, and the analysis of statistical data on budget revenues.

Keywords
tax law; public budget; tax on mineral extraction

1 Introduction

Poland is a country with one of the highest raw material potentials in Europe.[2] The raw material base is diversified and includes a lot of different energy (coal, lignite, natural gas and even crude oil), metal (copper, zinc, lead and iron ores), chemical (sulphur, rock salt) and rock (including granite, sandstone, marble) resources distributed practically all over the country. It plays a significant role in the development of the mining industry, but also influences the development of other branches of industry, which use raw materials

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[2] Ministerstwo Środowiska, 2017: 16.

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and, as a result, the functioning of the entire Polish economy.[3] Apart from energy raw materials, metal raw materials are also very important for the country's economy, including the richest deposits of copper, which makes Poland one of the largest producers of this metal in the world.

The Polish law imposes on the activities of mining companies, in addition to corporate income tax and property tax, a number of other burdens, such as: remuneration for providing geological information, licence fees, remuneration for mining usufruct[4] and mining fee.

2 Act of 2 March 2012 on the Tax on Extraction of Certain Minerals

The Tax on Extraction of Certain Minerals is a relatively new imposition in the Polish law. The legal basis is specified by the Act of 2 March 2012 on the Tax on Extraction of Certain Minerals.[5] It has been collected since 18 April 2012, the date of entry into force of the Act. The tax constitutes revenues to the State budget [Art. 3(1) ATECM].

The Tax on Extraction of Certain Minerals covers the extraction in the territory of the Republic of Poland or the territory of an exclusive economic zone of: copper, silver, natural gas and crude oil [Art. 1(1) ATECM]. According to the Act of 25 July 2014 on Special Hydrocarbon Tax, crude oil and natural gas extraction will be subject to taxation as of 1 January 2020. However, certain entities have already been obliged to comply with measurement, recording and tax return obligations since 1 January 2016. The following are not subject to taxation: copper ore or processed copper ore output not being a concentrate, converted into the weight of copper ore output not exceeding 1 tonne per month; natural gas extracted in the amount not exceeding the equivalent of 11 MWh per month; crude oil extracted in the amount not exceeding 1 tonne per month – if used for research purposes. Also, extracted methane occurring in coal deposits and extracted methane occurring as an associated mineral are not subject to taxation [Art. 3(3) ATECM].

A taxpayer is a natural person, a legal person; an organisational unit without legal personality, including a partnership whose shareholders have been granted a licence pursuant to the Act of 9 June 2011 – Geological and Mining Law[6] – an act which is the basic legal act regulating the conduct of extraction activities, that extracts copper, silver, natural gas or crude oil within the business activities conducted. If extraction of natural gas or crude oil takes place under a cooperation agreement referred to in the provisions of the Geological and Mining Law, the taxpayer is each party to

3 Strzelec-Łobodzińska, 2010: 102.
4 See the Act of 9 June 2011 – Geological and Mining Law (consolidated text, *Journal of Laws,* 2017, No. 2126, as amended).
5 Consolidated text, *Journal of Laws,* 2018, No. 228 (hereinafter: ATECM).
6 Consolidated text, *Journal of Laws,* 2017, No. 2126.

the agreement, and if the party to the cooperation agreement is a partnership, that partnership is a taxpayer.

The tax procedure for the Tax on Extraction of Certain Minerals is based on the principle of tax self-calculation. On this account, the taxpayer of the tax in question is obliged to submit monthly tax returns to the head of the tax office by the 25th day of the month in which the tax obligation arose and to calculate and pay the tax to the account of the competent tax office. It is worth noting that the taxpayer is obliged to pay the tax on the extraction of certain minerals regardless of the financial result achieved, i.e. also in the event of a possible loss. The tax does not in any way reward replacement expenditures or exploration expenditures.

Currently, KGHM Polska Miedź S.A. with its registered office in Lubin (hereinafter: KGHM) is the only taxpayer of the Tax on Extraction of Certain Minerals in Poland. It is the world leader in copper mining, with a history dating back to the early 1940s.[7] In 2014, KGHM was the world's largest silver producer and the eighth largest copper producer.[8] KGHM is engaged in the extraction and processing of the largest deposits of copper ore in Europe, located in south-western Poland. It also exploits deposits of copper, gold, nickel and platinum located in North and South America (mine production of metals in mines in the USA, Canada, Chile) (Annual KGHM Report 2016, 2017: 14).

The introduction of the Tax on Extraction of Certain Minerals was associated with a great deal of emotions. In 2011, when the then Polish Prime Minister announced in his expose the introduction of mineral taxation, the price of KGHM shares on the Warsaw Stock Exchange fell by 13%, as a result of their sale by investors who considered the introduction of the new tax to be a drop in the company's financial potential (Rapkiewicz and Fijalkowski, 2014: 11; Duda, 2013: 126). However, the State Treasury has undoubtedly benefited from the introduction of this tax. At the moment, it is indicated that the solutions adopted in relation to the tax have proven to be very budget effective, at the same time with low collection costs. What is more, in the opinion of the Government, these solutions allowed KGHM to make at the same time appropriate profits from the extraction of copper and silver (Rapkiewicz and Fijalkowski, 2014: 5). It is indicated that the Tax on Extraction of Certain Minerals had no impact on the reduction of employment in the mining sector. Moreover, due to the lack of negative impact on the labour market, no adverse impact of the Tax on Extraction of Certain Minerals was observed on local government authorities revenues from shares in the personal income tax (Annual KGHM Report 2016, 2017: 14).

It should be stressed, however, that the mineral tax, due to its structure, does not take into account the conditions of production and the quality of the ores exploited. On the other hand, these factors affect the taxpayer's result. Mining costs are varied, and

7 See http://kghm.com/pl/.

8 In 2014, KGHM produced 1,256 tons of silver. Available at: http://kghm.com/en/kghm-worlds-largest-silver-producer [Accessed 13 Sept. 2019].

while some mines are able to bear this huge tax burden, the prospects for mines exploiting more difficult deposits are much worse (Annual KGHM Report 2016, 2017: 14).

From 18 April 2012 until the end of 2017, KGHM paid approximately PLN 10 billion of the tax in question to the State Treasury.[9]

In 2017, the revenues from the Tax on Extraction of Certain Minerals amounted to over PLN 1,786 million, which in comparison to the total budget revenues (PLN 350,414,702 thousand) means 0.5% of state budget revenues and were higher than the forecast adopted in the Budget Law by PLN 786,224 thousand, i.e. by 78.6%.

