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Articles

Tax Ruling Regulations in Poland – Evolution of the Institution and Evaluation of the Regulations

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Abstract: This contribution deals with tax ruling in Poland, its evolution, evaluation of legal solutions concerning it, as well as the practice of issuing those rulings by competent tax authorities. The main objective of the contribution is to confirm the hypothesis that legal regulations concerning tax ruling provisions and the practice of issuing them did not sufficiently ensure the main purpose of the ruling, i.e. uniformity of application of tax law by the fiscal apparatus, as well as legal security of taxpayers. The research used a dogmatic and legal research method, which was supplemented by an analysis of the case law of administrative courts and the Constitutional Tribunal, as well as the existing statistical analysis.

Keywords: uniformity in the application of tax law; general tax ruling; individual tax ruling; amendment, annulment or expiration of the tax ruling

1. Introduction

The institution of tax ruling in Poland has been functioning since 1998. It is regulated by the Act of 29 August 1997, The Tax Ordinance[1] (hereinafter referred to as TO). The main reason for the introduction of this institution was the increasing complexity of the Polish tax law, which in turn translated into the growing complexity of economic relations and phenomena, as well as fears of taxpayers' efforts to circumvent tax law and avoid taxation.[2] Additionally, the taxpayer's self-calculation method being adopted in the Polish tax law transferred the burden of performing complicated and risky activities in the application of tax law, such as how to determine the provisions of both material and procedural tax law, their interpretation and application in relation to the actual state of affairs to the taxpayer. It created a threat to the legal security of the individual, who bears the risk and consequences of possible mistakes or errors made while calculating the tax.[3] These circumstances required the introduction of regulations that would prevent the tax authorities from issuing different decisions in the same factual and legal circumstances, and on the other hand would allow the taxpayer to obtain professional support provided by tax authorities.

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The Tax Ordinance, in its original wording,[4] provided for two types of tax rulings: official tax ruling and written information on the scope of application of tax law provisions.

Written information was issued by the competent tax authority of the first instance at the written request of the taxpayer, payer, and collector in their individual cases. The reason for introducing them was the resignation of the legislator from the concept of broad information to taxpayers on the provisions of tax law.[5] According to the adopted principle of information (Article 121 § 2 of the TO) the tax authorities are obliged, at the party's request, to provide only the necessary information on the tax law and only those that are related to the subject of the proceedings, hence the taxpayer's (payer's, collector's) right to obtain written information was to supplement the above principle.

Official tax rulings of the Minister of Finance (MF) constitute a specific legal aid in the interpretation of complicated tax law provisions[6] both for citizens and tax authorities. They are the resolution of an abstract problem that occurred in the field of application of tax law.[7] The purpose of introducing them was for the MF to ensure uniformity in the application of tax law by all tax authorities, in case of discrepancies in the practice of their application.

Uniformity in the application of provisions in tax law is of particular importance – it is a condition for the implementation of the principle of equality and justice of taxation.[8] It ensures that all taxpayers who are in the same legal and actual status will be treated equally by the tax authorities, which means they will bear the same tax burden. It also supports the implementation of the principle of taxpayers' certainty of taxation and their legal security, as it enables them to decide on their actions on the basis of full knowledge of the premises of the tax authorities and the legal consequences that their actions may entail.[9] The MF's tax rulings also serve to deepen citizens' trust in tax authorities and strengthen the proper implementation of taxpayer's rights in tax proceedings. The obligation to publish those means that citizens and tax authorities may obtain information on the manner of tax rulings of specific tax law provisions, and that compliance with them must not cause any negative consequences.

The article will present the evolution and attempt to evaluate MF's tax ruling. Individual tax rulings will be discussed only to the extent to which they complement the main objective of general tax rulings – ensuring uniformity in the application of tax law by tax authorities. Due to the complexity of the issue of individual tax ruling, the article refers only to tax rulings issued by the state tax administration agencies, it does not deal with tax rulings issued in terms of the attribute of the tax authorities of local government units.

2. Official Tax Rulings in the Period from 1 January 1998 to 30 June 2007

Initially (from 1998 till 2002), Art. 14 of the TO on the official MF was far too general and imperfect. It stated that official tax rulings were made to ensure uniform application of tax law by tax authorities and fiscal control authorities. The article did not regulate the legal character of official taxes, the manner of issuing them and the scope of their content, only that those tax rulings were to be made taking into account the case law of courts and

the Constitutional Tribunal decisions; and if discrepancies in the case law were found, the MF was to notify the competent court or authority that could apply measures to eliminate the discrepancies. The MF's tax rulings were published in the Ministry of Finance's Tax Bulletin.

The TO did not specify to whom the tax rulings of the MF are directed, but it stated that the taxpayer's compliance with the official tax ruling (only) could not harm them. At the same time, the provisions of the TO did not indicate any situations that could be considered harmful to the taxpayer, nor did they regulate the manner in which the tax authority should act in case of negative consequences of the taxpayer's compliance with the MF's tax ruling.

As a result of the amendment of the TO on 1 January 2003,[10] the provision of Art. 14 § 2 of the TO determined that the MF's tax rulings are the ones addressed to tax authorities and fiscal control authorities regarding tax law problems and they bind tax authorities and fiscal control authorities. Giving the MF's tax rulings binding force for tax authorities and fiscal control authorities had far-reaching consequences. That tax ruling, as incontestable, obliged the authorities (both the first and the second instance) to apply it, i.e. to proceed and rule in accordance with its content. Overturning the vitiated tax ruling could take place only if the taxpayer (the payer, collector) appealed against the final decision to the Supreme Administrative Court (SAC), which violated the principle of two instances of tax proceedings.[11] In the literature on the subject, it is stated that non-compliance with the binding tax rulings of tax authorities created a gross violation of the principle that tax proceedings should be led in the way that was raising citizens' confidence in the state authorities, in connection with Art. 121 § 1 of the TO.[12] On the other hand, the official tax rulings are not universally binding sources of law (Article 87 of the Polish Constitution provides for their closed catalogue) so they cannot constitute a legal basis for a tax decision. They should be treated only as guidelines of the MF, how to understand the law.[13] As a result, this provision, in part stating that the MF's tax rulings bind tax authorities and fiscal control authorities, was considered by the Constitutional Tribunal (judgment of 11 May 2004[14]) to be inconsistent with the Constitution of the Republic of Poland and on 31 May 2004 lost its binding force.

The amended Art. 14 of the TO exempted the MF from the obligation to notify the courts or the body that could apply measures to remove discrepancies in case law. In addition, it was specified that the MF does not tax rule in individual cases of taxpayers, payers or collectors, which unequivocally defined the abstract nature of these tax rulings.

Protection due to compliance with the MF's official tax ruling was granted to the payer and collector (except the taxpayer). However, it has been added that compliance with the tax ruling does not exempt the taxpayer, payer or tax collector from the obligation to pay tax. This regulation clearly indicated that the MF's tax ruling, although not binding for the taxpayer (payer, collector), protected him only if he behaved according to its content, even if it was incorrect. The taxpayer's (payer's, collector's) compliance with erroneous tax ruling was to have the effect that no proceedings in cases of fiscal offences or fiscal misdemeanours will be instituted against them, and the proceedings instituted in these cases will be dismissed, and that no other consequences, such as no default interest will be charged, or they will not pay the so-called additional liability, will they bear.

In addition, the compliance of a taxpayer, payer or tax collector to the tax ruling could also constitute a premise for the cancellation of tax arrears.

Another significant change in the regulations governing the institution of tax ruling took place at the beginning of the year 2005.[15] The MF was to make official tax rulings, taking into account not only judgments of the courts and the Constitutional Tribunal, but also of the European Court of Justice[16] (Art. § 1 p.2 of the TO). In addition, Art. 14 § 2 of the TO defined that the official MF's tax rulings are all the explanations of the content of applicable tax law, addressed to tax authorities and fiscal control authorities, regarding tax law problems (excluding tax rulings in individual taxpayer cases). This provision also provided that MF tax rulings and their amendments thereto would be published in the Official Journal of the Minister of Finance.

The principle stating that the compliance of a taxpayer, payer or a collector with the tax ruling must not be harmful to them, has also been extended to the taxpayer's legal successor and third parties responsible for tax arrears.

3. General Tax Rulings in the Period from July 1, 2007 to the Current Legal Status

A change in the structure of institutions of official tax ruling took place on 1 July 2007.[17] The previous official MF tax rulings took the form of general tax rulings, and written tax rulings – of individual tax rulings. The provision of Art. 14a § 1 of the TO, specifying the competences of the MF in the field of issuing general tax rulings, was amended several times, but in fact retained its shape and meaning in substance.

As a result of the tax administration reform (TAR), since 1 March 2017[18] general tax rulings have been issued by the MF in order to ensure a uniform application of the tax law by tax authorities. They should include a description of the issue in relation to which the tax law is ruled, as well as an explanation of the scope and manner of applying the interpreted tax law provisions to the described issue together with legal justification (Article 14a § 1a of the TO[19]).

Since January 2012,[20] general tax rulings have been issued by the MF not only ex officio but also upon request (Article 14a § 1 of the TO). In principle, the TO has not provided for any restrictions as regards entities entitled to submit a claim with one exception, public administration bodies are not entitled to submit applications (Article 14a § 1b of the TO). Applications for a general tax ruling shall be submitted on an official form, and a template thereof, in accordance with the instruction of Art. 14a § 11 of the TO, shall be specified by MF.[21] A fee of PLN 40 (Article 14d in connection with Article 14a § 9 of the TO) shall be paid within seven days from the date of submitting the application (Article 14f in relation to Article 14a § 9 of the TO). The fee shall be returned only in the case of issuing a general tax ruling, within seven days from the date of its publication (Article 14a § 8 of the TO).

According to Art. 14a § 2 of the TO an application for issuing a general tax ruling, in addition to the data identifying the applicant, should contain justification of the need to issue a general tax ruling, in particular:

- presentation of the issue and indication of tax law provisions requiring the general tax ruling, and
- indication of non-uniform application of tax law provisions in specific decisions, decisions and individual tax rulings issued by tax authorities and fiscal control authorities (in connection with TAR currently only by tax authorities) in the same factual circumstances or future events and in the same legal statuses.

It seems that meeting the conditions for submitting an application for a general tax ruling is even "prohibitive". While the presentation of the issue and indication of tax law provisions requiring a general tax ruling does not raise any objections, the applicant's indication of non-uniform application of tax law provisions in specific decisions, decisions issued by tax authorities in the same factual circumstances or future events and in the same legal statuses throughout the country may be extremely difficult to comply with.[22] This requires the applicant to find appropriate decisions or rulings, for which it is necessary to be aware not only of their existence (in accordance with Article 129 of the TO, the access to the case file, including decisions and rulings, is reserved exclusively for parties to proceedings, which significantly limits the knowledge about them and their availability), but also their content and whether they were issued in the same factual circumstances or future events (i.e. according to the linguistic interpretation, 'identical', 'unchangeable', 'uniform', 'equivalent'). It means that in practice, the indication of non-uniform application of tax law provisions may be limited only to individual tax rulings which, pursuant to the Act (Article 14i § 3 of the TO) together with the application for a tax ruling, are published in an anonymous version in the Public Information Bulletin. As the administrative courts emphasize, the existence of inconsistent individual tax rulings determines the necessity of issuing a general tax ruling at the taxpayer's request,[23] however, issuing two different individual tax rulings, one of which, within the time limit of issuing a general tax ruling, becomes incorrect pursuant to Art. 14e § 1 of the TO changed – to the extent consistent with the other – does not constitute a non-uniform application of law in individual tax rulings referred to in Art. 14a § 2 point 2 of the aforementioned Act.[24]

Art. 14a § 3 of the TO made issuing the general tax ruling dependent on the fulfilment of an additional condition. On the day of submitting the application for it issuance, in the cases indicated in the application, no tax proceedings or control proceedings by the fiscal control authority may be conducted, or no appeal or complaint was filed against the decision or provision (currently, if no tax proceedings, tax control, customs and tax control are conducted, or no appeal or complaint was filed against the decision or provision). In order to verify the fulfilment of this condition, tax authorities, upon the written request of the MF, are obliged to submit files regarding the decisions, provisions and individual tax rulings immediately (Article 14a § 7 of the TO)

At the beginning of 2012, the Ministry of Finance, acting on the basis of the delegation of Art. 14a § 10 of the TO, in order to improve the service of applicants, authorized five Directors of Tax Chambers (depending on the scope of cases) to issue, as the first instance authority, decisions on leaving without consideration requests for general tax rulings, and to submit written requests to tax authorities and fiscal control authorities to provide the files regarding decisions, provisions and individual tax rulings indicated in the application

for issuing general tax ruling.[25] Currently, as a result of the TAR, such authorization is held by the director of the National Tax Information (NTI).[26] The NTI director is responsible for the preliminary assessment of the submitted application (including checking whether the application has been addressed to the competent authority and whether the application fee has been paid) and verifying compliance with the statutory prerequisites for consideration of the application. Failure to comply with these conditions shall result in the application not being considered (Article 14a § 4 TO). This applies:

- if the application does not present the issue and the tax law provisions which require a general tax ruling and does not indicate non-uniform application of tax law provisions in specific decisions, provisions and individual tax rulings issued by tax authorities in the same factual circumstances or future events and in the same legal statuses, or
- if the application does not meet other requirements specified by law (in this case, to the requirements that should be met pursuant to Art. 168 of the TO regarding the manner of submitting the application, the designation of the entity from which it comes, its address, signature), or
- when the issue presented in the application is the subject to a general tax ruling and the legal status has not changed in this respect.

The decision to leave the application without consideration is made by the NTI Director by way of a decision which may be appealed against to the MF. If the application is considered justified and meets the formal requirements, the Director of NTI submits the application of the MF together with the attached acts, i.e. the decisions, provisions and individual tax rulings indicated in the application for a general tax ruling.

General tax ruling should be issued without undue delay, however not later than within 3 months from the date of the receipt of the application. According to Art. 14d of the TO, the dates and periods referred to in Art. 139 § 4 of the TO (including periods of suspension of proceedings or delays caused by the fault of the party or for reasons beyond the control of the authority, as well as the period necessary for the transfer of files related to the decisions, provisions and tax rulings indicated in the application) shall not be included in the time limit, which means that the actual deadline for issuing the tax ruling may be longer than 3 months (Article 14d in conjunction with Article 14a § 9 of the TO).

Submitting an application for a general tax ruling will, in principle, result in non-jurisdictional proceedings, however, in accordance with Art. 14a 9 of the TO, certain provisions on jurisdictional proceedings shall apply to it; including the ones on accordance with the rule of law (Article 120 of the TO), conducting the proceedings in a manner that inspires confidence in the tax authorities (Article 121 § 1 of the TO), in compliance with the principle of speed and thoroughness of proceedings (Article 125 of the TO) and transparency of proceedings for its parties (Article 130 of the TO).

Irrespective of whether tax ruling was issued upon the request or ex officio by the MF, it is not binding either for the taxpayer or the tax authorities. 'However, taking into consideration the official subordination and organisational subjection of tax authorities to the minister, one may doubt if they do not become quasi-sources of tax law'.[27] From the taxpayer's point of view the legal consequences of complying with the tax ruling are of

fundamental importance. The lack of a binding force of the MF's tax ruling means that the taxpayer may but does not have to use it, as it is not a decision.[28] However, complying with the tax ruling protects the taxpayer even if it is incorrect.

Since 1 July 2007, compliance with the general tax ruling prior to its amendment may not harm the party who has complied with it, as well as in the event of it not being taken into account in the decision on a tax case (Art. 14k § 2 of the TO). 'No harm' means that in the case of compliance with a general tax ruling which later has been amended or was not included in the decision of the tax case, no proceedings are instituted in cases concerning fiscal offences or fiscal misdemeanours, and the proceedings initiated in such cases are discontinued and interest on arrears is not charged (Article 14k § 3 of the TO).