3 The Mining Fee

The mining fee is a kind of imposition paid to a municipality by an entrepreneur extracting raw materials in its territory. This is a public legal imposition.[10] The background for the considerations of its legal nature may be the idea of ecological tax reform created at the beginning of the 1990s.[11] The interest in the so-called "environmental taxation" has been reflected in the EU legislation, i.e. in the regulation (EU) No. 691/2011 of the European Parliament and of the Council of 6 July 2011 on European environmental economic accounts, the term "environmentally related tax" [Art. 2 (2)] was defined.

The mining fee was regulated by the Act of 9 June 2011, Geological and Mining Law. In this Act, the legislator indicated several types of fees related to the extraction of raw materials: one-off fees for licensed prospection and exploration of mineral deposits, as well as prospection or exploration of an underground complex in connection with the storage of carbon dioxide; fees for underground stocking or storage or of substances, waste and carbon dioxide; additional fees for activities which grossly violate the conditions specified in the licence or in the geological works design; fees for activities conducted without the licence required or without the geological works design; mining fees for the extraction of mineral from the deposit. It should be noted that the term "mining" is used only for one of the abovementioned fees, i.e. the fee charged for the extraction of the mineral from the deposit (Ofiarski, 2017: 317), and should therefore be defined as a mining fee in *the strict sense*. Other charges are also collected in connection with the economic exploitation of the environment, and these are mining fees *in the broad sense* (Ofiarski, 2017: 317).

9 See http://podatek-miedziowy.pl/ [Accessed 24 July 2018].

10 See in detail Lipiński and Mikosz, 2003: 389. More about fees and charges in the Polish law see Antonów, 2017a: 25–52; Antonów, 2017b.

11 More on this matter in Śleszyński, 2004: 9.

The Constitutional Tribunal decided that the mining fee is equivalent in nature and therefore it is not a tax, but a classic fee.[12] The fee is a *remuneration for the economic use of the environment, which is now widely recognised as a common good.*[13]

The subject of the mining fee is primarily the activity consisting in the extraction of minerals from deposits. The mining fee shall be calculated on the basis of the amount of the extracted mineral expressed in units of mass or volume. In exceptional circumstances, the basis for the mining fee is the amount of a specific chemical element expressed in units of mass, as well as of a chemical compound contained in the mineral (this applies only to one mineral – gold ore).

The rate is of quota nature. The amount of the fee shall be differentiated according to the subject of activity covered by the licence. The provisions of the Geological and Mining Law are accompanied by an annex which specifies the rate set for particular types of minerals. These rates are subject to annual indexation, namely an annual change in accordance with the annual average consumer price index planned in the Budget Law for a given calendar year. Pursuant to Art. 136(2) of the Geological and Mining Law on the basis of the index referred to in the Annex to the Law, the minister competent for the environment shall announce, by way of an announcement, in the Official Journal of the Republic of Poland "Monitor Polski" the fee rates applicable for the following calendar year.[14] For example, in the announcement of the Minister of the Environment of 5 September 2017 on the fee rates for 2018 in the scope of the provisions of the Geological and Mining Law,[15] the rate for copper ore was set at PLN 3.52 per tonne, lignite – PLN 1.91 per tonne, coal – PLN 2.42 per tonne, methane-rich natural gas – PLN 6.43 per thousand m^3 and 24.73 per thousand m^3 over 2.5 million m^3, crude oil – PLN 37.96 per tonne, 51.52 per tonne over 1,000 tonne.

It is also worth indicating that each year KGHM produces around 700 thousand tonnes of copper in various forms. As a result, the mining fee is PLN 2,464,000.

The settlement period for the mining fee is six months, calculated from 1 January to 30 June and from 1 July to 31 December, respectively (Art. 137(1) of the Geological and Mining Law). However, if the amount of the fee due for the settlement period does not exceed PLN 300, its payment obligation shall not arise. This does not exempt from the obligation to submit information on the amount of the extracted mineral (Art. 137(4) of the Geological and Mining Law).

If it is found that the entrepreneur has not paid the fee within the time limit or has paid in an amount other than that due, the licensing authority shall determine, by way of a decision, the amount of the fee due, applying the rate in force in the settlement period to which the fee relates (see Art. 138 of the Geological and Mining Law).

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[12] Judgment of the Constitutional Tribunal of 2 February 1999, U 4/98, OTK ZU No. 1/1999, item 4. See also Judgment of the Constitutional Tribunal of 13 July 2011, K 10/09, *Journal of Laws,* No. 153, item 913. See also Gliniecka, 2007: 13, 32–39; Uberman, 2002: 46.

[13] Judgment of the Constitutional Tribunal of 9 February 1999, U 4/98.

[14] More in Pest, 2016.

[15] M.P. No. 868.

The legislator has also provided for increases in the rate. The activity performed with a gross violation of the conditions specified in the licence or in the approved or notifiable geological works design is subject to an additional fee. The additional fee is independent of the other fees regulated by this Chapter. The additional fee is determined, by way of a decision, by the licensing authority or geological administration authority, respectively, which approved the geological works design or to which the geological works design was submitted (Art. 139(2) of the Geological and Mining Law).

It is also worth mentioning the sanction rate. Activities conducted without the required licence or without an approved or notifiable geological works design are subject to the so-called increased fee. For example, prospection and exploration of mineral deposits determined in the amount of PLN 50,000 for each commenced square kilometre of the area covered by such activities (Art. 140(3) sec. 1 of the Geological and Mining Law).

The revenue from the mining fee represents 60% of the revenue of the municipality in which the activity is conducted and 40% of the revenue of the National Fund for Environmental Protection and Water Management (NFEP&WM). The revenue from the fees mentioned in this section in respect of hydrocarbons comprises 60% of the municipal revenue, 15% of the district revenue, 15% of the provincial revenue in which the activity is conducted and 10% of the revenue of NFEP&WM (Art. 141(1a) of the Geological and Mining Law).

Due to the divergent interests of the parties, over time conflicts have arisen around mining fees, which comprise remuneration for the economic use of the environment. On the one hand, there is the paying entity, including KGHM, which strives to minimise it. On the other hand, there is the local government, which participates in the revenues and is interested in increasing revenues, as the mining fee is an important source of budget revenue for the municipalities in which the mineral deposits are exploited.

Currently, a draft law has been developed[16] which provides for the establishment of the Polish Geological Survey, a Polish legal entity whose purpose is to perform broadly understood tasks of the state in the field of geology, as well as extremely significant changes in the redistribution of the fee. According to the project, the revenue from the mentioned fees constitutes 60% of the revenue of the municipality in which the activity is conducted, 35% of the Polish Geological Survey and 5% of NFEP&WM. The total annual inflow of the municipality from the transfer of the revenue may not, however, exceed PLN 500 per one inhabitant of the municipality. The surplus resulting from the difference between 60% of the revenue referred to in para. 1 and the total annual revenue of the municipality determined in accordance with para. 1c shall constitute the revenue of the Polish Geological Survey (draft wording of Art. 141(1d) of the Geological and Mining Law).

[16] For more information see https://legislacja.rcl.gov.pl/projekt/12289805/katalog/12378479#12378479 [Accessed 13 Sept. 2019].

At present, this applies mainly to a few municipalities,[17] whose budgets in 2018 would no longer be increased by the huge amount of mining fees paid by KGHM so far. It regards even 30% of the budget revenue. For example, according to the preliminary calculations in the Lower Silesia case, the following municipalities may lose the most: Jerzmanowa (ca. PLN 9 million, i.e. over 30% of revenues; budget – PLN 36 million), Grębocice would lose ca. PLN 4 million annually (budget – PLN 40 million), Radwanice nearly PLN 3 million (budget – PLN 24 million).[18]

Apart from the fact that they are paid impositions, they are also – like taxes – cash, universal, non-refundable payments determined unilaterally by the state. In the judgment P 6/02 of 10 December 2002, the Constitutional Tribunal indicated that: "The fee is a public imposition with characteristics similar to those of a tax and a duty, but, unlike a tax and a duty, the fee is a payable imposition. The fees are collected in connection with clearly indicated services and activities of state or local government authorities, conducted in the interest of specific entities. They, therefore, constitute a kind of remuneration for obtaining an individual benefit offered by a public law entity. In the classic form, the fees are characterised by full equivalence, which means that the value of the administrative service corresponds to the amount of the fee collected".[19]

Mining fee is connected with a fee understood as the remuneration for the use of the environment, which is at the disposal of public bodies. The mining fee is intended to compensate to a certain extent for the damage caused by the exploitation of minerals to the environment.[20]

The mining fee constitutes a significant part of the municipality's own revenue, which provides levelling of the negative effects of mining plant operations, in accordance with the subsidiarity principle. This solution has a long tradition in the Polish legal system (historical justification) and faithfully implements the constitutional principle of financial independence (in particular expenditure independence – Art. 167(1) and (4) of the Constitution of the Republic of Poland) of mining municipalities.

4 Conclusion

1. The functioning of the Tax on Extraction of Certain Minerals is controversial with regard to the single taxpayer in the country. This situation will be changed as of 2020, as entrepreneurs who extract hydrocarbons, i.e. crude oil, natural gas (including shale

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17 Minicipalities Polkowice, Jerzmanowa, Radwanice and Grębocice, rural commune Lubin.

18 Mostly KGHM (copper) and the Turów mine (lignite) are considered. Available at: https://legislacja.rcl.gov.pl/docs//2/12289805/12378479/12378482/dokument248974.pdf [Accessed 24 July 2018]; Opłata eksploatacyjna, available at: http://info.wyborcza.pl/temat/wyborcza/op%C5%82aty+eksploatacyjne [Accessed 17 June 2018].

19 See Smoleń, 2002: 257–258.

20 See also the judgement of the Supreme Administrative Court in Warsaw of 15 September 1998, SA 526/98.

gas) and their natural derivatives,[21] will start paying two new taxes to the state – a Tax on Extraction of Certain Minerals and a Hydrocarbon Tax. The ratio legis is related to geological surveys conducted, which indicate a high probability that large hydrocarbon deposits occur in Poland, particularly in shale formations.[22]

2. It is indicated that the tax adversely affects the long-term profitability of the company's mining operations and may lead to a reduction in investments that require significant expenditures. The assessment of the effects of the introduction of the Tax on Extraction of Certain Minerals should be conducted not only as a process of implementing the imposition at present, but above all should include the foreseeable effects in the future. It is important to refer to the impact of the tax on government revenues and the mining sector in the future and not only to examine the effects of the past, relatively short, period.

3. In conclusion, the mining fee is a public imposition which, in addition to its fiscal function (which is of secondary importance), also implements a number of non-fiscal objectives linked to the pursuit of compensation for operating costs and environmental damage, as well as for the consequences of such damage. The applicable legal structure of the fee must be considered a non-taxable charge, as compensation for environmental damage caused by the exploitation of minerals. It constitutes a particular price for the use of renewable and non-renewable environmental resources or the payment for the right to use the environment.

The compensation in question relates to municipalities affected by mining plant operations. In the context of the suggested changes, it is worth to note the accurate jurisprudence of the Constitutional Tribunal, according to which: if we assume that "at the starting point, i.e. at the moment of adopting the act, the municipalities had at their disposal funds to conduct their tasks, pursuant to Art. 167(1) of the Constitution, the reduction of the property being a source of their own revenue, with no compensation and unchanged level of tasks, constitutes a breach of the Constitution".[23]

It should be stressed that the distribution of revenue sources between the state and the local government should be adequate, should take place by law, in advance and basically for an indefinite period of time, on the basis of general and abstract premises – identical for each of the local governments (Art. 32 of the Constitution of the Republic of Poland).

[21] With the exception of methane in coal deposits and methane deposits occurring as an associated mineral.

[22] Act of 25 July 2014 on Special Hydrocarbon Tax (consolidated text, *Journal of Laws,* 2018, item 246, as amended).

[23] Judgment of the Constitutional Tribunal of 12 April 2000, K 8/98.

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Shaping Financial Accountability Via Participatory Budgeting – Theoretical Framework for Axiological and Legal Analysis[1]

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Abstract

Despite the potential of participatory budgeting, its possibilities to strengthen the common good principle are not fully implemented, due to the insufficient accountability for the local expenditure. Thus, the main purpose of this article is to propose the theoretical framework for shaping financial accountability via participatory budgeting. We will understand financial accountability as the social mechanism enabling significant enhancement via participatory budgeting of the cities inhabitants' influence on the executive and decision-making bodies in the field of the allocation of local budget's funds, to enhance the principle of common good due to the double-loop feedback of public values and the legal norm.

Keywords

public accountability; participatory budgeting; public values; moral norm; legal norms

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1 Introduction

Local governance that – in contrast to the previously dominant concept of local government – includes the citizens and the residents of local communities to decision-making process without limitation of their role (so far as the concept of local government is concerned) at most to the choosing their representatives in the local elections. Participatory budgeting (PB) is a part of the concept of public governance which assumes the citizens' participation in the decision-making process. This concept constitutes the extension of the New Public Management which began to dominate in the public administration in the eighties of the previous century as the result of the final collapse of the belief in the effectiveness of Weber's model of bureaucratic administration (Zawadzka-Pąk and Lotko, 2018).