Compliance with the above tax ruling also results in an exemption from the obligation to pay the tax, to the extent resulting from the event being the subject of the ruling. This is the case if the liability has not been properly performed as a result of complying with the ruling which has changed or the ruling not included in the judgment of the tax case, as well as when the tax consequences related to the event which corresponds to the factual circumstances took place after the publication of the general tax ruling (Article 14m § 1 of the TO). The scope of this exemption, depends on the tax settlement period – annual, quarterly or monthly (Art. 14m § 2 of the TO). Additionally, in a situation described in Art. 14m § 3 of the TO, the taxpayer may additionally demand from the tax authority a calculation of the tax, in a decision determining or fixing the tax covered by this exemption, or – in case of paying the tax, calculation of the amount of overpayment.

However, the compliance with tax ruling does not release from the obligation of payment, if the tax consequences related to the event, which corresponds to the factual circumstances being the subject of the ruling, took place before the issuing of the general tax ruling (Article 14l of the TO).

According to the TO, the MF's tax ruling cannot be appealed against by anyone, even if it has been issued upon request. It results from provisions of the TO that a taxpayer may submit an application for a general tax ruling, but not for its amendment. The only entity being entitled to amend the issued tax ruling is the MF,[29] who may do that ex officio if its inaccuracy has been stated, taking into account, in particular, judicial decisions of courts, the Constitutional Tribunal or the Court of Justice of the European Union.

Since 1 January 2017, the competence of the Ministry of Finance in the field of harmonizing the application of tax law has been extended by the possibility to issue ex-officio tax explanations, i.e. general explanations of tax law provisions regarding the application of these provisions (Article 14a § 1 point 2 of the TO). Tax explanations, similarly to general tax rulings, are issued taking into account the judgments of the courts, the Constitutional Tribunal or the Court of Justice of the European Union. However, their content differs from general tax rulings. General tax rulings contain an official interpretation of the provisions, whereas the essence of tax explanations is linking the content of the provision with its practical application in relation to exemplary situations.[30] The purpose of introducing tax explanations was to provide taxpayers with the possibility of obtaining a faster protection due to their compliance with the tax explanations, without the need to apply for an individual tax ruling. Identical scope of protection granted by tax explanations and tax rulings is to lead to a reduction in the number of individual tax rulings

issued in those areas in which sufficient explanations are included in tax explanations.[31] Tax explanations are included in the Public Information Bulletin, and their change may take place in the mode provided for general tax rulings.

4. Conclusions

The basis for introducing the institution of tax ruling was the MF's attempt to ensure uniformity in the application of tax law by the tax authorities, if the practice of its application raises any doubts. Consequently, it was supposed to prevent the tax authorities from issuing diverging individual tax rulings and to reduce the number of such rulings. The tool of unification of tax legislation application has so far been used by the MF to a limited extent. From 1 July 2007 till the end of 2011, when general tax rulings could only be issued ex officio, the MF issued only thirty. This situation has not been improved by the introduction of the possibility of issuing rulings upon request. In the period from 2008 till May 2018, the number of general tax rulings amounted to 78 (in the years: 2008 – 8; 2009 – 7; 2010 – 6; 2011 – 9; 2012 – 14; 2013 – 19; 2014 – 11; 2015 – 12; 2016 – 9; 2017 – 6; 2018 – 7), out of which 72 were issued ex officio. Since 2012, MF has issued only 6 tax rulings upon request (in the years: 2012 – 3; 2013 – 1; 2015 – 1; 2016 – 1). According to the data of the Tax Information Office for the years 2013–2016, it appears that a great part of the submitted applications for a general tax ruling was left without consideration (in the years: 2012 – 77 applications out of 57; 2013 – 41 applications out of 34; 2014 – 46 applications out of 32; 2015 – 20 applications out of 19; 2016 – 22 applications out of 17).

The presented data confirm that the conditions to be met by the application for issuing a general tax ruling are not so difficult to meet as they are 'prohibitive', hence the moderate activity of the MF in issuing rulings ex officio may be surprising. Especially that in the analyzed period the number of tax rulings issued in individual taxpayer cases increased successively (24,229 in 2008, 28,153 in 2009, 30,920 in 2010, 35,929 in 2011, 36,816 in 2012 36,143 in 2013, 37,891 in 2014, 37,710 in 2015), which were often contradictory[32] and also erroneous, thus repealed by administrative courts.[33] The decrease in the number of these tax rulings took place in 2016–2017 (up to 34,151 in 2016 and 25,718 in 2017). The reason for the decrease in the number of issued tax rulings should be seen not so much in improving the quality of the Polish tax law, guaranteeing the legal security of taxpayers, as in the introduction into the TO in 2016–2017 new legal regulations allowing to, among others file a so-called joint application (Article 14s of the TO), which may be requested by at least two interested parties who are in the same factual circumstances or are to participate in the same future event. The competent authority may also refuse to issue an individual tax ruling, if the anti-avoidance clause applies in the case described in the application, or if an attempt to avoid taxation is detected (Article 14b § 5b of the TO). On this basis, in 2017, the Director of the NTI issued 650 decisions refusing to issue a tax ruling. It seems that the fear of the effects of this regulation itself may lead to a decrease in the number of applications. In addition, the provisions of the TO provide that no ruling shall be issued if the factual circumstances or future events presented in the

application correspond to an issue being subject to a general tax ruling issued in the same legal state. In such a case, the Director of the NTI issues a decision stating that general tax ruling is applicable to such a situation or event (Article 14b § 5a of the TO). In 2017, the Director of NTI issued 491 decisions on the application of general tax ruling, whereas NTI offices received a total of 29,599[34] applications for an individual tax ruling. It seems that the purpose of this regulation is not only to reduce the impact of requests for individual tax rulings, but also to ensure greater activity on the part of the MF in issuing general tax rulings, which unfortunately cannot be observed.

Therefore, it should be stated that, although the regulations regarding the tax rulings of the MF have been significantly improved and clarified since the day of their introduction, the provisions of the TO do not contain regulations which would indicate what criteria should be followed by the MF while assessing the need for a general tax ruling. Even if there are discrepancies in the assessment of identical factual circumstances between the views presented in the case law of administrative courts and the views presented by tax authorities, the minister is not required to issue a general tax ruling consistent with the case law of these courts or to amend an existing one[35] which should be considered as a weakness of this regulation. For this reason, it should be recognized that the regulations concerning the interpretation of tax law provisions and the practice of issuing them do not sufficiently ensure the main purpose of a tax ruling, i.e. ensure uniformity of application of tax regulations by the tax office.

References

1 Uniform text: Journal of Laws 2018, item 800, as amended.
2 Bogumił Brzeziński, Advance tax rulings jako instytucja prawa podatkowego [Advance tax ruling as an institution of tax law], 13–21, in *Roczniki Nauk Prawnych [Annals of Juridical Science],* no. VII (1998).
3 Zbigniew Kmieciak: Procesowe gwarancje ochrony interesu podatnika [Procedural guarantees protecting taxpayer's interest], 9–28, in *Kwartalnik Prawa Podatkowego [Tax Law Quarterly]*, no. I (2000).
4 Journal of Laws, no. 137, item 926.
5 Henryk Dzwonkowski, Indywidualna interpretacja prawa podatkowego [Individual tax ruling], 18–23, in *Monitor Podatkowy [Tax Monitor]*, no. 4 (2003).
6 Jacek Brolik, *Kontrowersyjne kompetencje Ministra Finansów w dziedzinie stosowania prawa podatkowego [Controversial competences of the Minister of Finance in the field of application of tax law],* 6, in P*rzegląd Podatkowy [Tax Review],* no. 7 (1999).
7 Leonard Etel (eds.), *Prawo podatkowe [Tax Law]*, 216–217 (Warsaw, Difin 2008).
8 Constitutional Court, K 10/93. All verdicts of the Constitutional Court are available at trybunal.gov.pl/wyszukiwarka/ (accessed 4 June 2018).
9 Constitutional Court, K 47/05.
10 The Act of 12 September 2001 on the amendment of the Act – Tax Ordinance Act and on amendments of certain other acts (Journal of Laws, no. 169, item 1387).
11 Cezary Kosikowski et al., *Ustawa Ordynacja Podatkowa. Komentarz [Tax Ordinance Act. Commentary]*, 78 (2nd edition, Warsaw, Dom Wydawniczy ABC 2004).
12 Roman Szumlakowski, Zasady prawne postępowania podatkowego organów administracji podatkowej w relacjach z podatnikiem [The legal principles of tax proceedings of tax administration authorities in relations with the taxpayer], 203–213, in Paweł Borszowski (eds.), *Podatnik versus organ podatkowy [Tax payer versus tax authority]* (Wrocław, Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2011).
13 Justyna Bauta, Ryszard Sowiński, Ochrona podatnika przed skutkami błędnej interpretacji prawa podatkowego [Protection of a taxpayer against the consequences of misinterpretation of tax law], 53, in *Przegląd Podatkowy [Tax review],* no. 10 (2001).
14 Constitutional Court, K 4/03.
15 The Act of 2 July 2004, Provisions introducing the Act on the freedom of economic activity, Journal of Laws of 2004, no. 173, item 1808.
16 Now: Court of Justice of the European Union.
17 The Act of 16 November 2006 on the amendment of the Act – Tax Ordinance Act and on amendments of certain other acts, Journal of Laws, no. 217, item 1590.
18 The Act of 16 November, 2016. Regulations introducing the Act on the National Tax Administration, Journal of Laws of 2016, item 1948.
19 Art. 14a § 1 amended on 1 January 2016 by the Act of 10 September 2015 on the amendment of the act – Tax Ordinance Act and certain other acts, Journal of Laws of 2015, item 1649.
20 Act on 16 September 2011 on the reduction of certain obligations of citizens and entrepreneurs, Journal of Laws of 2011, no. 232, item 1378.
21 At present the template is regulated by the Regulation of the Minister of Finance of 17 February 2017 on the template for the application for a general tax ruling and how to pay the application fee, Journal of Laws of 2017, item 352.
22 Hanna Filipczyk: Interpretacja ogólna na wniosek – nowe rozwiązanie w Ordynacji podatkowej [General tax ruling upon request], 11–15, in *Monitor Podatkowy [Tax Monitor]*, no. 3 (2012).
23 The Voivodship Administrative Court in Warsaw: III SA/Wa 3379/12. All verdicts of administrative courts are available at orzeczenia.nsa.gov.pl/cbo/query (accessed 4 June 2018).
24 Supreme Administrative Court, II FSK 2253/13.

25 Directors of Tax Chambers: in Bydgoszcz – in the field of personal income tax; in Katowice – in the field of corporate income tax and excise duty; in Poznan – in the field of tax on goods and services; in Warsaw – in the area of tax on civil law transactions, inheritance and donation tax, and the provisions of the Tax Ordinance Act; in Lodz – in the scope of other applications, irrespective of the place of residence or registered office of the applicant. Regulation of the Minister of Finance of 27 December 2011 on authorizing the issuance of decisions on leaving without consideration the applications for general tax rulings and for performing certain activities related to submitted applications (Journal of Laws, no. 296, item 1757).

26 Regulation of the Minister of Economic Development and Finance of 21 February 2017 on authorizing the issuance of decisions on leaving without consideration the applications for issuing general tax rulings and performing certain activities related to submitted applications, Journal of Laws of 2017, item 341.

27 Przemysław Krzykowski, Urzędowe interpretacje prawa podatkowego a system źródeł prawa [Official interpretations of tax law and the system of sources of law], 28–29, in *Kwartalnik Prawa Podatkowego [Tax Law Quarterly],* no. 3–4 (2005).

28 The Voivodship Administrative Court in Rzeszow, I SA/Rz 1153/13.

29 Art. 14e § 1 p. 1 of the TO amended on 1 January 2016 by the Act of 10 September 2015 on amendment of the act – Tax Ordinance Act and certain other acts.

30 Leonard Etel et al., *Ordynacja podatkowa. Komentarz [Tax Ordinance Act, Commentary],* 183, (Warsaw, Wolters Kluwer, 2017).

31 Polish Parliament of the VII term: Justification of the draft law amending certain acts to improve the legal environment of entrepreneurs, paper no. 994.

32 Compare: Individual tax rulings of the Tax Chamber Director in Warsaw no. IPPB5/423-200/09-2/DG, no. IP-PB3-423-59/08-2/GJ, no. IPPB5/423-788/10-5/DG as well as: Individual tax rulings of the Tax Chamber Director in Katowice, no. IBPBI/2/423-709/09/SD and Individual tax rulings of the Tax Chamber Director in Bydgoszcz annulled by The Voivodship Administrative Court in Gdańsk, I SA/Gd 1311/10.

33 Compare: Supreme Administrative Court, II FSK 1242/16; I FSK 2140/15; I FSK 726/16; I FSK 382/16; I FSK 350/16; I FSK 307/16.

34 All the data come from the Information on the Tax Information Office activities for the years: 2013, 2014, 2015, 2016, and the Information on the Revenue Information Office activities for the year 2017, www.kis.gov.pl/dzialalnosc/raporty-z-dzialalnosci (accessed 28 May 2018), and Official Journals of the Ministry of Finance and Official Journals of the Ministry of Economic Development and Finance for the years 2007–2018, www.mf.gov.pl/ministerstwo-finansow/minister-finansow/dziennik-urzedowy (accessed 28 May 2018), www.mf.gov.pl/ministerstwo-finansow/minister/dziennik-urzedowy-ministra-rozwoju-i-finansow (accessed 27–28 May 2018).

35 The Ombudsman, RPO-630990-VI/09/AB, www.rpo.gov.pl/sites/default/files/Informacja_kwartalna_o_pracy_RPO_pazdziernik_%E2%80%93_ grudzien_2009_r.pdf (accessed 22 May 2018).

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The Civil Service Law System in Poland – Selected Issues

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Abstract: The article refers to the topic of civil service law in Poland. It describes the organization of civil service system in comparison to other international solutions and it gives the historical background of how it has been evolving so far. Particularly it refers to the elements of its regime, the position and duties of the Polish Head of the Civil Service and rights and duties of the civil service corpus' members. The author claims that the changes taking place in the area of this part of law are due to the domination of private law (labor law) over public law (administrative law). This tendency currently prevails in the western legislation.

Keywords: civil service; administrative law; public governance; public administration

1. Introduction

The topic of the Polish civil service is still very much a current issue. A discussion on this topic is being held in Poland now by both administration, labor and constitutional law representatives. Therefore, the statements published in recent articles refer to the constitutional basis of the Polish civil service, to the labor rights and duties of the civil service members and not really to the public-private character of this law institution. Therefore, it makes sense to assess the changes in the law of office which regulates the legal status of government administration employees from the point of view of administration law rules. Researching such an area of studies and looking at it from historical perspective will let assess the state of the Polish civil service and formulate conclusions as to its changes.

The current act on the civil service of 21 November 2008[1] in the last several years was the fourth act which has regulated in a totally new way the legal situation of the Polish government administration staff. Therefore, my first conclusion is that the legislator in the post-transformation period (after the system changes in 1989) was making the changes in an unplanned and inconsistent way. The big number of these changes violated the rules of good legislation, the quality of law, its continuity and security and what it leads to – the operational calm of public administration work. The changes made in the following acts of 1996,[2] 1998,[3] 2006[4] and 2008 and at the same time parallel and alternative laws that were kept in force – act of 16 September 1982 on state posts officials[5] – did not aim at building one coherent official corps, which, in my opinion, is a condition of a proper implementation of public duties.

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However, the law currently in force has been a long awaited legal act, necessary in the first place to eliminate the legal solutions of its predecessor i.e. the act on civil service from 2006 (and strictly connected with its act of 24 August 2006 on the state human resources and senior state positions).[6] Some of the above-mentioned acts have been generally assessed not only as unacceptable but also incompatible with the Polish Constitution. To illustrate this well, let me mention the concept of liquidation of the government administration central organ, responsible for the civil service: Chief of the Civil Service, which, despite being criticized already on the stage of the legislative work, was introduced to the state law order in 2006. An experiment (described in Article 8 of this act) according to which the Prime Minister was in charge of the civil service (while the PM Chancellery Chief was to carry out tasks on behalf of the PM), has not defended itself against the accusation of the degradation of the current output in the area of the civil service (in the context of other proposed changes in the civil service organization, particularly creating the state human resources).