Participatory budgeting means a year-long decision-making process through which citizens negotiate among themselves and with local government officials in organised meeting and then vote over the allocation of local spending (Wampler, 2008). The decisions taken in such a way are incorporated to the local budgets. The introduction of the PB to the traditional local budgetary procedure reduces (but does not eliminate until covering all local government expenditures by the BP) the discretional decisions of bureaucrats and officials about the allocation of public expenditures.

Despite the potential of a PB, its possibilities to strengthen the common good principle are not fully implemented, due to the insufficient accountability for local expenditure. Economic and political sciences provide arguments that public accountability is easier to achieve at the local level rather than at the central one, especially due to the territorial proximity of residents and local authorities (Yilmaz et al., 2012).

Thus, the main purpose of this article is to propose the theoretical framework for shaping financial accountability via participatory budgeting. We will understand financial accountability as the social mechanism enabling significant enhancement via participatory budgeting of the cities inhabitants' influence on the executive and decision-making bodies in the field of the allocation of local budget's funds, to enhance the principle of common good due to the double-loop feedback of public values and the legal norm.

The paper focuses on a central research question in public administration research and practice: Is it possible to enhance financial accountability via participatory budgeting? Our hypothesis is as follows: Shaping financial accountability via participatory budgeting requires the existence of certain public values.

As the article is theoretical, it does not present the results of the empirical research, the non-obstructive method to analyse the foreign and Polish literature presenting the results of both theoretical and empirical research.

In the article, having presented in the introduction the methodological issues, first, the constitutional value and principle of common good (sec. 2), the problems of representative democracy (sec. 3), and the financial accountability (sec. 4) were first explained. Next, the participatory approach to financial accountability (sec. 5) and the need to enhance public accountability via public values and legal norms (sec. 6) were presented. We conclude that the enhancement of public values should increase the financial accountability to strengthen the constitutional principle of a common good.

2 Constitutional Principle and the Value of Common Good

According to Art. 1 of the Constitution of the Republic of Poland of April 2, 1997, the Republic of Poland is the common good of all citizens. On the grounds of the Polish legislation, common good is the constitutional value as well as the constitutional principle. On the grounds of the financial law, the public financial funds and an appropriate way of spending them should be the basic, though obviously not the only one instrument of the realisation of the common good value (principle). This was confirmed by the Constitutional Tribunal recognising a properly constructed (and balanced) budget as a necessary condition for the state to realise the goal of caring for the common good (PL: Constitutional Tribunal: SK 36/07, III. 4).

3 Democracy in Deficit

The main characteristic of the democratic system consists in electing the citizens' representatives to make public decisions, including the financial ones, in the public interest, which is valid at both central and local level. However, the problem arises as the citizens' activity is mainly limited to the participation in the elections. Using Tocqueville's words (De Tocqueville, 2010) each individual endures being bound because he sees that it is not a man or a class, but the citizens emerge for a moment from dependency in order to indicate their master and return to it. In consequence, the contemporary societies are struggling with "a participation pathology" (i.e. the lack of citizens' conviction that participation can help to solve public problems) and with "a representation pathology" (i.e. the reduced citizens' sense of being represented by those they had elected) (Allegretti, 2014). In such circumstances, public spending in the public interest is limited by the principal-agent problem (Jensen and Meckling, 1976). The separation of ownership and control causes serious conflicts of interests, as the politicians (agents) chosen (employed) by the citizens (principal) do not always act in the interests of the latter, but seek to realise their own needs, thus the principal' moral hazard problem appears (Miller and Whitford, 2006).

4 Financial Accountability as a Sort of Public Accountability

Thus, to ensure public spending in the public interest, there is a need for an effective form of financial accountability. Although the concepts of accountability among the researchers are not fully consistent, T. Schillemans, having analysed 210 academic papers, argues that the minimal consensus on accountability consists of the following observations.

- Accountability is about providing answers, about answerability, towards others with a legitimate claim in some agents' work.
- Accountability is furthermore a relational concept, as it focuses the attention on agents who perform tasks for others and thus may be held accountable by others.
- Accountability is retrospective and focuses on the behaviour of some agent in general, ranging from performance and results to financial management, regularity or normative and professional standards.
- Accountability is not a singular moment or situation, but rather refers to a layered process (Schillemans, 2013).

However, the problem of contemporary democracy consists in remoting the voters from the representatives elected by them. Due to the illusory contacts between principals and agents, the politicians are becoming less and less accountable to the citizens (Toffler, 1998). That is the consequence of the fact, that in the traditional, representative democracy, two traditional types of public accountability took place, i.e. the vertical accountability and the horizontal one. The vertical accountability is realised by the citizens (society) towards public officials, the elected ones and expansively to the administration subordinated to them (O'Donnell, 1998), using its basic instrument (the election), during which voters can, at least in theory, hold accountable for decisions realised in the public interest. The main disadvantage of this approach is limiting the role of citizens to the only role of a voter, while the rulers make countless decisions affecting the well-being of each of them. The extension of the vertical accountability is the horizontal one, based on the distribution of authority among different departments or branches of government and the system of checks and balances (Przeworski, 1999).

5 Participatory Approach to Financial Accountability

To resolve these democracy's deficits, political science proposes the concept of the participatory democracy (Pateman, 1970); deliberative democracy (Bohman, 1998), or direct democracy (Saward, 1998), whereas the public management science tries to solve the problem via the similar governance concept (Kooiman, 2002).

Theoretical grounds to shape the financial accountability via public participation were laid out by S. Arnstein[3] and B. Damgaard and J. M. Lewis. S. Arnstein argues that the citizens' participation and involvement in public affairs play an important role in increasing their control powers conceived the ladder of citizen participation. Using the implications of her findings, B. Damgaard and J. M. Lewis proposed the use of particular levels of participation to build five levels of participation in accountability (Table 1).

Table 1. Shaping Public Accountability via Public Participation

Levels of participation as presented by S. R. Arnstein (Arnstein, 1969)		**Levels of accountability as presented by B. Damgaard and J. M. Lewis** (Damgaard and Lewis, 2014)	
Citizen power	Citizen control	Joint ownership	Set the agenda (policy-making) Define correction/innovation to ensure effectiveness and responsiveness ▪ Define and apply consequences ▪ Pass judgment (full range) ▪ Pose specific questions
	Delegated power	Collaboration	Impact the agenda (services delivered) ▪ Pass judgment (full range) ▪ Pose specific questions
	Partnership	Advice	Impact the setting or change the standards monitored ▪ Pass judgment (limited range) ▪ Pose specific questions
Tokenism (illusion of participation)	Placation	Involvement	Monitor the processes ▪ Pose specific questions
	Consultation		Discuss the issues (place at the table) ▪ Pose general questions
	Informing	"Education"	Receive information ▪ One-way communication
Non-participation	Therapy		Subjects of persuasion ▪ Non-participation
	Manipulation		Subjects of misinformation ▪ Non-participation

Source: Damgaard and Lewis, 2014

Climbing the consecutive ladder's steps increases the awareness and control of citizens and enables the creation of the civil society and climbing the last ladder's participation, i.e. joint ownership. The latter seems to constitute an important factor shaping the agent's accountability and reduce the negative effects of lack of the real ownership relation in the public sector, as they exist in business between shareholders and managers. In consequence, the forms of the "participation by invitation" appearing when the public institutions officially open the social dialogue and "admit" the presence of citizens in moments of public debate and decision-making (Allegretti, 2014) have the potential

[3] The theory presented by S. R. Arnstein is currently one of the classics of social participation, her article in English-language journals has been cited more than 3,000 times.

to strengthen the financial accountability, and in consequence, reduce the problem of separation of ownership between citizens and politicians.

With the emergence of PB based on the participatory approach, a new form of financial accountability took shape. PB cuts across vertical, horizontal, and societal accountability (Wampler, 2004), and it is better viewed mainly as a form of societal accountability (Ma, 2009) because the control mechanism that it relies on is societal (citizen) control. In consequence, three forms of financial accountability should be taken into consideration, i.e. bureaucratic, horizontal, and societal – each associated with three types of budgetary controls – administrative, legislative and societal (Ma and Hou, 2009). First, participatory institutions have the potential to allow citizens to vote for representatives and specific policies (vertical), second, to act as a check on the prerogatives and actions of mayoral administrations, and third to rely on the mobilisation of citizens into political processes as a means to legitimate the new policymaking process (societal) (Wampler, 2004). These three types of public accountability were distinguished using the criterion of actors toward whom public authorities are accountable. In case of the horizontal one, accountability is realised towards the hierarchically superior public officials, whereas vertical accountability, analogically as the societal accountability, is strongly rooted in the society, even if the strength and scope of citizens' influence in the two cases are different.

All three forms of accountability are essential to ensuring financial accountability. However, as in reality, no country seems to have all of them in place at the beginning of the search for accountability (Ma and Hou, 2009), there is a strong need to continue the research. B. Wampler has observed that PB only partly helped to extend accountability in some Brazilian cities, whereas in the others, PB had a negligible impact on this outcome. "While PB does offer new opportunities for participation and decision-making, it continues to bear the risk that authority will be concentrated in the mayor's office, which has the potential to undercut efforts to establish a system of checks and balances at Brazil's local level of government" (Wampler, 2004).

6 The Need to Enhance Public Accountability via Public Values and Legal Norms

However, to effectively weaken the moral hazard related to the public-agent problem using the societal accountability, public values as a solid base are needed. Then, by climbing the particular level of participation and accountability, getting closer to the joint-ownership sought to be possible, and by that, overcoming the facet of principal-agent problem related to the separation of ownership and control between citizens and politicians.

Although some previous researchers have explored the question of the link between PB and social accountability (Ma and Hou, 2009; Wampler, 2004) little attention was paid to public values as the instrument of the reduction of the moral hazard problem resulting from the separation of the ownership and power between the citizens and local politicians. Therefore, to fill the existing research gap, we rely on the existing catalogue of public values, reconstructed by T. B. Jørgensen and B. Bozeman from approximately 230 studies dealing with public values (Table 2).

Table 2. Catalogue of Public Values

Accountability, adaptability, advocacy, altruism
Balancing interests, benevolence, businesslike approach
Citizen involvement, citizens' self-development, collective choice, common good, competitiveness, compromise, continuity, cooperativeness
Democracy, dialogue
Effectiveness, efficiency, employees' self-development, enthusiasm, equal treatment, equity, ethical consciousness
Fairness, friendliness
Good working environment
Honesty, human dignity
Impartiality, innovation, integrity
Justice
Legality, listening to public opinion, local governance
Majority rule, moral standards
Neutrality
Openness
Parsimony, political loyalty, professionalism, protection of individual rights, protection of minorities, productivity, public interest
Reasonableness, regime dignity, regime loyalty, regime stability, reliability, responsiveness, risk readiness, robustness, rule of law
Secrecy, shareholder value, social cohesion, stability, sustainability
Timeliness
User democracy, user orientation
Voice of the future
Will of the people

Source: Jørgensen and Bozeman, 2007

Traditionally, the values are divided into terminal values and the instrumental ones (Rokeach, 1973). In our paper, accountability is understood as the terminal value, whereas the catalogue of instrumental values aiming to shape it can be reconstructed from the catalogue of public values. The preliminary theoretical reflections on the essence of the PB process and the financial accountability lead to the conclusions that eight public values presented in Figure 1 are significant for shaping financial accountability within the PB process.

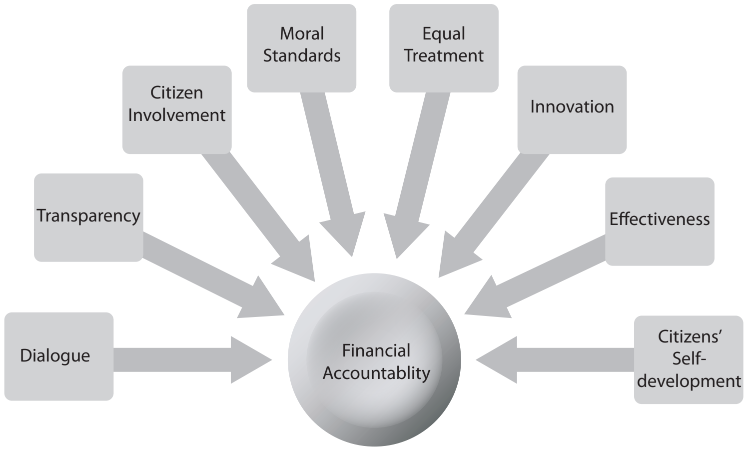

Figure 1. Public values significant for shaping financial accountability via PB (preliminary catalogue)

Source: Compiled by the author.