The current act on the civil service has liquidated the state human resources, high positions have been placed again within the civil service as well as the Civil Service Chief as the central organ of the government administration (his own post has not been restored but assigned to the PM Chancellery). Despite some concerns that will be discussed further on, this act is therefore a big improvement which can be called a partial restitution of the correct status of the Polish civil service.[7]

2. General Assumptions of the Civil Service Law of 21 November 2008

The current civil service law came in force on 24 March 2009 and complemented the law context of the Polish civil service corps through specifying the constitutional[8] and systemic assumptions as well as describing the elements of the service regarding the civil service corps members in several decrees published by the PM and Civil Service Chief. The law has been amended several times and the amendments referred to the rules of the senior positions placement as well as the Board of Public Service, its duties and tasks.[9] None of its articles has been so far controlled by the Polish Constitutional Tribunal[10] but it has been a subject of Supreme Court cases a few times.

3. Detailed Assumptions of the Civil Service Act of 21 November 2008

Describing the chosen and, in my opinion, the most important elements of the legal status of the civil service corps members in view of the law from 2008, I need to state that the further assessment will be made based on the fact that the law of office is the natural part of administration law and the civil service is of a public-private character. In other words, the civil service is not only a tool or an instrument to carry out the political will nor is it a group of people employed to perform specific work but it is an important element of the

philosophical concept of a "democratic country of law" whose constant attribute is a professional, objective and politically neutral staff corps which is protected by a catalog of guarantees.

3.1. The Jurisdiction of Labor Courts with Regard to the Status of Civil Service Corps Members

I agree with the opinion that the acceptance of the public-private concept of the employment relations at the same time meant that the employment relations belonged to the administrative law with all its process consequences as to its changes and solutions.

This assumption in a classic form was respected by the Polish legislator in the interwar period,[11] when matters resulting from business relations were settled during the administrative procedure, ending in a decision appealing to the administrative court.

The exclusion of the principle of presumption of administrative court jurisdiction for common courts occurred at the moment of codification of labor law.[12] From that moment, the possible submission of selected cassation cases to administrative courts required a separate legal basis or an appropriate, explicit reservation in the act. Despite the common classification of the legal status of members of the civil service corps as "public officials" (e.g. the verdict of the Provincial Administrative Court in Poznań of 13 March 2013[13]) in the currently binding pragmatics, even a few examples of guaranteeing administrative law-changing modes of action – despite the classic models of administrative and court-administrative proceedings – were granted to the labor courts.

An excellent example of this is the civil service's right to appeal to the Prime Minister against the decision of the central government administration body competent in civil matters – the Head of the Civil Service in the matter of transferring him to another office (Article 67). The appeal procedure in this respect is governed by the provisions of the Code of Administrative Procedure[14] but the decision of the Prime Minister may be appealed not to the administrative court, but to the labor court – in accordance with the general rule set out in Art. 9 pragmatics, according to which 'disputes over a claim regarding an employment relationship in the civil service are considered by labor courts'. This was confirmed by the Voivodship Administrative Court in Warsaw in the judgment of 8 May 2012,[15] by unambiguously stating that in case of filling the vacant position by transfer, the legislator did not foresee control measures in the administrative course of the instance. Therefore, in such a situation, the complaint is inadmissible and subject to rejection.

A similar example of the questionable transfer of cases to the examination of labor courts is the system of protection of the civil service corps member in the assessment procedure. In the light of Art. 83 pragmatics from the periodic assessment of the corps member is used to oppose the director general of the office. If the objection is not met within the statutory deadline, or if the objection is not taken into account – which follows the law in the form of a "decision" – the corps member has the right to appeal again not to the administrative court, but to the labor court. This is indicated by the verdict of the Appeal Court in Rzeszów of 24 June 2014,[16] in which "the right of the labor court to perform periodic review control in all its aspects was clearly confirmed. At the same time,

it must determine whether the mode of the periodic assessment as well as its formal nature resulting from the act were taken into account strictly". This view was also shared by the Supreme Court in its judgment of 30 October 2013,[17] stating that "the civil servant's objection from the periodic assessment is examined by the district court – the labor court".

It is worth noting that in the above context – in systemic terms – there is a glaring inconsistency of the Polish legislator in the elimination of public law elements in the employment relations of public officials. To prove this, it is enough to refer to the legal status of appointed controllers of the Supreme Audit Office[18] or prison officers[19] whose certain employee matters were explicitly excluded from the general jurisdiction court for administrative judiciary. Primarily I am referring to the possibility of challenging the decision to transfer to another organizational unit, terminating the employment relationship with notice and without notice and to appeal against the decision on the negative qualification.

3.2. The Issue of Recruitment to the Civil Service Corps

Recommendation of the Committee of Ministers of the Council of Europe[20] on the status of public employees in Europe clearly indicates that the constructive element of proper recruitment to the public service is effective administrative supervision over this procedure and its judicial and administrative control. The importance of this issue was emphasized by the Polish Constitutional Tribunal, pointing out that the essence of a properly constructed recruitment process for the public service is the feature of competitiveness that characterizes it. It is why the proceedings need to be protected in court-administrative proceedings against arbitrary decisions, while at the same time constituting a procedural measure of constitutional review of the criteria of equal access to the same principle[21] It follows – which is extremely important – that the omission of the competition fundamentally changes the legal position of people interested in public service, because it deprives them of proper protection against arbitrary decisions. The exclusion of the competition system means eliminating the path of judicial review of the correctness of applying the recruitment criteria to the civil service.

From the point of view of the assumptions made, the pragmatics in force did not create a fully correct concept of recruitment, did not guarantee the transparency of the proceedings, as well as clarity and understanding of the actions and decisions taken. Analyzing this law, it is not possible to read the substantive criteria, the fulfilment of which is a condition of access to public service. The candidate also has no knowledge as to the rules, methods, mode of operation and decision-making by the recruiters, as well as the general directors of offices responsible for conducting the proper conduct, who do not have any statutory guidelines as to the legislator's expectations in this respect. It will only fill in the gap when declaring open and competitive recruitment. What is more, the amendments introduced in 2015, changes in the scope of casting senior positions in the civil service, in particular the introduction of "appointment" as a legal basis for establishing employment relationships at the same time, enabling the appointment of people from

outside the civil service corps, the required competition deepens the negative assessment of the solutions in this area.

On the other hand, the solutions of the Act on the Civil Service of 1996 may serve as an example of optimal consideration of the pragmatics of the above-mentioned conditions. It guaranteed the candidate who took part in the qualification procedure the right to request a written decision by the civil service body at that time. Although the 1996 Act did not specify *expressis verbis* that this decision was subject to appeal to the administrative court, nevertheless the doctrine rightly, consistently assumed that it had the character of an administrative decision. Such legal classification determined the possibility of being challenged by the Supreme Administrative Court with a request that the Qualifying Committee remove the violation of law.

3.3. The Subjective Scope of the Civil Service Act

In the light of the systemic assumptions of the Polish civil service, using the jurisprudence of the Constitutional Tribunal, one may put forward the thesis that in the constitution's view the civil service corps should cover all government administration offices. According to the wording of Art. 153 of the Constitution of the Republic of Poland, the sphere of action of the civil service corps are offices of the government administration, and the Prime Minister is the supervisor of this corps. The meaning of the term "government administration" can be determined on the basis of the definition of the term, the taxonomy of the Constitution and the interpretation presented by the Constitutional Tribunal.

Therefore, with his interpretation, it can be recalled that to recognize an office as a government administration office it is necessary to meet two conditions simultaneously, i.e. to perform tasks of public administration character and to place the state apparatus in this segment, headed by the Council of Ministers. In the justification to the judgment of 13 November 2003,[22] the Tribunal indicated that the wording of Art. 153 of the Constitution allows the adoption of a position that the entire clerical apparatus, performing tasks for public administration, in its part subject to the Council of Ministers, should be covered by the Act on Civil Service.

Meanwhile, the legislator in the content of the binding pragmatics is inconsistent in this respect. In addition to the statutory directory of offices covered by the civil service corps, there are unjustifiable entities that have their status in the structure of public administration in this part, headed by the Council of Ministers. A perfect example of this is the legal status of the Government Legislative Center, which was not legally covered by the civil service corps.

3.4. System of Civil Service Organs

I believe that granting – in the light of obligatory pragmatics – the Head of the Civil Service, the status of a central government administration body is optimal, but current regulations granting it insufficient catalog of competences may adversely affect the manner

and effectiveness of his tasks. Incomplete scope of competences of the Head of the Civil Service, including the lack of significant supervisory or imperious powers, obviously limits the effectiveness of his actions and makes it impossible to enforce decisions. Therefore, I am of the opinion that the potential resulting from the status of a "central government administration body"[23] has not been fully used. The more so because the problem of its organizational separation still remains a problematic issue, because currently this body is supported by the Chancellery of the Prime Minister. The current legal situation in this respect is somewhat in contradiction with the theoretical assumptions of the "administrative body" model. The assumed lack of independence of this body in managing the auxiliary apparatus assigned to it to serve, contradicts the general concept of the status of such a body.

On the other hand, the analysis of the nature of the current powers of the Public Service Council reveals a certain inconsistency between its statutory declared status (i.e. an advisory and consultative body) and the rights it possesses. The direction of change adopted by the legislator perceived as positive in the provisions of the Act of 2008, in the light of which some strengthening of the position of this body by granting subsequent rights, should be considered positive. This testifies to the growing importance of the Council in the civil service system. Therefore, due to the actual tools in which it has been equipped in the current legal status, it may be necessary to consider a statutory change of the concept of the status of this body from consultative and advisory to approval and control.

The current provisions, in my opinion, do not guarantee the person holding the office of the general director of the office the appropriate status and sufficient tools to effectively implement the tasks assigned to the law. From the analysis of transformations of the legal status of this entity, in the light of successive office law pragmatists, there emerges a disturbing tendency to limit the role and importance of the director general of the office. His position in relation to the head of the office is weak, which may directly threaten the apolitical nature of the civil service corps. Some doubtful legal solutions can be found in the part of the Civil Service Act in which it enables the Director General to perform his duties – during his vacancy and in the situation of not finding a replacement – by a member of the civil service corps employed in that office. This may result in the practice of long-term failure of directors-general and long-term actual performance of these functions by people who do not meet the statutory conditions necessary to take up this position.

3.5. Eligibility Procedure in the Civil Service

Another key element having a fundamental impact on the correct status of the civil service is the qualification procedure in the civil service. Handover of the National School of Public Administration – in accordance with the Act of 1991 on the National School of Public Administration,[24] the status of "legal person" – tasks in the organization of the recruitment procedure implied serious consequences for the legal position of the participant in this proceeding. As a result of this transfer (in accordance with the decision of the Supreme Administrative Court[25]) in the current legal state, "the qualification

procedure" is in fact the so-called "Act of knowledge". In this dimension, in historical terms, the legal situation of a person applying for the status of civil servant has deteriorated. The legislator resigned from the solutions of earlier acts, in the light of which the central organ of public administration, that is the Head of the Civil Service, was responsible for conducting the qualification procedure, and then he transferred this responsibility to the "state legal person". This has far-reaching effects, mainly expressed in maintaining the legal status in which the participant in the recruitment procedure was deprived of adequate legal protection. The lack of instances in this proceeding and, consequently, also of judicial and administrative control from the point of view of administrative law principles – may be considered as controversial.

These are not only theoretical considerations, which is confirmed by the judicature, and which is illustrated by the judgment of the Provincial Administrative Court in Warsaw of 22 August 2012[26] that ruled on the complaint of the person taking part in the qualification proceedings for inactivity of the National School of Public Administration, which according to the plaintiff 'consisted in the lack of appointment as a civil servant.' The court dismissed the complaint by rightly noting that administrative courts within their jurisdiction exercised control over the legality of actions or omissions of public administration bodies. Thus the National School of Public Administration was not the subject of the control – in other words, the Head of the Civil Service would be able to remain inactive if he was responsible for carrying out the qualifying procedure. The above legal classification of the recruitment procedure in another judgment was confirmed by the Supreme Administrative Court (referred to the aforementioned judgment of 6 February 2013), which stated that in the light of the current provisions, the recruitment procedure is not an administrative proceeding and cannot be subject to administrative court control, and consequently, the inadmissibility of the authority on this subject cannot be subject to control. What is extremely important, at the same time in the light of the judgments of administrative courts, the recruitment procedure is not a claim under the employment relationship – thus, Art. 9 of the Act on Civil Service in which there is a mention of court cognition in such matters.[27]

4. Final Remarks

I believe that the development in 2008 of pragmatics of the concept of organizing the civil service system, which restores the central government administration body competent in civil service matters and maintains a consultative and advisory body at the Prime Minister in civil service matters and finally introducing a statutory requirement to disseminate information about the recruitment to work in the civil service corps – although in discussions and subject to further improvement – are positive examples of achievements in the construction of this part of the public service.

This conclusion is important in the discussion on the possibility or legitimacy of adopting solutions applied in government administration in pragmatists regulating the legal status of employees of other "segments" of public administration – be it state or local government offices. Personally, I am in favor of uniformly defining the legal status of all

public administration employees, as there is no rational justification that members of the civil service, local government employees and employees of state offices cannot be covered by similar ethical or professional standards, or that they are not subject to similar selection, recruitment evaluation or disciplinary responsibility. However, it is too early to say that the process of building the Polish civil service is completed, and thus too early to transfer these solutions from the area of government administration to local government or state.

Therefore, based on the above presented considerations on selected elements of the legal status of the civil service, but also bearing in mind the aforementioned discussion between representatives of the doctrine of labor and administrative law, as well as the current state of the act on local government employees and the act on employees of state offices that the Polish law of office *still* faces an identity crisis. Nevertheless, a recent – extremely important – Supreme Court ruling of 10 April 2014[28] in which it was stated that the Head of the Civil Service as a central government administration body does not act in the field of labor law as an employer but performs its statutory powers of a public law, act of appointment is an act of applying the law by a public administration body (i.e. a unilateral, authoritative, declaration of will, thus shaping the individual legal situation of the person applying for appointment), and in the matter of determining the obligation of the Head of the Civil Service to issue this act an administrative route – allows the Polish administrative law attorneys to look with some hopes on the further course of the discussion on this identity of the Polish official law.