All these public values can be shaped by legal provisions resulting from central and local legal regulations on public participation (consultations) and PB, as – according to L. Petrazycki[4] – the law seems to be a necessary factor complementing and strengthening moral motivation. It contributes to shaping moral attitudes and moral awareness of society. It plays the role of a specific catalyst in the process of forming moral judgments (Breczko et al., 1999). In this context, and in reference to the educational aspect of the function of law, it is worth paying attention to L. Petrażycki's emphasis on the feedback of the development processes of the psyche and the development of law and morality. In his theory of social action of law and morality, discussing the problems of their educational and motivational impact, he showed the influence of both standard systems on the development of the human psyche and change of people's character towards their ever better adaptation to social life, on the "civilizing" properties of law (Borucka-Arctowa and Skąpska, 1993). At the same time, however, the Author stated that these processes are of a reciprocal character, and the development of human psyche and the development of law are mutually conditional. The human psyche, also by the power of its internal dynamics, develops in the direction of ever better adaptation to social life, which is expressed in the gradual elimination of egoistic traits and the development of altruistic features. Law and morality (public values) in the process of its development, therefore adapt to the increasingly higher level of human development (Petrażycki, 1960).

4 Leon Petrażycki is the father of the psychological direction in the theory of law. Cf. Petrażycki, 1959.

7 Conclusion

As the purpose of the paper was to propose the theoretical framework of shaping financial accountability via PB, the presented theoretical considerations lead to the conclusion that financial accountability in the PB process could be enhanced via selected public values. In this way, the research hypothesis seems to be confirmed; however, the proposed catalogue of public values need to be verified in the process of empirical (qualitative) research on the role of public values in the process of enhancement of financial accountability in selected case studies, i.e. cities that have implemented PB.

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Ability-to-pay Principle and the Structure of Personal Income Tax in Poland (Selected Issues)

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JEL Classification: K34, H24

Abstract
The ability-to-pay principle is one of the two principles that legitimise the collection of taxes. It pertains to the correct distribution of the tax burden that gives rise to a great deal of controversy and disputes in the theory and practice of financial law. The objective of this article is to demonstrate whether the Polish legal structure of personal income tax enables the distribution of tax burdens among citizens in accordance with this principle.

Keywords
ability-to-pay; personal income tax; tax progression; tax-free amount

1 Introduction

The doctrine of financial law is constantly accompanied by the question of the desired (appropriate) distribution of tax burdens. The answer is not simple, as it requires setting limits to taxation and thus indicating what is meant by tax justice and how to achieve it. The literature on financial law points out that tax justice can be achieved through two tax theories: equivalence and ability-to-pay (Gomułowicz, 1995: 59). However, currently the fair tax burden cannot be justified by its development proportionally to benefits acquired by the entity obliged to pay taxes on public law entity authorised to obtain tax revenues (Nita, 2013: 19–20). The reason for this is, *inter alia,* the absence of an objective measure of the benefits provided to the taxpayer by the state or a local self-

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government authority (Gomułowicz, 2001: 66). This is due to the fact that in the concept of the equivalence of benefits, tax is similar to the price that a taxpayer is required to pay in return for the provision of public and social goods (Nizioł, 2007: 120). For this reason, in democratic states under the rule of law that frequently declare and guarantee the protection of citizens' financial and economic interests in their constitutions, the ability-to-pay theory is universally applied. It assumes that the amount of tax burdens should correspond to the taxpayer's individually determined ability to bear the tax burden.

The objective of this article is to show whether the current legal structure of personal income tax in Poland guarantees the distribution of tax burdens among citizens in accordance with the taxpayer's ability-to-pay principle. However, due to its limited scale, the considerations are limited to the analysis and assessment of two elements of the structure of this tax, *id est* the tax-free amount and the tax progression.

2 The Essence of the Taxpayer's Ability to Pay

The ability-to-pay principle as a rule justifying tax collection appeared in the 19th century doctrine of financial law with the emergence of a new direction in tax thought, exposing the non-fiscal objectives of taxation. In literature, its main representative is considered to be Adolf Wagner, a representative of the so-called German Historical School. He claimed that taxes ceased to be used only and exclusively to accumulate public revenues, but they also fulfil broadly understood socio-political and social functions, including an effective instrument for correcting inequalities in the distribution of the national income. Conversely, such objective of the tax policy is achievable, if the citizens are involved in financing costs of the state's operation differently and adjusted to their individual subjective payment ability (Zieliński, 2016: 702).

The ability-to-pay concept is vague, ambiguous and stirs disputes (Gomułowicz, 1990: 27). In legal and financial literature, it is synonymous with the strength and ability of a taxpayer to make a financial sacrifice (Gomułowicz, 2013: 50). In view of the foregoing, it can be concluded that it constitutes the taxpayer's ability to bear a tax burden which does not fundamentally alter his or her economic position (Gomułowicz, 1990: 27). Therefore, the respect of the ability-to-pay principle requires adjustment of tax burdens to the individual possibilities of providing services, based on taking into account all of its elements, both personal and, above all, economic and financial (Nizioł, 2007: 119). These include, in particular, the amount of income earned by the taxpayer in the tax year, as well as significant circumstances differentiating his or her personal situation, such as: civil and family status, the number of dependants, health and age, ability to work, and extraordinary events (e.g. natural disasters with damage to property or personal nature that weaken that ability) (Pomorska, 2016: 49; Gajl, 1995: 25–26; Kalinowski, 1996: 55).

The literature indicates that the application of the ability-to-pay principle has certain advantages (Gomułowicz, 1998: 88; Nizioł, 2007: 120). Firstly, since it requires tax to be considered a general obligation and not to be combined with any payment on the part of the state, the distance between the taxpayer and the spending of funds from the state budget is maintained, which in turn ensures impartiality towards the citizen. Secondly, it contains a characteristic measurement scale of the tax burden as – if properly implemented – it may put an end to the fiscalism associated with the collection of (economically) unjustified tax burdens. Thirdly, the tax ability principle requires that the legal and economic protection of sources of taxation be respected, both in terms of the benefits to the taxpayer and to the state. Finally, by applying the principle in question, it is possible to gain public acceptance of tax law, which is undoubtedly important for the authority of the state and for the law itself. Negating this principle may therefore erode attitudes towards taxation, which in turn may jeopardise the smooth functioning of the fiscal function of the tax.

Considering the foregoing, in the modern fiscal doctrine, the ability-to-pay principle is considered the cornerstone of fair taxation. Equating the ability to pay with a fair distribution of the tax burden has, in turn, led to vertical and horizontal tax justice. The first one is observed when individuals whose financial position is better are levied with greater taxes than those whose abilities to assume tax liabilities are lesser (Famulska, 1996: 3). This justice is therefore expressed in a differentiated ability to pay, with less attention to the taxpayer and more to the amount and type of income he or she receives (Szołno-Koguc, 2016: 169). On the other hand, the horizontal tax justice presupposes equal treatment of entities in identical economic conditions, which, in turn, is connected with respect for the postulates of universality and uniformity of taxation.

The literature indicates that the ability-to-pay concept that individualises the tax burden mainly applies to direct taxes (Gomułowicz, 1995: 62), most notably taxes on general income that reflects the taxable capacity of a taxpayer more than partial income (Pomorska, 2009: 129). It follows from the above that the rules for burdening natural persons' income cannot be dissociated from their ability to pay. Therefore, in the legal structure of this tax, the legislator applies elements enabling the aforesaid postulate to be carried out. These primarily include the amount of income exempt from taxation, tax allowances and exemptions, the type of tax scale applied, as well as preferential taxation of income of the taxpayer's family members.

3 Legal Structure of Personal Income Tax in Poland

The rules for burdening the income of natural persons in Poland are regulated by the Personal Income Tax Act of 26 July 1991 (hereinafter: Act). This tax is paid by natural persons generating income from the sources of income listed in the Act.[2]

[2] The sources of revenues whose incomes are levied with this tax may be divided into four fundamental groups. The first group comprises revenues from the taxpayer's own work and they are as follows: remuneration paid under employment relationships, contract of mandate, contract for specific work and the like, revenues generated by self-employed professionals, revenues from the non-agricultural business activity and form special divisions of agricultural production. The second group includes

The tax base in this tax is income obtained from one source of revenues or a total amount of incomes generated from several sources of revenues subject to accumulation. Unless otherwise specified in specific provisions, income from the source of revenues is defined as the surplus of revenues from this source over deductible costs of income generation during the fiscal year. The tax base determined in this way is further reduced by the income tax deductions set out in the Act[3] and then it is subject to taxation with the tax progression shown in the table below.

Table 1. Scale of personal income tax in 2018

Tax assessment basis (in PLN) over	to	Tax amounts to
	85,528	**18%** less tax reduction amount
85,528		PLN 15,395.04 + **32%** surplus above PLN 85,528 less tax reduction amount

Source: Art. 27(1) of the Act.

Further, the calculated tax is reduced by the tax deductions set out in the Act[4] and is paid into the bank account of a competent tax office within the period of lodging the tax return, i.e. by no later than the 30th day of April of the subsequent tax year, amounting to the difference between the tax due on income set forth in the tax return and the total advance personal income tax payments made during the tax year.

4 Selected Instruments Taking into Account the Taxpayer's Ability to Pay Included in the Legal Structure of the Polish Personal Income Tax

An analysis of the legal structure of personal income tax in Poland allows stating that it generally provides for all the elements taking into account the taxpayer's ability to pay. These are a tax-free amount, tax credits and allowances, tax progression, and preferential rules for burdening income of the taxpayer's family members that enable

subsidy revenues such as: disability pensions, retirement pensions, some scholarships, benefits and the like. The third group consists of revenues from capitals and property rights and their sale (e.g. shares in joint-stock companies, shares, bonds, interest on bank savings, sale and replacement of real estate property). The last group includes revenues from other sources such as revenues that are not based on disclosed sources or deriving from undisclosed sources (Wójtowicz, 2014: 243).

3 These are as follows: social security contributions, disability allowance, Internet allowance, donations to the purposes specified in the Act in kind or in cash up to a total amount of 6% of the taxpayer's annual income, donations to charity and care activities of the Catholic Church (or other churches authorised under agreements), expenditures on research and development, and payments made by the taxpayer into an individual pension security account during the tax year.

4 They are as follows: social security contributions amounting to maximum 7.75% of their assessment, expenses for children upbringing and the so-called abolition allowance.

joint taxation of income of spouses and of single-parent families. However, as indicated in the introduction, further consideration will only focus on the analysis and assessment of two of them, *id est* a tax-free amount and tax progression.

4.1 Tax-free amount

The reference books rightly postulate that the taxpayer's income that constitutes the basis for taxpayer's material existence and is the only source of income should not be subject to taxation at all (Kosikowski, 2011: 300). There is no doubt that the taxpayer as a natural person needs to have a certain amount of income to live. Otherwise, not only can this person be a taxpayer of income tax, but he or she also becomes a beneficiary of various forms of social assistance, which are necessary for this person's biological existence (Wójtowicz, 2017: 20). For this reason, the legal structure of personal income tax should include an amount of non-taxable income, and its amount should reflect the minimum amount of financial resources necessary for the taxpayer to satisfy his or her basic needs, *id est* it should take into account the so-called minimum subsistence.

The tax-free amount is a permanent component of the construction of personal income tax in Poland. It appeared both in the legal regulation of the interwar period and in the period of centrally planned economy (Duda-Hyz, 2016: 46–53). It should be noted that its amount is not specified directly in statutory regulations, but it results indirectly from the fact that the income tax calculated according to the tax progression is reduced by the amount of tax reduction indicated in the Act. Pursuant to Art. 27(1a) of the Act, this amount is as shown in the table below.

Table 2. Amount of income tax reduction in 2018

Tax assessment basis over	Tax assessment basis to	Tax reduction amount
	PLN 8,000	PLN 1,440
PLN 8,000	PLN 13,000	PLN 1,440 – [PLN 883.98 × (tax assessment basis – PLN 8,000)/PLN 5,000]
PLN 13,000	PLN 85,528	PLN 556.02
PLN 85,528	PLN 127,000	PLN 556.02 – [PLN 556.02 × (tax assessment basis – PLN 85,528)/PLN 41,472]
PLN 127,000		Lack of tax reduction amount

Source: The author's calculations under Art. 27(1a) of the Act.

According to these data, personal income tax is not collected in Poland from taxpayers who earned income lower than PLN 8,000 in the tax year. At the same time, it is the maximum tax-free amount. For taxpayers whose annual income ranges from PLN 8,000 to PLN 13,000, the tax-free amount decreases from PLN 8,000 to PLN 3,091. A similar situation is faced by taxpayers whose annual income ranges from PLN 85,528 to PLN 127,000.

Their tax-free amount is reduced from PLN 3,091 to PLN 0.00, respectively. On the other hand, those taxpayers whose annual income ranges from PLN 13,000 to PLN 85,528 are entitled to a fixed tax-free amount of PLN 3,091, and natural persons whose annual income exceeds PLN 127,000 are not entitled to the tax-free amount.