References

1 Ustawa z dnia 21 listopada 2008 r. o służbie cywilnej; Dz. U. Nr 227, poz.1505 [Act of 21 November 2008 on civil service; Dz. U. No. 227, item 1505], www.prawo.sejm.gov.pl (accessed 20 May 2018).
2 Ustawa z dnia 5 lipca 1996 r. o służbie cywilnej; Dz. U. Nr 89, poz. 402 [Act of 5 July 1996 on civil service; Dz. U. No. 89, item 402], www.prawo.sejm.gov.pl (accessed 20 May 2018).
3 Ustawa z dnia 18 grudnia 1998 r. o służbie cywilnej; Dz. U. Nr 49, poz. 483 [Act of December 18, 1998 on Civil Service; Dz. U. No. 49, item 483], www.prawo.sejm.gov.pl (accessed 20 May 2018).
4 Ustawa z dnia 24 sierpnia 2006 r. o służbie cywilnej [Act of 24 August 2006 on civil service; Dz. U. no. 170, item 1218], www.prawo.sejm.gov.pl (accessed 20 May 2018).
5 Dz. U. z 2001 r., Nr 86, poz. 953 [Dz. U. of 2001, no. 86, item 953], www.prawo.sejm.gov.pl (accessed 20 May 2018). This Act covered the same category of officials in its subjective scope.
6 Dz. U. Nr 170, poz. 1217 [Dz. U. no. 170, item 1217], www.prawo.sejm.gov.pl (accessed 20 May 2018).
7 Teresa Górzyńska et al., *System prawa administracyjnego, Tom 2 Konstytucyjne podstawy funkcjonowania administracji publicznej [System of administrative law, Volume 2 Constitutional grounds for the functioning of public administration]*, 452 (Warsaw, 2012).
8 Constitution of the Republic of Poland of April 2, 1997; Dz. U. of 1997 no. 78, item 483 (hereinafter referred to as the "Constitution of the Republic of Poland"), www.prawo.sejm.gov.pl. The text referring to Art. 153 is added as follows: '1. In order to provide a professional, reliable, impartial and politically neutral performance of state tasks, the civil service corps functions in government administration offices. 2. The Prime Minister is the head of the civil service corps.'
9 The most serious changes were introduced by the act of 30 December 2015 amending the act on civil service and some other acts; Dz. U. 2016, item 34 (ustawa z dnia 30 grudnia 2015 r. o zmianie ustawy o służbie cywilnej oraz niektórych innych ustaw; Dz. U. 2016, poz. 34), www.prawo.sejm.gov.pl (accessed 28 February 2019).
10 The joint constitutional complaint of the Ombudsman and a group of deputies awaiting consideration by the Constitutional Tribunal regarding the constitutionality of the aforementioned amendment of 2015, case no. K 6/16, www.trybunal.gov.pl/s/k-616/ (accessed 20 May 2018).
11 The first Polish law regulating the legal status of officials is the Act of 17 February 1922 on State Civil Service; Dz. U. of 1949 no. 11, item 72 (ustawa z 17 lutego 1922 r. o państwowej służbie cywilnej; Dz. U. z 1949 r. Nr 11, poz. 72).
12 Ustawa z dnia 26 czerwca 1974 r. – Kodeks pracy; Dz. U. z 1998 r. Nr 21, poz. 94 [Act of June 26, 1974 – Labor Code; Dz. U. of 1998 no. 21, item 94], www.prawo.sejm.gov.pl (accessed 20 May 2018).
13 Sygn. akt IV SA/Po 786/13 (*Ref. act IV SA / Po 786/13*), www.orzeczenia-nsa.pl (accessed 20 May 2018).
14 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego; Dz. U. z 2000 r. Nr 98, poz. 1071 [The Act of June 14, 1960. The Code of Administrative Procedure; Dz. U. of 2000 No. 98, item 1071], www.prawo.sejm.gov.pl (accessed 20 May 2018).
15 W. Drobny, *Glosa do postanowienia WSA z dnia 8 maja 2012 r. [Gloss to the decision of the Provincial Administrative Court of 8 May 2012]*, VII SA / Wa 639/12, LEX / el 2012.
16 Sygn. akt III APa 4/14 [Ref. act III APa 4/14], www.orzeczenia.rzeszow.sa.gov.pl (accessed 20 May 2018).
17 Sygn. akt II PK 32/13 [Ref. act II PK 32/13], www.sn.pl (accessed 20 May 2018).
18 Ustawa z dnia 23 grudnia 1994 r. o Najwyższej Izbie Kontroli; Dz. U. 2012, poz. 82 [The Act of December 23, 1994 on the Supreme Audit Office; Dz. U. 2012, item 82], www.prawo.sejm.gov.pl (accessed 20 May 2018).
19 Ustawa z dnia 9 kwietnia 2010 r. o Służbie Więziennej, Dz.U. 2010, nr 79, poz. 523 [The Act of 9 April 2010 on the Prison Service, Dz.U. 2010, No. 79, item 523]; www.prawo.sejm.gov.pl (accessed 20 May 2018).
20 Zalecenie KM RM z 24 lutego 2000 r., R/2000/6 [RM RM Recommendation of 24 February 2000, R / 2000/6].

21 Wyrok TK z dnia 12 grudnia 2002 r., sygn. akt K 9/02 [Judgment of the Constitutional Tribunal of December 12, 2002, Ref. act K 9/02], www.trybunal.gov.pl (accessed 20 May 2018).
22 Sygn. akt K 51/02 [Ref. act K 51/02], www.trybunal.gov.pl (accessed 20 May 2018).
23 Jan Zimmermann, *Prawo administracyjne [Administrative Law]*, 128 (Cracow, 2005).
24 Ustawa z dnia 14 czerwca 1991 r. o Krajowej Szkole Administracji Publicznej, Dz. U. Nr 63, poz. 266 [The Act of June 14, 1991 on the National School of Public Administration, Dz.U. U. no. 63, item 266], www.prawo.sejm.gov.pl (accessed 20 May 2018).
25 Postanowienie NSA z dnia 6 lutego 2013 r., sygn. akt I OSK 65/13 [Order of the Supreme Administrative Court of 6 February 2013, Ref. I I OSK 65/13 file]; www.orzeczenia.nsa.gov.pl (accessed 20 May 2018).
26 Sygn. akt VII SAB/Wa 45/12 [Ref. act VII SAB / Wa 45/12], www.orzeczenia.nsa.gov.pl (accessed 20 May 2018).
27 For example, the aforementioned judgment of the Provincial Administrative Court of 22 August 2012.
28 Sygn. akt II PK 259/13 [Ref. act II PK 259/13], www.sn.pl (accessed 20 May 2018).

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Simplified Tax Procedures in the New Tax Ordinance Act in Poland

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Abstract: The purpose of this article is to indicate the need to simplify typical tax procedures but also to explain how it could be done. The discussed issues are based on proposed provisions provided in the draft of the New Tax Ordinance Act prepared by the General Tax Code Codification Committee. Efforts should be made to increase the efficiency of tax proceedings, which means, among others, the elimination of the overly extensive and formalized procedure for assessment of low tax amounts. At present, for example, proceedings regarding million zlotys tax amounts are carried out on identical terms as in the case of taxes amounting to several dozen PLN. The proposed new law will speed up the handling of many matters, but will also reduce the costs incurred in meeting all the existing procedural requirements. In addition, there should be no proceedings undertaken regarding tax amounts that are lower than the costs of obtaining them. The procedures for serving documents to taxpayers should be also simplified. Currently, they are very expensive. Additionally, they are often ineffective, which leads to the loss of significant tax revenues by the state. In addition, the process of granting individual tax reliefs should be simplified, especially in the context of local taxes. It should be enabled municipalities to independently decide on these entitlements and streamline the procedure for their granting.

Keywords: simplification in tax law; simplified tax proceeding; tax procedures; tax proceeding; general tax law; tax ordinance act

1. Introduction

The problem which should be solved in the nearest future is excessive and too formalized procedures of the realization of taxes. Tax authorities have to assess and then collect taxes with all formal procedural requirements determined in the Act of 29 August 1997, Tax Ordinance Act, hereinafter referred to as TO (Act no. 749/2012, On Books). Paradoxically,

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this just rule in reference to all tax evokes, however, a great number of negative consequences (Popławski: 77). One of them is the fact that proceedings referring to tax amounts going into millions are realized on the same basis as in the case of taxes of a few dozen zlotys. This results in the tax authorities being overwhelmed with petty cases, and thereby they have less time to conduct proceedings referring to considerable amounts. Also the costs borne in connection with fulfilling all procedural requirements resulting from the Ordinance are not to be disregarded. A typical tax procedure concluded with issuing a decision consists of at least three letters addressed to the taxpayer (the decision of initiating the procedure, notice on a possibility to comment on the gathered evidence and the decision). The cost of their delivery alone is more than a dozen zlotys. They are not considerable expenses in the proceedings concerning high amounts, but when the tax oscillates within PLN 40, it is doubtful if the costs of the proceedings do not exceed the obtained revenues. The problem has already been noticed by the legislator but the amends to the Ordinance are not sufficient. The provided possibility in the TO as for the delivery of the establishing decision only, at the so-called annual assessments in the situation where the actual state has not changed or where the decision is to be issued only on the basis of the data resulting from the information submitted by the taxpayer, fails to solve the problem under examination. This enhances the realization the property tax, the agricultural tax and the forest tax, but they are still classic simplified procedures where the procedural requirements, unwanted by the taxpayer, and unnecessarily lengthening the tax case proceedings, are reduced to a minimum. The proceedings concerning the tax amounts which are lower than the costs of their obtaining should also be abandoned. The currently valid regulations in this matter are too rarely applied due to the low amount which allows for not initiating and discontinuing petty cases. It is also important to modify the mode of the changes in final decisions due to the circumstances occurring after their issuing which affect the tax amount. In practice this mode is applied out of the provision wording – it is impossible otherwise – which is not a positive phenomenon. The process of communication of the tax authority and the taxpayer should be spread. The present day procedures of delivering the taxpayers' letters, beside the fact that they are expensive, are often ineffective, which leads to the municipalities' losses of considerable revenues. The opportunity of paying the tax for the taxpayer by other persons should also be extended.

It is easy to indicate the effects of their elimination in all the procedures and methods. This would be a beneficial action for tax authorities (lower expenses and workload) as well as taxpayers (swifter handling of the case). The objective of this article is to indicate the need for simplifying typical tax procedures and the ways it should be done. Proposing amendments in the currently valid regulations, the proposed provisions of the new Tax Ordinance are taken into consideration, as presented in The New Tax Ordinance Bill of 6 October 2017 and its justification prepared by the Codification Commission of the General Tax Law (hereinafter referred to as the Commission).

2. Simplified Procedures

A problem which negatively affects the effectiveness of tax authorities' work is the necessity of carrying out tax proceedings concerning small tax amounts in obvious cases, which do not require any evidence procedure. There is no sense in a formalized and expensive procedure in the situation where the tax amount is not disputable, the actual state raises no doubts and the taxpayer wants to have the case settled as soon as possible. Under the current Ordinance routine cases referring to less than a few dozen zlotys must be carried out on the same basis as the cases of a few million zlotys, which by nature requires a long evidence procedure. This illustrates the need for introducing simplified procedures (Kmieciak). Such procedures are deformalized and by definition must be short. They are concluded with issuing a decision which is not justified. In effect, the taxpayer has a fast decision, and the tax authority has less work and lower procedure costs. The simplified procedure cannot be implemented without the taxpayer's consent (or request) and in problematic cases, where are discrepancies referring to the circumstances affecting the tax amount. The proposal of simplified procedures is included in the bill of the New Tax Ordinance. In accordance with the bill, if there is no need for an evidence procedure (the actual state raises no doubts) or the tax amount does not exceed PLN 5,000, the tax authority may, at the party's consent, issue a decision immediately without its justification. Cases in this procedure will be handled quickly, no longer than within 14 days. In accordance with the bill, the simplification of the procedure is reduced to the decision that there is no need for issuing and delivering the decision on its initiation, the taxpayer is not notified on an opportunity to comment on the collected evidence, and the issued decision is not justified, unless the party demands it after the conclusion is delivered. The taxpayer has the right, on the terms of general rules, to appeal against the decision issued by the authority of the first instance to the authority of the second instance and to complain to the court the decision issued by the second instance authority. The introduction of the simplified procedure proposed in the bill of the New Tax Ordinance will enhance handling petty cases, reduce the workload of tax authorities and the expenses connected therewith. (The Bill of the Tax Ordinance).

3. Proceedings on Trivial Tax Amounts

We should decidedly extend the already implemented procedure for tax amounts not exceeding the lowest expenses of the delivery of a registered mail with confirmation of receipt (currently, the rounded amount is PLN 7.00). The amount is too low. The tax of a few zlotys covers the costs of delivery only, assuming that in the case only one tax decision is issued. And what about other expenses connected with the collection of this tax? A tax the amount of which is lower than the costs of its enforcement has no economic grounds. Such a tax is not wanted by the state or a local government unit, and, which is obvious, by the taxpayer. It is collected only because it is required by the tax law. It is the beneficiary of tax incomes who should decide on when it is profitable to collect the tax. Otherwise, the taxes generating costs are a financial burden for the entities which should benefit from

them. The already mentioned bill of the New Tax Ordinance extends the rule of not initiating or discontinuing proceedings on trivial amounts. In the case where the tax amount does not exceed PLN 50.00 the procedure is not initiated and those initiated are discontinued, and the taxpayer is notified about the fact.

The procedure refers to the proceedings initiated (discontinued) *ex officio*. It cannot be applied by, for example, a taxpayer who assessed in the declaration the tax amount lower than PLN 50.00. The amount resulting from the declaration must be paid. If the taxpayer fails to pay, the authority may, on the basis of the declaration, initiate enforcement proceedings.

In the case of taxes being the income of the state, in accordance with the bill of the New Tax Ordinance, there will be no possibility to conduct tax proceedings if the amount possible to collect is less than PLN 50.00. The bill provides for, including the interest of tax beneficiaries who have significant incomes from trivial obligations, competences for the municipality council of establishing the amount lower than the limit amount of PLN 50.00. In this way municipality councils obtain an opportunity to adjust the limit of triviality to the specificity of a particular area.

Here it is important to note an erroneous practice of certain tax authorities, which is reduced to issuing and delivering so-called zero decisions. The tax authority assesses in such a decision that the taxpayer has nothing to pay (for example, is exempted) and this "assessment decision" is delivered to the taxpayer[1]. As a result of realizing this tax, the tax authority loses (delivery costs) and does not profit, which contradicts the essence of the tax. This case, even though the statutory obligation of not initiating or discontinuing proceedings on trivial amounts has been introduced, is still controversial. Taxpayers demand issuing such decisions, especially in the agricultural tax, due to the needs for acquiring by them or their family members social benefits (e.g. scholarship, dole). The "zero" decision is treated here groundlessly as an equivalent of the certificate which should be issued in a different mode.

4. The Modification of the Rules of Changing Establishing and Determining Decisions

Issuing thousands of decisions establishing the amount of the tax obligation within the framework of an annual assessment (in the property tax, agricultural tax and forest tax) at the beginning of the year entails the obligation of their change, if, after their delivery, changes occur affecting the tax amount. These are very often situations connected with, for instance, a sale of the property or a change of its intended use during the year, which raises the need for modification of the decision issued at the beginning of the year and assessing the tax for the whole year. The burdensomeness of the procedure of decision change is connected with the flaws of the currently valid regulations (Act no. 749/2012 on Books: Art. 254), being the only legal basis for these changes. In accordance therewith, the final decision, establishing or determining the amount of a tax obligation for a particular period, may be changed by the tax authority that issued it, if, after its delivery, a change occurred of actual circumstances affecting the cessation or determination of the obligation amount,

and the results of these circumstances were regulated in the provisions of tax law binding on the day of the decision issuing. Thus, a decision change requires the occurrence of actual circumstances, the results of which are regulated by the provisions of law. Literature aptly notes that the reduction of the possibility of a decision change to the occurrence of actual circumstances only in practice unnecessarily limits this competence of tax authorities (Dowgier: 274). The reason for a decision change may be also other circumstances, for example legal, which results in the necessity of adjusting to them the assessment decisions issued before (e.g. the introduction of an exemption or lowering the rate). In such circumstances, the only basis for a decision change is the regulation under scrutiny (Act no. 749/2012 on Books: Art. 254), which discusses actual circumstances only. Interpretative problems emerge also because of the reservation that the effects of the occurrence of the circumstances affecting the tax amount must be provided for in the provisions of tax law. These provisions, regulating particular local taxes (property, agricultural and forest taxes) regulate the effects of the occurrence of these circumstances, but only in reference to natural persons. Nothing is mentioned on legal persons and organizational entities without legal personality, in relation to whom decisions determining the tax amount were issued. Thus, in the current legal state, taking into account only the wording of the provision under analysis, it is possible to change a decision establishing the amount of the obligation for a natural person, and it is formally impossible to change a decision determining the obligation for a legal person. This is absolutely groundless and therefore, in practice, on the basis of TO, all decisions which established or determined obligations are being changed (Act no. 749/2012 on Books: Art. 254). This practice, however, misses the literary wording of this regulation. In the works on the new tax ordinance an improvement of the mode under scrutiny was proposed, so that it could be applied as extensively as possible. (The Bill of the Tax Ordinance: Art. 259). In accordance with the planned wording, the final decision establishing or determining the amount of the tax obligation may be changed, ex officio or on the party's request, if after its delivery a change of the circumstances occurred affecting its content. The designed adjustment of this mode of the decision change to the needs of local tax authorities will eliminate the aforementioned interpretative doubts. The facultative nature of this decision is not a drawback of the designed regulation. The decision may be changed, or the authority may not have to change it. If a tax authority decides, regardless if *ex officio* or on request that there were circumstances affecting the tax amount established or determined in the decision, it has to change it (the principle of legalism). It will not be allowed to do it after the obligation expiry date only.

5. Procedures of Communication with the Taxpayer

A considerable and costly problem connected with conducting tax proceedings by tax authorities is the mode of communication with the taxpayer (his representative). Due to the fact that the currently valid regulations do not include an obligation of the taxpayer to report the change of his address to the tax authority (in the period out of the tax proceedings), the delivery of the decision very often makes a great number of difficulties and lengthens the proceedings. Taxpayers make use of gaps in legal regulations regarding

deliveries in order to evade paying taxes. It is relatively easy, for example in local taxes paid by natural persons, because the failure in the delivery of the establishing decision results in no obligation and the interest for delay is not accrued. Legal persons, on the other hand, as practice shows, use the imperfect procedure of establishing decision deliveries for lengthening the proceedings till the expiry date. These problems were noted in the bill of the New Tax Ordinance. In the opinion of the Codification Commission of General Tax Law, it is important to introduce a cheap and effective method of communicating with the taxpayer and his representative. The bill proposes extending the possibility of delivery through electronic devices. In this form the letters could be delivered to not only professional representatives and public entities, but also entrepreneurs (except those taxed in the form of tax card and lump sum for registered incomes, unless they provide their electronic address) as well as the users of ICT systems (e-PUAP and the tax portal). Additionally, it is proposed that the data in the registering report stored in the Central Register of Taxpayers of the National Registry of Taxpayers (CRT) were the basis for establishing the address of residence and the address of the headquarters for the purpose of delivering letters. The possibility of successful delivering to the address indicated in the register will enhance the effectiveness of deliveries and reduce the costs connected therewith. Taxpayers, who do not have an address registered in the CRT, letters will be delivered on general basis.

6. Tax Payment for the Taxpayer

The possibility of paying a tax for the taxpayer by the members of his closest family and by certain other categories of persons was first introduced to the Ordinance in 2016. Taxes are very often paid not by the taxpayer but other persons, foremost his family. This is not bad in itself and does not result in abuses. Why, for example, a father cannot pay an agricultural tax for his daughter and reversely? The introduction of such a possibility should be assessed positively. In relation to taxpayers this is legalizing the common practice resulting in paying taxes on time. Beside the family members who can pay a tax without reducing the amount, also the current owner of the subject of compulsory mortgage or tax pledge may pay the secured amount of tax. All other persons may pay the tax for the taxpayer but up to PLN 1,000 only. The introduction of this limitation leads to interpretative problems.[2] Does this entitlement embrace the possibility of paying tax arrears along with the interest for delay? We believe so, because the tax arrears is nothing else but the tax unpaid before the deadline. It is impossible to pay the arrears alone without paying the interest amount for delay connected therewith. Thus, other persons may pay the arrears together with the interest for delay for the taxpayer. The statutory limit of PLN 1,000 should be referred to the arrears amount only, and not the interest for delay. For example, if the amount of the arrears is PLN 300 and the interest PLN 1,000, then, even though the amount of the payment exceeds the statutory limit, there is no basis for questioning the payment by the person other than the taxpayer. The amount of arrears has not exceeded PLN 1,000 (the interest amount should not be counted as the statutory limit). There is also no problem if another entity pays for the taxpayer a PLN 200

installment of the tax. This regulation is applicable without doubts to the moment when there are five installments. The tax is also an installment and an advanced payment, which is an argument for recognizing such a payment (Act no. 749/2012 on Books: Art. 3 point 3). As we can see, the article under analysis may be differently interpreted, which justifies the need for enhancing its wording. The bill of the New Tax Ordinance raises the tax amount which may be paid by another person up to PLN 5,000. This possibility also includes tax arrears and the entailed interest for delay. In this way we increase the possibility of paying relatively petty tax amounts by persons other than the taxpayer, which will facilitate their enforcement.

7. Conclusions

In conclusion, it is important to state that certain tax procedures for tax realization should be modified due to the need for increasing their effectiveness and reducing the costs of tax collection. The aforementioned proposals are largely included in the planned provisions of the New Tax Ordinance. However, changes are necessary also in the laws regulating particular taxes, including foremost the taxes supplying municipal budgets. First of all, we have to reform the procedure of the so-called annual tax assessment, based on delivering sometimes dozens of thousands decisions establishing the amount of the tax obligation for natural persons in a short period of time (January–February). Also declarations and information submitted by the taxpayer should be uniformed, which will lead to the popularization of their submission through the means of electronic communication. The tax records must finally begin to operate, not only on paper, which will perfectly facilitate the access to date necessary for proper and punctual concluding tax proceedings.

Reference

1 This does not refer to decisions on investment reliefs issued on the basis of Article 13 of the Act on Agricultural Tax. This decision establishes the agricultural tax amount and then the so-called investment expenses borne by the taxpayer are deducted, which results in the situation that there is no tax amount to pay. This decision has to be delivered, because the fact of its delivery results in the tax obligation from which the investment expenses are deducted.

2 Leonard Etel (ed.), *Ordynacja podatkowa*, Komentarz, 544, (Warsaw 2017).

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Concept of Good Governance in Jurisprudence: The Russian Experience and Practice

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Abstract: In the given contribution the author analyses the Russian experience in the implementation of the concept of good governance. The research highlights the issues in the sphere of public management, which have been only partially resolved in the course of the administrative reform in the Russian Federation. Using the method of comparative legal analysis and monitoring the author reviews the existing approaches to the concept of good governance in the scientific literature and explores the implementation of the principles of good governance enshrined in the EU documents in the Russian law.

Keywords: good governance; good administration; modern bureaucracy

1. Introduction

In this article the author presents the results of an analysis of the implementation of the principles of good governance declared in the governing documents of the Council of Europe in the national legislation of the Russian Federation.

On the basis of the methods of systematic comparative legal analysis and monitoring, the study of normative regulation of activities of executive bodies of the Russian Federation the author reveals the effect of such principles as transparency and the rule of law.

2. Analysis of the Situation in the Russian Federation

According to a number of experts, formalization of relations is one of the sides of bureaucracy. Being a complicated social phenomenon, bureaucracy is explored by political scientists and government officials and is practically not included in the legal categories.[1]

There is also an opposite position claiming that it's been a long time since the historical process of bureaucracy development demonstrated a number of features of this phenomenon, including its trend towards self-expansion and a tight connection with the regulatory self-description, i.e. association with the principle of legality.[2]

In the research of issues related to bureaucracy as part of public administration and administrative law the emphasis is firstly on the sphere of executive power.

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How did the executive power in Russia transform in the recent years, what are the top priorities of the administrative reforms?

As it's been noted by the experts from the Institute of Comparative Legislation under the Government of Russia, an important direction of administrative reforms is connected with the administrative legal regulation of the mechanism used by the executive bodies exercising their powers. Executive bodies must follow the uniform rules established by law. This order will in many ways contribute to the efficiency and democratic character of the judgements made in public and private cases in this country, as well as to the development of a modern system of executive power.[3]

In addition to the settlement of administrative procedures there was a task to develop administrative procedures that would regulate the fulfilment of all state functions and certain processes that ensure their fulfilment, including those connected with the provision of state services to the public; with a guarantee of protection of citizens and organizations' rights and duties; with the provision of public services to particular persons in the state bodies.[4]

Evaluating the practical results of the administrative reforms in facts and figures one should note the following:

- federal bodies of executive power have developed over 400 administrative policies of public services provision;
- 232 policies have been approved and registered in the Ministry of Justice of the Russian Federation;
- over 40 subjects of the Russian Federation have adopted their legal framework of policies and continue their development;
- the total number of administrative policies adopted at the level executive bodies of the subjects of the Russian Federation is over 2,000.[5]

In addition to regulatory policies, active work has been done on the development of information support of public administration.

Based on the Russian Government Decree of 25 December 2009 no. 1088 (as amended on 27 November 2015) state automated information system "Administration" (Rus. "Upravleniye") was created.[6]

SAS "Administration" is a unified distributed state information system that provides collection and procession of the data contained in state and municipal information resources, official statistics, and the data for making management decisions in the sphere of public administration, including the information support of strategic planning, as well as the provision and analysis of the data in accordance with the relevant decree.

The state automated information system "Administration" was created in order to increase the efficiency of public administration and to deal with the following tasks:

a) provision of informational and analytical support to the decision-making bodies of the state and local self-governments, as well as planning the activities of these bodies;
b) monitoring, analysis and control of the execution of the decisions made by the bodies of state and local power of the Russian Federation, including the strategic planning decisions and top priority national projects;

c) monitoring and analysis of the processes occurring in the real sector of economy, finance, banking and social spheres, as well as social and economic development of the constituent territories of the Russian Federation;
d) assessment of the efficiency of the activity of the executive bodies of the Russian Federation and local self-governments;
e) monitoring, analysis and control over the achievement of target indicators stipulated in the Decrees of the President of Russia of 7 May 2012 no. 596–606 for the constituent territories of the Russian Federation, as well as the implementation of measures aimed at their achievement;

strategic planning support in:
- state registration of the documents of strategic planning;
- maintaining the state federal registry of documents of strategic planning;
- monitoring and control of implementation of documents of strategic planning in accordance with the established procedure;
- monitoring and controlling indicators of social and economic development and protection of Russian Federation national security;
- monitoring the efficiency of work of strategic planning participants;
- providing participants of strategic planning participants, entities and individual with an access to the documents of strategic planning;
- development of public hearings and approval of the drafts of strategic planning documents in accordance with the established procedure;
- information and analytical support of strategic planning participants in fulfilment of strategic tasks.

SAS "Administration" contains the data on 8.5 thousand indicators. The list of indicators is formed by means of coordination of operation flow charts of interdepartmental interaction with the help of the portal of methodological support of SAS "Administration" project development.

For the citizens of the Russian Federation the practical result of the administrative reform is the creation of a portal of public services and a chain of multi-functional centres providing state and municipal services (MFC), which simplified considerably the interactions with the state bodies aimed at the receipt of a number of documents and other public services.

As it has been noted by the colleagues from the Institute of Comparative Legislation, more and more measures facilitating the access to public services are introduced in the legislation. The terms of entering market relations are simplified. For example, there is a transition to the notification order of business registration based on a single-window principle within the timeframe established by law. The number of licensable activities has decreased dramatically. The functions of the licensing bodies are regulated by means of removing control and oversight powers over subordinate subjects from their authorities.[7]

The single-window principle implies that the state or municipal service is provided after a single application with a relevant request.

As of 1 January 2016, 2,684 centres and 10,130 offices providing state and municipal services were created in Russia. The coverage of the population with the single-window service amounted to over 94%.

The Government of the Russian Federation summarized the results of multi-functional centres creation project. The key results are presented in the report on the progress of the realization of the Decree of the President of Russia of 7 May 2012 no. 601 "On the Main Direction in Improving the Public Administration System". According to the data of monitoring the development of MFC network, as of 1 March 2017, 2,777 multi-functional centres, 10,214 autonomous units and 312 offices on the basis of contractors had been created in Russia. Over 33,000 of multifunctional specialists are employed by them all over the country. About 350,000 citizens of Russia apply to multi-functional centres for advice or services per day. Over 60 million services were provided in multi-functional centres in 2016.[8]

As of 1 March 2017, the indicator of population coverage by the single-window system, calculated on the basis of the methodology approved at the Government Committee hearing concerning the implementation of the administrative reform of 30 October 2012 no. 135, amounted to 96.6% of the total population of the Russian Federation.

Regular social studies have shown that the average waiting time for the citizens applying for state and municipal services is decreasing steadily: in 2012 this indicator was 55 minutes; in 2013 – 52 minutes; in 2014 – 42 minutes; in 2015 – 35.7 minutes; in 2016 – 21.9 minutes. About 49.1% of the respondents noted that they had spent less than 15 minutes in the queue waiting for their turn to submit the documents in order to receive state and municipal services. The results of the research show that the waiting time in MFC is less than in the bodies of public authority and self-government bodies and is evaluated by the respondents at 18.9 minutes.

Analysing the results of the transformations many Russian colleagues speak of low efficiency of the reform. Thus, for example, A.M. Gogolev emphasizes that the course of the administrative reform is contradictory and that it is dragged out.[9] He points out that the key "consumer" of the reform at present is the entrepreneurial environment. And one of the key components of the reform is the orientation at the efficient service for this environment. The functional differentiation of federal executive bodies shows that the reform is aimed at the so-called new models of public administration that have already been implemented in other countries by liberal reformers. The transition to the new form of public administration is taking place under the conditions that are either absent or in their infancy in Russia.

Director of the Institute of Legislation and Comparative Legal Studies under the Government of the Russian Federation T.Y. Khabrieva underlines that the absence of a systemic approach to the regulation of administrative procedures leads to a situation where many of them will start either working inefficiently or translate into administrative barriers that impede the exercise of rights and freedoms and the solution of economic and political tasks faced by the state and society.[10]

The source, or the "breeding ground" for the administrative barriers could be the loopholes in the legislation, as well as excessive regulation, which is proved by the practice

of enforcement of numerous regulations related to the execution of public functions and provision of public services.[11]

Early in the '80s of the last century EU countries kickstarted the work on the assessment and removal of excessive administrative control. The given activity that was called "de-regulation" was determined by the need to reinforce the role of small business as the most active sector of economy. In the middle of the '90s the CIS countries joined this activity, too. In Russia the stable trend towards the reduction of administrative burden emerged early in this century.[12]

A. M. Gogolev highlighted two strategies of reforms implementation. The first strategy makes entrepreneurship the top priority and sees it as the only unifying force in the face of radical social changes. The second one relies on the liberal concept of the priority of the civil society over the state and views public administration as a purely auxiliary tool, while the key goal of the reform is to turn public administration into a transparent and efficient institute providing service to the person and to the citizen. The reform implementation must involve the institutes of social control and the necessity for wide public debates.

Today the basis of the reform efforts should be the change in the relationships between the state and the citizen, where the state should be given the role of a kind of service centre, safeguarding the interests of a person and a citizen, while the administrative law should fulfil the function of legal support of this activity. The given position seems quite relevant and viable for modern Russia.

3. The Concept of Good Governance and Its Russian Interpretation

The term "good governance" has become quite popular in the legal doctrine recently, which is confirmed by numerous publications and the enshrinement of the given principle in international acts and national legislation.

As it has been noted by Professor Igor Bartsits, the very term "good governance" (Spanish "buen gobierno", French "bonne gouvernance") is quite widespread. There is a Canadian political maxim "Peace, order and good governance", which places good governance in one row with such unconditional values as peace and order.[13]

Professor I. V. Ponkin considers good governance in terms of three key aspects:

1. as a measure of ideal in public administration;
2. as a concept of design, development, realization and assessment of public administration;
3. as a tool system.

The first case refers to the ideal quality of the system of public administration that is in public demand.

The second one refers to the value-laden regulatory concept describing "good governance", including the systemic totality of formal rules (laws and by-laws) and non-formal propositions (corporate and social norms), regulating the conduct of individuals

and organizations and guiding the managerial activity. The concept also includes the ideas, the tools for their implementation and the system of essential attributes (and at the same time criteria) of quality of public administration and expected (designed) quality indicators of public administration.

As a tool system "good governance" is a structural and functional totality of institutional, legal, organizational and administrative mechanisms of design, programming, realization, provision and control of public administration with the aim of providing, protecting and safeguarding public interests, realizing social, economic and other functions of public power, including the provision of sustainable wealth of all the citizens, security of an individual, of the society and the state, stability of the positive and efficient economic development of the state.[14]

To our opinion one can simplify all of the constructions mentioned above by leaving Cicero's formula that is as old as time, "Salus populi suprema lex esto" and determine the wealth of the people to be the main appraisal criterion of public authority's activity.

It should be noted that in the Russian legal doctrine, as well as in the legislation, the term "good governance" is not a widely spread one yet, while its separate elements or principles are used in the regulatory framework, e.g. executive and local self-government bodies' performance indicators have been established, guaranteed access to the information about the activity of public authorities has been enshrined, as well as the defence of economic entities' rights in the course of state and municipal control, the principles of electronic government activity and the use of electronic document flow in the activity of public authorities.