In assessing the aforesaid solutions, it should first be noted that they are complex and difficult to apply. Therefore, they negate one of the fundamental principles that forms the basis for the general personal income tax system, namely the simplicity of taxation. Secondly, the tax-free amount is now degressive, *id est* it decreases with an increase in the tax base and is not available to all taxpayers. This solution should be considered consistent with the concept of the taxpayer's ability to pay, but with the proviso that the method of differentiating this amount (*id est* the value of the tax base on which this amount depends) adopted by the legislator is arguable. As a result, over 80% of the taxpayers are entitled to the tax-free amount of PLN 3,091 per annum. Thirdly, it should be noted that only the maximum tax-free amount (amounting to PLN 8,000 per annum) corresponds to the level announced by the Institute of Labour and Social Affairs, the so-called minimum subsistence level.[5] In 2018, it amounts to PLN 9,111.81 per annum, which means that this amount constitutes about 114% of its value. It should be noted, however, that this is the biological minimum set for a one-person household. If the tax-free amount is compared with the minimum subsistence values set for other types of households, the situation changes dramatically. For a three-person household the biological minimum value amounts to PLN 18,267 per annum, whereas in a five-person household this amount equals to PLN 30,133.20. This means that the maximum tax-free amount represents just 43.8% of the value of the minimum subsistence level adopted for a three-person household and 26.5% of the value of this minimum level determined for a five-person household. These ratios are drastically reduced, if the aforesaid minima are compared to the tax-free amount that is currently due to most taxpayers, *id est* PLN 3,091 per annum. Therefore, it follows from the above that this amount constitutes only about 34% of the minimum subsistence level set for a one-person household, about 17% of this level set for a three-person household, and about 10.3% of this level set for a five-person household.

It is also noteworthy that the implementation of the ability-to-pay principle requires the tax-free amount to be individualised, *id est* this amount is made dependent on the personal situation of a particular taxpayer and his or her family. Unfortunately, in the legal structure of personal income tax in Poland, it is difficult to find the implementation of this postulate, apart from the degressive nature of the tax-free amount and the fact that it is granted only to selected taxpayers. Definitely, there are no absence of such solutions which

5 The minimum subsistence level, also called the biological minimum, defines the limit below which there is a biological threat to human life and psychophysical development, and it includes expenditure on survival, primarily related to the purchase of food (at a level that does not give rise to the biological degradation caused by quantitative and qualitative diet deficiency), the cost of maintenance and use of the apartment, and to a certain extent expenditure on the purchase of clothing, medicines, personal care products, as well as books and school supplies related to the performance of compulsory schooling.

can be found in tax jurisdictions of other states, and which in practice respect this demand. For example, in Germany the tax-free amount is twice as high for married couples who settle together (EUR 17,304 per annum) as for other taxpayers (EUR 8,652 per annum). In Spain, on the other hand, the tax-free amount equals to EUR 5,500 per annum, while for taxpayers aged over 65 this amount is EUR 1,150 higher and for persons aged over 75 it amounts to EUR 1,400 higher per annum. In Ireland, the tax-free amount to which taxpayers are entitled depends on their marital status. For married/registered couples and widowers in the mourning year, this amount is EUR 3,300 per annum, for unmarried persons this amount equals to EUR 1,650 per tax year, and for widowers and singles living in civil partnerships it amounts to EUR 2,190 per tax year.

4.2 Tax progression

In order to spread the tax burden according to the taxpayer's ability-to-pay concept, the construction of tax progression is widely used in addition to the tax-free amount. Its essence consists in a relatively heavier burden on higher incomes and a lighter one on lower income, which is intended to reduce the income inequality among citizens. Since its implementation, personal income tax in Poland has been a progressive tax. In the years 1992–2008, a three-tier tax scale was in force with rates ranging from 19% to 45%.[6] However, starting from 2009, the scope of this progression was significantly narrowed since there was implemented a two-tier tax scale with rates of 18% and 32% which is in force until now and in which the amount of PLN 85,528 was adopted as a criterion for differentiating their amount. Therefore, the introduced change contradicts the rule of shaping tax obligations in accordance with the taxpayer's ability-to-pay concept. It should be considered that the criterion for differentiating the amount of progressive tax rates was PLN 85,528. As it is indicated in the literature, it was taken over automatically from the previous three-tier scale in which it was used as the marginal threshold of the second income bracket (Pomorska, 2016: 62–63). It has, therefore, not been adapted to economic, social and demographic conditions and has been preceded by a macro- and micro-economic analysis in order to maximise the beneficial impact of this tax on the economic and social spheres (Wolański, 1999: 3). As a result, the scope of progression in personal income tax in Poland is too narrow. This is due to the fact that the same tax rate of 18% is imposed on both low income from minimum and average wages or pensions, and much higher income of over PLN 7,000 per month (Pomorska, 2016: 61–62). Moreover, the progression in personal income tax is only apparent as, in practice, it takes the form of proportional tax. This is proved by statistical data of the Ministry of Finance, according to which in the years 2009–2016, the tax rate was

6 In 2005, another fourth tax rate of 50% was implemented to burden income exceeding PLN 600,000 in the tax year. However, due to the lack of an appropriate period of vacatio legis, the Constitutional Tribunal considered its introduction inconsistent with the Constitution of the Republic of Poland.

lower, *id est* 18%, from 98.41% to 96.96% of the total taxpayers of this tax, and only from 1.59% to 3.04% of taxpayers who paid the tax at a higher tax rate.

In the light of the foregoing and the postulates resulting from the ability-to-pay principle, there is no doubt that the construction of tax progression in Poland needs to be urgently reviewed. It should aim to increase the number of tax thresholds, e.g. to four, to introduce corresponding tax rates (ranging from 10% to 32%) and to substantially rebuild the income capacity of its various ranges (Pomorska, 2016: 65). As it is emphasised in the literature, only a mild progression can combine the effective implementation of tax revenues with the taxpayer's ability to pay (Gomułowicz, 2013: 55).

5 Conclusion

To sum up, the aforesaid considerations on the tax-free amount and the tax progression as the construction elements of this tax that take into account the taxpayer's ability to pay, it should be noted that they implement this postulate to a rather limited extent. This is mainly due to the fact that the tax-free amount is not individualised. As indicated, over 80% of the taxpayers are entitled to the same amount and additionally it does not correspond to the value of the so-called minimum subsistence. Moreover, when determining the amount of the tax, the legislator did not consider such circumstances as the taxpayer's age, marital status or joint taxation of spouses (spouses who jointly tax their income are entitled to the same tax-free amount as those who account for this tax individually) that significantly diversify this ability. Similarly, the tax progression included in the construction of this tax is too narrow and, consequently, it does not protect the least prosperous taxpayers from excessive and inadequate taxation in relation to their ability to pay, hence it does not distribute the social tax burden in a fair way.

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