4. Good Governance in International Documents

As it has been noted by Professor I. V. Ponkin, at present the term "good governance" has become a permanent part of the vocabulary of a wide range of participants of the international community. Today almost all major institutes declare that "good governance" is their priority and a part of their development strategy.[15]

Article 41 "Right to good administration" of the Charter of Fundamental Rights of the European Union (2007/C 303/01) (Strasbourg, 14.12.2007)[16] declares:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
   (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   (c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

The principle of good governance is mentioned in the Stockholm Programme – an Open and Secure Europe serving and protecting citizens (2010/C 115/01) (4.5.2010), "The European Council recalls that transparency of decision-making, access to documents and good administration contribute to citizens' participation in the democratic life of the Union. Furthermore, the Union citizens' initiative introduced by Article 11 TEU will create a new mechanism for civic participation. That mechanism should be realised rapidly" (2.6. Participation in the democratic life of the Union).[17]

P.4 Art. 71 Regulation (EC) No. 883/2004 of the European Parliament and of the Council on the coordination of social security systems (Strasbourg, 29.4.2004)[18] enshrines that "The institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time and shall in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this Regulation".

The given principle is also reflected in branch administration. As an example, one can think of Recommendation Rec(2005)8 "On the principles of good governance in sport" (adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies), where it was stipulated that "good governance in sport is a complex network of policy measures and private regulations used to promote integrity in the management of the core values of sport such as democratic, ethical, efficient and accountable sports activities; and that these measures apply equally to the public administration sector of sport and to the non-governmental sector of sports".

Good Governance – the responsible conduct of public affairs and management of public resources – is encapsulated in the Council of Europe 12 Principles of Good Governance. The 12 Principles are enshrined in the Strategy on Innovation and Good Governance at local level, endorsed by a decision of the Committee of Ministers of the Council of Europe in 2008. They cover issues such as ethical conduct, rule of law, efficiency and effectiveness, transparency, sound financial management and accountability:[19]

1. Fair Conduct of Elections, Representation and Participation
2. Responsiveness
3. Efficiency and Effectiveness
4. Openness and Transparency
5. Rule of Law
6. Ethical Conduct
7. Competence and Capacity
8. Innovation and Openness to Change
9. Sustainability and Long-term Orientation
10. Sound Financial Management
11. Human Rights, Cultural Diversity and Social Cohesion

12. Accountability

5. Incorporation of the Principles of Good Governance in the Russian Legal System

Let us consider how the above-mentioned principles can be incorporated into the Russian legal system.

It is obvious that the analysis of the implementation of all 12 principles is not the objective of the given work, so we will dwell only on such an important component as good governance as openness and transparency (4).

The given principle implies that:

- Decisions are taken and enforced in accordance with rules and regulations.
- There is public access to all information, which is not classified for well-specified reasons as provided for by law (such as the protection of privacy or ensuring the fairness of procurement procedures).
- Information on decisions, implementation of policies and results is made available to the public in such a way as to enable it to effectively follow and contribute to the work of the local authority.

Federal law of 09.02.2009 No 8-FZ (as amended on 28 December 2017) "About Ensuring Access to Information on Activities of State Bodies and Local Government Bodies",[20] Article 4 "The Main Principles of Ensuring Access to Information on Activities of State Bodies and Local Government Bodies" enshrines the following:

1. openness of information on the activity of state bodies and local self-government bodies and a free access to that information, except for the cases specified under federal laws;
2. the accuracy of information and the timeliness of its provision;
3. freedom of search, receipt, transfer, production and dissemination of information on the activity of state bodies and local self-government bodies by any legal means;
4. observation of citizens' rights to the inviolability of private life, personal and family privacy, their honour and business reputation of citizens as well as the business reputation of organisations in the course of provision of information on the activity of state bodies and local self-government bodies.

The given law establishes some restrictions on the effect of the principles mentioned above in case it constitutes state or other official secret under the legislation of the Russian Federation (Article 5).

Article 8 also declares that the information users shall have the following rights:

1. to receive reliable information on the activities of government bodies and local government bodies;
2. to refuse to receive information on the activities of government bodies and local government bodies;

3. not to substantiate the need to obtain the requested information on the activities of government bodies and local government bodies, the access to which is not restricted;
4. to appeal in accordance with the established procedure the acts and (or) actions (omissions) of state bodies and local government bodies, their officials, which violate the right to access information on the activities of government bodies and local government bodies and the established procedure for enjoyment thereof;
5. to demand, in accordance with the procedure established by the law, compensation for harm caused by violation of his/her right to access to the information on the activities of government bodies and local government bodies.

In the legal system of the Russian Federation there is a separate act on the provision of access to information on the activities of the courts. Federal law of 22.12.2008 No 262-FZ (as amended on 28 December 2017) "On provision of access to information on the activities of courts in the Russian Federation"[21] envisages the following ways of access to the information on the activities of courts:

1. presence of citizens (individuals), including representatives of organizations (legal entities), public associations, public authorities and local self-government bodies, in an open court session;
2. disclosing (publishing) information on the court activities in the mass media;
3. posting information on the court activities in the Internet;
4. placement of information on the court activities in the premises occupied by the courts, the Judicial Department, the bodies of the Judicial Department, and the bodies of the judiciary;
5. familiarization of information users with the information retained in archives;
6. providing information users upon their request with information on the activities of the courts;
7. webcasting open court sessions on the Internet in accordance with this Federal Law, other federal laws (Article 6).

The Resolution of the Plenum of the Supreme Court of the Russian Federation of 13.12.2012 no. 35 "On the openness and publicity of legal proceedings and about information access about activity of the courts"[22] enshrines that the openness and publicity of legal proceedings, timely, qualified, objective informing society on the activity of the courts of the general jurisdiction contribute to an increase in the level of legal awareness of judicial system and legal proceedings, are a guarantee of fair legal proceedings, and also provide public control over functioning of judicial authority. Open legal proceedings are a means of maintaining the society's trust in court.

The openness and publicity of legal proceedings, access to the information about the activity of courts shall promote the realization of tasks of civil, administrative and criminal trial (Article 2 CCP of the Russian Federation, Article 24.1 of the Code of the Russian Federation on Administrative Offences, Article 6 of the Code of Criminal Procedure of the Russian Federation) and shall not lead to any intervention in judicial activities, as courts implementing justice are independent and submit only to the Constitution of the

Russian Federation and the law (Article 120 of the Constitution of the Russian Federation, Article 5 of the Federal constitutional law "About Judicial System of the Russian Federation", Item 5 Article 4 of the law on ensuring access to information).

6. Conclusion

The concept of good governance in the Russian Federation has formed mainly in the managerial and administrative legal doctrine.

Some of its elements or principles are used in the regulatory framework, e.g. executive and local self-government bodies' performance indicators have been established; guaranteed access to the information about the activity of public authorities has been enshrined, as well as the defence of economic entities' rights in the course of state and municipal control,[23] and a number of others.

A considerable amount of work aimed at the provision of legal regulation of executive bodies' activity in terms of public functions fulfilment (including the provision of public services to individuals and legal entities) has been done in the Russian Federation.

A lot of attention is given to the regulation of administrative procedures, the development of administrative policies and forms of interaction, including the online one, between the public authorities.

A legal framework and electronic resources ensuring the interaction of the system of state power with the external environment have been developed, among which there are such state automated systems as "Administration", "Justice", "Elections", public services, Federal Tax services portals, etc.

The percentage of the population using electronic services has increased; the time of their provision has decreased.

However, a lot of administrative barriers have not been removed yet; the paper-flow and reporting forms have grown massively (online reports have been added to the paper ones); there is excessive regulation of a number of administrative processes (e.g. lengthy interdepartmental approval of documents).

References

1 Л. Е. Калинина, Программно-целевая бюрократия: публично-правовой аспект [L. E. Kalinina, Special-Purpose Bureaucracy: Legal and Public Aspect], 11–14, in Государственная власть и местное самоуправление *[State Power and Local Self-Government]*, no. 10 (2014).
2 И. А. Исаев, Легальность и бюрократия [I. A. Isaev, Legality and Beraucracy], 3–8, in История государства и права *[History of State and Law],* no. 20 (2014).
3 Е. К. Волчинская, и др., С. Е. Нарышкин, С. Е., Хабриева, Т. Я., Административная реформа в России. Научно-практическое пособие [E. K. Volchinskaya et al., S. E. Naryshkin, T. Y. Khabrieva (eds.), *Administrative Reform in Russia. Research and Practice Textbook*] (Moscow, Kontrakt, Infra-M 2006).
4 Ibidem.
5 *Monitoring Administrative Policies Implementation (National Research University "Higher School of Economics")*, monitoring.hse.ru/about (accessed 10 May 2018).
6 Собрание законодательства РФ *[Collection of Legislative Acts of the Russian Federation]*, 4 January 2010, no. 1, Art. 101.
7 Т. Я. Хабриева, Ж. Марку, Административные процедуры и контроль в свете европейского опыта [T. Y. Khabrieva, Zh. Marku (eds.), *Administrative Procedures and Control in the Light of European Experience*] (Moscow, Statut 2011).
8 Совершенствование государственного управления: портал административной реформы *[Enhancing Public Administration: Portal of the Administrative Reform],* http://ar.gov.ru/ru/news/42956/1/0/2/10/index.html (accessed 10 May 2018).
9 А. М. Гоголев, Некоторые тенденции и закономерности становления и развития государственного администрирования [A. M. Gogolev, Some Trends and Patterns in the Development of Public Administration], 19–25, in Административное право и процесс *[Administrative Law and Procedure],* no. 2 (2018).
10 Т. Я. Хабриева, Ж. Марку, Административные процедуры и контроль в свете европейского опыта [T. Y. Khabrieva, Zh. Marku (eds.), *Administrative Procedures and Control in the Light of European Experience*] (Moscow, Statut, 2011).
11 See more in: Доклад Департамента развития малого и среднего предпринимательства Министерства экономического развития Российской Федерации „Об исполнении полномочий по государственному контролю (надзору), муниципальному контролю государственными (муниципальными) предприятиями и учреждениями" *[Report of the Department of Small and Medium Business Development of the Ministry of Economic Development of the Russian Federation "On the Execution of Authorities of State Control (Oversight), Municipal Control by State (Municipal) Enterprises and Institutions"]* (Moscow 2010).
12 Л. А. Истомина и др., Малое предпринимательство: как снизить административные барьеры? Зарубежный опыт. [L. A. Istomina et al., Small Business: How to Reduce Administrative Barriers?] (Moscow, Tesey, 2003).
13 И. Н. Барциц, Конституционное право на хорошее (эффективное) управление: критерии, показатели, оценки [I. N. Bartsits, Constitutional Right to Good (Efficient) Governance: Criteria, Indicators, Evaluation], 64–71, in Конституционное и муниципальное право *[Constitutional and Municipal law]*, no. 11 (2013).
14 И. В. Понкин, Теория публичного управления*:* Учебник для магистратуры [I. V. Ponkin, *Theory of Public Administration: Texbook for Master's Programme*], 336 (Moscow 2017)
15 И. В. Понкин, Теория публичного управления*:* Курс лекций [I. V. Ponkin, *Theory of Public Administration: Course of Lectures*], 86 (Moscow 2013).
16 Хартия Европейского Союза об основных правах *[The EU Charter of Fundamental Rights]*, www.coe.int/t/ngo/Source/reading_guide_charter_fr.pdf (accessed 10 May 2018).

17 Стокгольмская программа „Открытая и безопасная Европа, которая служит своим гражданам и защищает их“ *[The Stockholm Programme – An open and secure Europe serving and protecting the citizens]*, ec.europa.eu/anti-trafficking/eu-policy/stockholm-programme-open-and-secure-europe-serving-and-protecting-citizens-0_en (accessed 10 May 2018).

18 Регламент *N 883/2004* Европейского парламента и Совета Европейского Союза „О координации систем социальной защиты” *[Regulation (EC) No 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems]*, eur-lex.europa.eu/ (accessed on 10.05.2018)

19 *Principles of Good Governance and European Label of Governance Excellence (ELoGE)*, www.coe.int/en/web/good-governance/12-principles-and-eloge (accessed on 10.05.2018)

20 Собрание законодательства РФ. 2009. № 7. Ст. 776 [Collection of Legislative Acts of the Russian Federation of 4 January 2009, no. 7, Art. 776]

21 Собрание законодательства РФ, 29.12.2008, N 52 (ч. 1), ст. 6217 [Collection of Legislative Acts of the Russian Federation of 29 December 2008, no. 52, part 1, Art. 6217]

22 Бюллетень Верховного Суда РФ. 2013. N 3, март [Bulletin of the Supreme Court of the Russian Federation of 2013, no. 3, March]

23 Федеральный закон от 26.12.2008 N 294-ФЗ (ред. от 18.04.2018) „О защите прав юридических лиц и индивидуальных предпринимателей при осуществлении государственного контроля (надзора) и муниципального контроля” [Federal Law of 26.12.2008 No 294-FZ as amended on 18 April 2018 “On protection of rights of legal entities and individual entrepreneurs in exercise of state control (supervision) and municipal control”), Собрание законодательства РФ. 2008. N 52 (ч. 1), ст. 6249 (Collection of Legislative Acts of the Russian Federation. 2008, no. 52, part 1, Art. 6249]

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Impact of the Principle of Proportionality in Tax Law on the Jurisprudence of the Court of Justice of the European Union and the Supreme Administrative Court in Poland

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Abstract: The principle of proportionality in tax law as an EU and constitutional standard may play an important role in the interpretation of tax law. The principle of proportionality is associated with moderation of the activities of public authorities and minimization of their interference in the sphere of rights and freedoms. The principle of proportionality is also called the principle of commensurability, moderation, and adequacy. The article analyses the impact of the proportionality principle in tax law on the case law of the Court of Justice of the European Union. The case law of the Polish Supreme Administrative Court uses the principle of proportionality when interpreting tax law, and the judgments of the Court of Justice of the European Union and the Polish Constitutional Tribunal have a significant impact on the jurisprudence of administrative courts in Poland.

Keywords: principles of law; the principle of proportionality; Court of Justice of the European Union; jurisprudence; the case law of the Constitutional Tribunal; the case law of the Supreme Administrative Court; Poland

1. Introduction

The objective of the article is to attempt at answering the question of what role is played by the principle of proportionality in tax law, with particular focus on the case law of the Court of Justice of the European Union (CJEU) and municipal courts in Poland.

This paper will offer answers to two fundamental questions:

1. Does the Court of Justice of the European Union, in tax cases, employ the analysed European standard, and are Polish solutions compliant with this European standard?
2. Does the case law of the Polish Supreme Administrative Court, in its interpretation of tax law provisions, employ the principle of proportionality, and

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do judgements of the Court of Justice of the European Union and Polish Constitutional Tribunal exert significant impact on the case law of administrative courts in Poland?

The principle of proportionality is an important standard in taxpayer rights protection and is associated with moderation of the activities of public authorities and minimization of their interference in the sphere of rights and freedoms. The principle of proportionality is also called the principle of commensurability, moderation, and adequacy (L. Etel, P. Pietrasz, *Niekompletność świadczeń o przeznaczeniu oleju opałowego a zastosowanie sankcji podatkowej, o której mowa w art. 89 ust. 16 ustawy o podatku akcyzowym [Incompleteness of declarations on the use of fuel oil and the imposition of the tax sanction provided for in Art. 89 (16) of the Value Added Tax Act],* ZNSA, no. 2(41)/2012, p. 27). Furthermore, the principle of proportionality is linked with observation of the criteria of usefulness, necessity, and the weighing up of particular values.

The addressees of the principle of proportionality are:
1) the legislative authority
2) the executive authority
3) the judiciary

With consideration to the scope of the research set out in the article, the object of assessment will be observance of the principle of proportionality by the judiciary, id est by courts and tribunals.

2. The Principle of Proportionality in the Normative Sense

The principle of proportionality can be understood as a normative, doctrinal principle. It exerts significant influence on interpretation of legal provisions performed by tribunals and courts. The principle of proportionality in tax law is one of the most important general principles of European law. It should also be stated that the indicated standard is anchored in the Constitution of Poland. It impacts the interpretation applied by the Polish Supreme Administrative Court (SAC) in tax cases; that court applies an EU-friendly and constitutionally consistent interpretation.

In the normative sense, the legal basis of the principle of proportionality jest Art. 3b (3 and 4), incorporated into the Treaty on European Union and Treaty Establishing the European Community by the Lisbon Treaty, replacing Art. 5 (4 and 5) of the Treaty on European Union.

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The principle serves as criterion for evaluating the activities of EU institutions and is the basis for assessing actions taken by the member states (M. Bącal, in M. Militz, D. Dominik-Ogińska, M. Bącal, T. Siennicki, *Zasady prawa unijnego [Principles of EU Law]*, Warsaw 2013, pp. 145–146).

Under the adopted solutions and under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. As we can see, in this case the principle of proportionality is associated with the principle of subsidiarity. In order for these principles to be more than words on paper, the aforementioned Protocol also sets out mechanisms designed to ensure observance of the principle of proportionality. In particular, national Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol (Art. 3b[3]). Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality (Art. 3b[4]).

The Protocol holds that each institution shall ensure constant respect for the principles of subsidiarity and proportionality set out in Article 3b of the Treaty on European Union (Art. 1 Protocol). The Commission shall forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator. The European Parliament shall forward its draft legislative acts and its amended drafts to national Parliaments (Art. 4 Protocol).

The Court of Justice of the European Union plays an important role in respect of adherence to the principles of proportionality and subsidiarity. It is competent to rule on cases concerning violations by a legislative act of the principle of subsidiarity brought by Member States in accordance with the provisions of Article 230 Treaty on the Functioning of the European Union (TfEU) or presented by them pursuant to their legal regimes in the name of a national parliament or chamber thereof. Under the rules set out in that same article, applications may be brought by the Committee of the Regions (CoR) in respect of legislative acts whose adoption requires consultation under the TfEU (Art. 8 Protocol). In addition, the Commission presents each year to the European Council, the European Parliament, the Council, and national Parliaments a report on application of Article 3b TEU. This annual report is also presented to the Economic and Social Committee and the Committee of the Regions (Art. 9 Protocol).

In addition, the principle of proportionality is present in the highest legal act in effect in Poland, the Constitution. Under Art. 31 (3) of the 1997 Constitution (OJ L no. 78, item 483 as amended), any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. This regulation also applies in tax law.

3. Impact of the Principle of Proportionality on the Case Law of the Court of Justice of the European Union

Member States of the European Union are obliged to carry out timely and correct implementation (transposition) of EU regulations. The subject literature emphasizes that implementation as a whole is composed of: 1. normative implementation, 2. administrative implementation, and 3. judicial implementation. Judicial implementation refers to the role of municipal courts as EU courts applying principles of EU law and imposing sanctions for violations or non-application of EU law by individual entities (A. Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich [Methods of Harmonization of Consumer Law in the European Union and their Impact on Implementation Processes in Member States],* Warsaw 2013, p. 89).

Recognition by the CJEU that judicial application of the law is an element of national implementation of a Directive makes it possible to: 1. grant courts the competence to assess whether a State has properly implemented European law, 2. achieve in the judicial application of law the objectives of EU law, including of Directives (principle of effectiveness of EU law), 3. interpretation of municipal law consistent with EU law, 4. uniform application of EU law in all Member States (see judgment of CJEU of 10 April 1984 in case C 14/83, Sabine von Colson and Elisabeth Kamann versus Land Nordrhein-Westfalen, and of 9 December 2003 in C-129/00, Commission versus the Republic of Italy).

In the judgment of the SAC of 12 June 2013 (I FSK 146/13) it is indicated that European Law provides a clear division of competences concerning interpretation and application of European law. The CJEU is the court competent to rule on binding interpretation and validity of acts of European Union law, while municipal courts as European courts are charged with the duty of applying those provisions and their interpretation in individual cases. Application of provisions of EU law by municipal courts encompasses *inter alia* the duty to apply those provisions and their interpretation in individual cases, as well as the duty to ensure the full effectiveness of provisions of EU law and non-application of provisions of municipal law that are in conflict with it (principle of primacy). An unambiguous and precise response by the CJEU concerning interpretation of EU law 'in practice determines the content of the judgement by a municipal court in a given case, and even in the absence of express regulation of the issue, in fact has binding force' (SAC judgment of 19 September 2008, I GSK 1038/07, Central Repository of Administrative Court Judgments – CRACJ).

Pursuant to Art. 260 TfEU, if the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances (see CJEU judgment of 22 June 2016

in C-557/14, *European Commission vs Portuguese Republic* [non-compliance with CJEU judgment of 7 May 2009 in case C-530/07, *European Commission vs Portuguese Republic*] and of 4 June 2009 in case C-568/07, *Commission of the European Communities vs Hellenic Republic* (non-compliance with CJEU verdict of 21 April 2005 in case C-140/03, *Commission of the European Communities vs Hellenic Republic*).

Here we should cite one such ruling by the CJEU. In its judgment C-241/11 of 25 June 2013, the CJEU imposed a lump sum payment on the Czech Republic of EUR 250,000 for failure to implement measures in a timely manner ensuring implementation of CJEU verdict C-343/08 of 14 January 2010. In assessing the seriousness of the infringement, the CJEU indicated that the absence in that country of a second pillar in its pension system, as well as the fact that institutions for occupational retirement provision are prohibited from establishing themselves in its territory, late compliance, by that Member State, with the judgment in *Commission v. Czech Republic* had a limited effect on the internal market for occupational retirement provision, which Directive 2003/41, according to recitals 1, 6 and 8 in the preamble thereto, seeks to establish, and, therefore, on private and public interests (para 53). In particular, the complete transposition of Directive 2003/41 is intended principally to inform interested persons in the event that, as the Court observed in paragraph 51 of the judgment in *Commission v. Czech Republic*, the national retirement pension system develops in that regard (para 54).

The CJEU, in deciding whether interpretation of the provision of the Act performed by the Supreme Court of the Czech Republic constitutes legislation, emphasized that assessment of the scope of municipal legislative, executive, and administrative provisions must be performed with heed to the interpretation given by municipal courts (verdict C-382/92 of 8 June 1994, *Commission vs United Kingdom*). In consequence, the notion of "legislation of a member state" is understood by the CJEU as also encompassing interpretation of a provision of municipal legislation performed by a national Supreme Court (CJEU judgment of 15 March 2018 in case C-431/16, Instituto Nacional de la Seguridad Social (INSS), *Tesorería General de la Seguridad Social (TGSS) vs José Blanc Markus*).

From the above said we may conclude that the Court of Justice of the European Union plays a primary role in the interpretation of EU law. Because of the principle of primacy in the application of EU law and effectiveness of that law, municipal courts must respect verdicts of the CJEU. If they fail to adhere to the interpretation indicated by the CJEU, they may be at risk of a fine, as in the case of the Czech Republic, whose Supreme Court ignored a judgment of the CJEU.

The Union principle of proportionality has been invoked quite frequently in tax law cases decided by the CJEU. The Court has reviewed compliance of national solutions with the principle of proportionality. This test has frequently led to decisions of benefit to taxpayers, for example, that a given legislative solution adopted in an EU Member State violated that principle. However, there is also a collection of rulings by the CJEU holding that this principle was not infringed.

For reasons of space, the article only gives some examples of CJEU judgments concerning the research problem undertaken, with particular attention to rulings that have been handed down in Polish cases.

In its judgment C-418/14 of 2 June 2016 in ROZ-ŚWIT Zakład Produkcyjno-Handlowo-Usługowy Henryk Ciurko, Adam Pawłowski spółka jawna vs Dyrektor Izby Celnej we Wrocławiu, the CJEU held that Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity and the principle of proportionality must be interpreted as:

- not precluding national legislation under which sellers of heating fuel are required to submit, within a prescribed time limit, a monthly list of statements from purchasers that the products purchased are for heating purposes, and
- precluding national legislation under which, if a list of statements from purchasers is not submitted within a prescribed time limit, the excise duty applicable for motor fuels is applied to the heating fuel sold, even though it has been found that the intended use of that product for heating purposes is not in doubt.

Having regard to the discretion which Member States have as to the measures and mechanisms to adopt in order to prevent tax avoidance and evasion connected with the sale of heating fuels and since a requirement to submit to the competent authorities a list of statements from purchasers is not manifestly disproportionate, it must be held that such a requirement is an appropriate measure to achieve such an objective and does not go beyond what is necessary to attain it.

Secondly, a provision of national law under which, in the event of failure to submit a list of statements from purchasers within the time limit, the excise duty applicable for motor fuels is automatically applied to heating fuels even if those fuels are used as such, runs counter to the general scheme and purpose of Directive 2003/96, based on the principle that energy products are taxed in accordance with their actual use. Furthermore, such an automatic application of the excise duty applicable to motor fuels in the case of non-compliance with the requirement to submit such a list infringes the principle of proportionality. The application of the rate of excise duty provided for motor fuels to the heating fuels because of the infringement of the requirement imposed by national law to submit a list of statements from purchasers within the time limits set, where it has been held that there was no doubt as to the intended use of those products, goes further than is necessary to prevent tax avoidance and evasion (see paras 25, 26, 33–35, 39, 42).

In its opinion, the CJEU emphasized that general principles of law, which include the principle of proportionality, form part of the EU legal order. They must accordingly be observed not only by the EU institutions but also by Member States in the exercise of the powers conferred on them by EU directives (see, to that effect, inter alia, judgments of 21 February 2008 in Netto Supermarkt, C-271/06, EU:C:2008:105, paragraph 18, and of 10 September 2009 in Plantanol, C-201/08, EU:C:2009:539, paragraph 43).

It follows that national rules, such as those at issue in the main proceedings, which are intended, inter alia, to transpose the provisions of Directive 2003/96 into the domestic legal order of the Member State concerned must be consistent with the principle of proportionality (paras 20 and 21).

In another verdict, C-588/10, of 26 January 2012 (Minister Finansów vs Kraft Foods Polska SA), the CJEU defined the limits of the freedom of EU Member States to determine the rights and duties of taxpayers on the example of the requirement to possess confirmation

of receipt of a correcting invoice. In that ruling it indicated that the requirement that, in order to be entitled to reduce the taxable amount as set out in the initial invoice, the taxable person must be in possession of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services constitutes a condition for the purpose of Article 90(1) of the VAT Directive (para 42).

However, the principles of the neutrality of value added tax and proportionality do not, in principle, preclude such a requirement. However, where it is impossible or excessively difficult for the taxable person who is a supplier of goods or services to obtain such acknowledgment of receipt within a reasonable period of time, he cannot be denied the opportunity of establishing, by other means, before the national tax authorities of the Member State concerned, first, that he has taken all the steps necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and is aware of it and, second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice. Copies of the correcting invoice and the reminder addressed to the purchaser of the goods or services to send acknowledgment of receipt and, as KFP submitted at the hearing without being contradicted on that point, proof of payment or the production of entries from the accounts which make it possible to identify the amount actually paid to the taxable person in connection with the transaction in question by the purchaser of the goods or services may serve that purpose (cf. paras 41, 42).

Analysis of this verdict demonstrates that the CJEU, in interpreting provisions concerning value added tax, frequently applies the principle of neutrality alongside the principle of proportionality, the former of which is supposed to prevent VAT from burdening an entrepreneur. Furthermore, the principle of proportionality prevents the national legislator from applying any "automatic" mechanisms to tighten up tax regulations.

In its verdict of 29 July 2010 in case C-188/09, Dyrektor Izby Skarbowej w Białymstoku vs Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski sp.j., formerly Profaktor Kulesza, Frankowski, Trzaska sp.j., the CJEU took up the imposition of sanctions for failure to maintain a record of sales using a cash register. In this judgment it was indicated that the common system of value added tax, as defined in Article 2(1) and (2) of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes and in Articles 2, 10(1) and (2) and 17(1) and (2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2004/7/EC of 20 January 2004, does not preclude a Member State from imposing a temporary restriction on the extent of the right of taxable persons who have not complied with a formal requirement to keep accounting records of their sales to deduct input tax paid, on condition that the sanction thus provided for complies with the principle of proportionality. In essence, because it aims at ensuring the proper collection of tax and prevention of tax, such an obligation is consistent with the measures that can be applied by Member States under Art. 22 (8) of the Sixth VAT Directive. In that context, by providing that, in cases where that accounting obligation is not complied with, the proportion of the VAT which the taxable person may deduct is reduced by 30%, that measure must be regarded as constituting an

administrative sanction, the deterrent effect of which is intended to ensure compliance with that obligation. However, it is a matter for the national court to determine whether the procedure for determining the amount of the sanction and the conditions under which the facts relied on by the tax authorities in order to apply that sanction are recorded, investigated and, as the case may be, adjudicated upon effectively render meaningless the right to deduct VAT, and thus do not undermine the principle that the tax burden must be neutral in relation to all economic activities. It must be observed in this connection that the rate of the amount withheld in the main proceedings, which is limited to 30% and thus preserves the greater part of the input tax paid, appears neither excessive nor inadequate for the purpose of ensuring that the sanction in question is deterrent and, therefore, effective. Moreover, such a reduction on the basis of the amount of tax paid by the taxable person is not manifestly without any link to the level of the economic activity of the person concerned. Furthermore, in so far as the purpose of that sanction is not to correct accounting errors but to prevent them, its flat-rate nature, resulting from the application of the fixed rate of 30%, and, consequently, the lack of any correspondence between the amount of that sanction and the extent of any errors which may have been made by the taxable person cannot be taken into account in the assessment of whether that sanction is proportionate (cf. paras 27, 28, 34–37, 39).

The Court also held that national provisions imposing administrative sanctions that can be imposed on VAT taxpayers in the event of their failure to apply a cash register to record transactions and tax sums due are not "special measures for derogation" intended to prevent certain types of tax evasion or avoidance within the meaning of Article 27(1) of the Sixth VAT Directive. Such a measure thus cannot constitute a „special measure for derogation" under Art. 27(1) because it displays characteristics of measures encompassed by Art. 22(8) of the Sixth Directive, on grounds of which Member States may impose other obligations they see fit for the proper accounting and collection of tax and prevention of tax fraud (cf. paras 41–43).

It was also held that Article 33 of the Sixth VAT Directive does not preclude the maintenance of provisions such as those of Article 111(1) and (2) of the Polish 2004 Law on VAT, which provide for administrative sanction in the event it is held a taxpayer has not adhered to the obligation of using a cash register to record turnover and tax sums due (cf. para 49).

In its verdict of 26 March 2015 in C-499/13, Marian Manikowski przeciwko Dyrektor Izby Skarbowej w Gdańsku, the Court took up the issue of a court bailiff being considered a VAT payer arising from the sale of movables in the course of enforcement proceedings. In that ruling, the CJEU held that Articles 9, 193 and 199(1)(g) of the VAT Directive must be interpreted as not precluding a provision of national law, such as that at issue in the main proceedings, which, within the context of a sale of immovable property effected through enforcement, imposes on a person – namely the court enforcement officer who made the sale – obligations to calculate, collect and pay the VAT on the proceeds of that transaction within the prescribed time-limits. In essence, the national regulation is designed to avoid situations in which the taxpayer, owing to poor financial condition, violates the obligation to pay VAT; such regulations can ensure the proper collection of the tax and be subject to Art. 273 of Directive 2006/112. Furthermore, although it is true that

those provisions provide, in essence, that the tax may be payable only by a taxable person carrying out a taxable supply of goods or, in certain circumstances, by the purchaser of the immovable property, the function of the court enforcement officer as the intermediary responsible for the collection of that tax does not fall within those provisions. In essence, because the obligation merely ensuring the collection of the amount of the tax and its payment to the tax authority on behalf of the taxable person by whom it is payable, within the prescribed time-limit. In that situation, the court enforcement officer's obligation is not a fiscal obligation, because that obligation still lies with the taxable person (cf. paras 38, 39, 41, 42, 45).

Furthermore, the Court ruled that the principle of proportionality must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, under which a court enforcement officer must be liable with his entire assets for the amount of VAT due on the proceeds of the sale of immovable property effected through enforcement where he does not discharge his obligation to collect and pay that tax, provided that the court enforcement officer concerned actually has all legal means to discharge that obligation, which is for the referring court to determine (cf. para 53).

The presented case law demonstrates that the Court of Justice of the European Union, in interpreting the provisions of tax law, takes into consideration the principle of proportionality, which is intended to protect the taxpayer in certain situations. This principle serves as a sort of safety valve to protect against overly restrictive legislation. However, in the absence of sanctions for failure to record turnover in a cash register and the recognition of a court enforcement officer, the test of infringement of the principle of proportionality was failed.

4. The Principle of Proportionality in the Case Law of the Supreme Administrative Court

The principle of proportionality, derived from normative acts, impacts the interpretation of legislation applied by administrative courts in Poland. With a view to the effectiveness of EU law, which is defended by the Court of Justice of the European Union, the Polish Supreme Administrative court frequently invokes the case law of the CJEU in tax matters.

In its verdict of 18 May 2017 (I FSK 1916), the SAC ruled that Art. 88 (3a)(4)(b) of the Value Added Tax Act of 11 March 2004 (VAT Act) (OJ L 2011, No. 177, item 1054 as amended), under which issued invoices, correcting invoices, or customs documents containing sums inconsistent with the real value of goods and/or services (false values) are not grounds for tax deductions – in respect of those items for which false values have been provided, the proper interpretation is, in the event the evidence gathered gives the tax authority the possibility of assessing the true value of the transaction for which an excessive figure has been given in the invoice – with a view to the principles of neutrality and proportionality – the right remains to deduct tax in the portion consistent with the true value of the transaction.

In its verdict of 24 May 2016 (I FSK 1625/14), the SAC took the position that the time limit on exercising the right to deduct VAT provided for by Art. 86 (13) of the VAT

Act, apart from specified cases from 1 January 2014 in Art. 86 (13a) of the Act regarding reverse charge to the purchaser, does not violate the principles of neutrality, balance, effectiveness, and proportionality, and is not in and of itself capable of making it practically impossible or severely hindering the exercise of the right of the duly diligent taxpayer to take the deduction; instead, it constitutes a sort of sanction for an insufficiently diligent taxpayer in the form of the loss of the right to deduct that tax upon expiry of the time limit. The time limit can be waived only in the event a duly diligent taxpayer could not observe it owing to causes beyond his control.

In turn, in its verdict of 22 October 2015 (I FSK 1131/14), the SAC ruled that an invoice containing a formal defect that could be remedied by the issuance of a correcting note (e.g. address of the purchaser) allows the taxpayer under Art. 86 (1) of the VAT Act to exercise the right to deduct the tax listed in the invoice within the time limits provided for by the Act (Art. 86 [10] [1]; from 1 January 2014 Art. 86 [10] and [10b] [1]), regardless of whether the formal defects in the invoice are corrected – if there is no risk of fraud or abuse (the activities documented by the invoice were performed on behalf of the taxpayer and benefited his taxable activity). However, an invoice that has not been corrected and whose formal defect is so serious as to render it impossible to determine the true scope (subjective and/or objective) of the transactions listed in the invoice, and by the same token to determine whether they have in fact taken place, thereby giving rise to the possibility of fraud or abuse as well as preventing the effective collection of tax – does not give the taxpayer the right under Art. 86 (1) VAT Act to deduct the tax assessed from such an invoice. This does not constitute an infringement of the principles of neutrality and proportionality.

Invoking the principle of proportionality in its verdict of 21 October 2014 (I FSK 1536/13), the SAC held that in the case of a taxpayer who – meeting all the conditions set out in Art. 89a (2) of the VAT Act as worded through 31 December 2012 – revised the tax due in an inappropriate accounting period, a correcting filing submitted pursuant to Art. 81 § 1 of the Tax Code of 29 August 1997 (OJ L 2012, item 749 as amended) with the intent of correcting that defect and settling the adjusted tax due on the basis of Art. 89a (1) VAT Act in the proper accounting period indicated in Art. 89a (3) is not subject to the time limit imposed by Art. 89a (2) (5) VAT Act, as there has been no fraud or detriment to the state budget.

In another verdict of 9 May 2015 (I FSK 709/12), the SAC, invoking EU and Constitutional standards, indicated that interpretation of Art. 116 (6)(2) of the VAT Act cannot lead to violations of the principles of VAT neutrality, proportionality (as defined by Art. 31 [3] and Art. 2 of the Constitution of Poland and Art. 5 of the Treaty on European Union), and protection of property rights (as defined by Art. 21 [1] and Art. 64 [1] of the Constitution of Poland). This means that the provision in question should be interpreted as not depriving the taxpayer submitting past-due payment for agricultural products and/or services to a farmer assessed lump-sum tax, encompassing lump-sum tax rebate, the right to recover the value of the tax.

In its verdict of 12 June 2012 (I FSK 841/11), the SAC held that depriving a taxpayer-seller the right provided for in Art. 129 (1) of the VAT Act to apply the tax rate of 0% to the supply of goods transported outside the European Union, and on which that taxpayer

refunded the tax to a traveller, for the sole reason that the taxpayer did not adhere to the informational conditions provided for by Art. 127 (4)(1 and 4) VAT Act, violates the principle of proportionality expressed in Art. 31 (3) and Art. 2 of the Constitution of Poland.

5. Summary

Initial research undertaken in the preparation of this work has demonstrated that the principle of proportionality plays an important role in the application of tax law in effect in the countries of the European Union. An important role in shaping the proper implementation of tax law is performed by the Court of Justice of the European Union. On the one hand, with the test of adherence to the principle of proportionality the CJEU examines whether a Member State has violated that principle. On the other hand, the Court, in settling disputes between a taxpayer and tax authorities, examines whether the applied measures are adequate to the circumstances. The Court's case law in this respect is diverse, as it ascertains infringement of the principle of proportionality through the introduction of specified solutions, but in the case of the imposition of sanctions and recognition of a court enforcement officer as a taxpayer it holds that the indicated principle has not been violated, by the same token providing certainty as to the law.

The Supreme Administrative Court, particularly in turnover taxes subject to harmonization – value added tax and excise tax – applies EU-friendly interpretation (consistent with EU law). In practically every judgment of the SAC, we may find references to the case law of the CJEU. Particular attention is paid by administrative courts in Poland to the application of the principle of proportionality when interpreting tax law. In this respect the SAC invokes not only EU standards, but also points to constitutional solutions in effect in Poland.

The rulings of the SAC within the subject matter being examined here are diversified and dependent on the circumstances of a particular case.

The research issue taken up concerning the principle of proportionality in tax law should be explored further.

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Abusus Iuris and the Protection of Public Interest by Administrative Authorities and (Administrative) Courts in Slovakia

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Abstract: The presented paper deals with public interest in the decision-making practice of public authorities. The author also deals with the so-called *abusus iuris* (with focus on public law) which does not enjoy legal protection on the grounds that it is contrary to public interest. In this context, the author also points out that there is no uniform and universal definition of the concept/term of "public interest", but that public interest as such consists of partial public interests which may sometimes even be in conflict with one another thus comparing public interest and private interest in a certain case does not always have to suffice. He also points out certain procedural burdens relating to administrative proceedings – in particular the burden of sufficient reasoning and fact-finding especially in reference to the protection of public interest by administrative authorities. The paper primarily focuses on the decision-making practice of the courts of the Slovak Republic and of the Czech Republic – both at the level of protection of public interest in administrative proceedings and of its protection in court proceedings.

Keywords: good governance; administration; law

1. Chapter 1

The protection of public interest[1] is undoubtedly an essential component of the functioning of the State, which as such also constitutes an element necessary for the existence of the State itself. However, the key questions we need and we strive to explore in this paper is what the protection of public interest is, where the boundaries of this institute are, under what circumstances is its application admissible and how its implementation is ensured so that it cannot be misused in such a way that referring to the protection of public interest would eventually become a "legitimate reason" for the issuance of an unlawful act by the public authorities.

First of all, it is necessary to consider whether "public interest" is something that is expressed in the Constitution of the Slovak Republic or in other generally binding legislation explicitly by (always) using the phrase "public interest". The answer is a very clear "no" and this makes the matter even more complicated and sensitive at the same time. The Constitution of the Slovak Republic and the laws of the Slovak Republic use a number of indications, which sometimes explicitly, sometimes descriptively indicate the protection of public interest.[2] To illustrate, it is possible to point to some partial legal regulations, i.e. Art. 20 par. 2 of the Constitution of the Slovak Republic states "The law shall establish

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certain property, which is necessary for the purposes of safeguarding the needs of the society, the development of the national economy and *the public interest*, except the property defined in Art. 4 of this Constitution as the exclusive property of the State, the municipality or specific legal persons. A law may also lay down which property only individual citizens or legal persons residing in the Slovak Republic may own."[3] (Explicit use of the term "public interest") Art. 20 par. 3 of the Constitution of the Slovak Republic states: "The ownership is binding. It shall not be misused causing harm to others or in contradiction with the general interests protected by the law. The exercise of right in property must not be detrimental to the health of other people, nature, cultural sites or the environment beyond the margin laid down by a law." (Use of the term "general interest" as a concept indicating the protection of public interest). Art. 20 par. 4 of the Constitution of the Slovak Republic further – "Expropriation or restrictions of right in property may be imposed only to the necessary extent and in public interest, based on the law and for a valuable consideration."[4]

If we go to the level of inspecting the regulations defined by general Acts (rather than by the Constitution), it is evident that there are various Acts that protect public interest – (e.g. Act. No. 538/2005 Coll.) states – for example – that "The State Spa Commission will reject an application for a permit to use a resource if it is in the public interest not to use a natural healing resource or a natural mineral resource..."[5]. The provisions above (examples of sources of law) represent the legal basis of the protection of public interest in specific matters, while the protection of public interest can be (and most often is) realized in the decision-making processes of public authorities in particular cases. In this context, it is necessary to refer to administrative bodies, which decide about the rights, duties and rightful interests of natural persons and legal entities within the administrative procedure and who are obliged according to § 3 par. 1 of Act no. 71/1967 Coll. (Code of Administrative Procedure)[6] to protect the public interest in the decision-making process – "Administrative authorities shall act in accordance with laws and other legislation. They are required to protect the interests of the state and society, the rights and interests of natural persons and legal persons, and to consistently require the fulfilment of their duties." Where the protection of public interest is expressed by the phrase *are required to protect the interests of the State and of society* (the term corresponds to the time at which the aforementioned legal provision was formulated, the terminology equates to today's "public interest").[7] On the other hand, within the administrative judiciary we may encounter the protection of public interest expressed explicitly when § 5 par. 3 of Act no. 162/2015 Coll. – the Code on Administrative Judiciary – states that "In its decision-making the administrative court is committed to the protection of law and public interest." (SVK: "Pri rozhodovaní správny súd dbá na ochranu zákonnosti a verejného záujmu.")

The protection of public interest is specifically addressed in the Code on Administrative Judiciary e.g. with regard to the suspensory effect of the administrative action in relation to the decision to be subjected to judicial inquiry, which results from the provision of § 185 (a) of the Administrative Proceedings Code, according to which "The administrative court may, following a motion by the claimant and the defendant's statement, grant a suspensive effect to a claim: (a) if the immediate execution or other legal consequences of the contested decision of the public authority or of the measure of the

public authority would threaten to cause serious damage, whether substantial financial damage or economic damage, damage to the environment or any other serious irreparable *consequences and the granting of a suspensive effect is not contrary to the public interest.*"

Finally, it must be concluded (within this general introduction) that there are more procedural provisions explicitly regulating the protection of public interest in public law decision-making procedure (i.e. by reference to the phrase "public interest" or other designation with similar content – e.g. Act no. 50/1976 Coll. Building Act states in its § 81 that "In the building approval [occupancy] proceeding, the building authority shall in particular examine whether the construction was carried out according to the documentation certified by the building authority in the construction procedure and whether the conditions of constructions specified by the zoning plan of the zone or the conditions specified in the territorial decision and in the building permit were observed. It shall further examine whether the actual construction or use of the structure will endanger the public interest, especially in terms of the protection of life and health of people and the environment, occupational safety and the safety of the technical equipment."). For the purposes of this paper we consider it sufficient to point out provisions of the law highlighted above, which we consider to be sufficient to illustrate the existing legal regime in which the protection of "public interest" is expressed in a direct way (directly).

2. On the Protection of Public Interest (The Indirect Way/Method)

However, the protection of public interest is not always provided for by a direct reference public interest in the source of law. With regard to the protection of public interest, it cannot be omitted that the legislation of the Slovak Republic recognizes a number of partial institutes – sometimes inspired by the legislation of foreign countries and incorporated into the legal order of the Slovak Republic, and some based on the decision-making activity of the European and/or international courts (with effects similar to those of the protection of public interest arising from the text of the Act explicitly [see above]). In the cases we will deal with in this section of the paper, there is *no explicit definition of/ reference to the protection of public interest,*[8] i.e. the legislature does not use the phrase "public interest" or "general interest" (in the very source of the law) but through other legal expressions and legal regulations, it provides for the protection of public interest as a whole or a part thereof (e.g. in order to ensure quick and cost-effective judicial or administrative proceedings, to ensure the protection of public finances, etc.). Examples of such regulations include, for example, § 5 of Act no. 160/2015 Coll. Civil Proceedings Code for Adversarial Proceedings: "Obvious abuse of rights shall not involve legal protection. The court may, in so far as provided for in this Act, refuse and sanction procedural acts that are manifestly abusive, arbitrary or unlawful, or lead to unjustified delays in the proceedings." The provisions of § 3 par. 6 of Act no. 563/2009 Coll. on the Administration of Taxes and on Amendments to Certain Acts (hereinafter referred to as Tax Code), which is identical with the provisions of § 2 par. 6 of the previous Act no. 511/1992 Coll. on the administration of taxes and charges and on changes in the system of territorial financial authorities, with

effect from 1 January 1993, regulated – without any substantive change – *the principle of informality of the tax procedure* according to which in the application of the various tax laws in tax administration, the actual/true content of the act or of other event crucial to finding, the levying or collection of taxes had to be taken into account.

As of 1 January 2014, the provision has been supplemented so that a legal relation or other fact crucial to finding, the levying or collection of taxes which have *no economic justification* and *are resulting in targeted tax avoidance or obtaining such a tax advantage* which the taxable entity would not otherwise be entitled to or resulting in a targeted reduction of tax *liability shall be disregarded in tax administration.* The purpose of the change in question was to allow the tax authorities *to prevent tax administrators (tax authorities) from taking into account, for example, artificial transactions and structures* created for unwanted tax optimization, even if such tax optimization is not the sole purpose of those transactions, and while avoiding an unjustified tax advantage under which it understands the unjustified application of claims resulting from tax legislation, such as a non-taxable portion of the tax base, the application of undue tax charges, the use of fictitious expenses, and the like. Thus, the question is related to the prohibition of *abusus iuris* in tax proceedings, which has already been recognized by the judicial practice even before, despite the absence of a specific statutory provision. For example, the Supreme Court of the Slovak Republic in its decision – file no. 2Sžf 44/2013 – stated that "the conduct of a taxpayer whose sole purpose is to obtain [tax] overcompensation and which conduct is devoid of any economic meaning, cannot be classified otherwise as an abuse of the objective law [abusus iuris] thus such conduct cannot be taken into account for tax purposes."

Understanding the prohibition of abuse of law/rights in court practice, based on the assessment of the economic meaning of the transaction by the taxpayer and the subsequent confrontation with the result in obtaining an unjustified tax advantage, the tax reduction for the entity is close to the formula used by the legislator in the amended provision of § 3 par. 6 of the Tax Code. Even in this case, these are facts which have no economic justification and which result in deliberate circumvention of a tax duty or acquisition of a tax advantage to which the taxpayer would otherwise not be entitled to or which results in a specific tax reduction. Under the aforementioned circumstances, therefore, it appears that the amendment does not impose any new rules of conduct, but only the settled judicial practice has been given the form of a statutory provision. From the use of the words *purposeful circumvention, purposeful reduction,* and advantage to which the entity would not be entitled to, it is beyond doubt, that the law here refers to acts that violate the law or obstruct it, and not what the law predicts directly – and combines the consequences in the form of benefits for the tax entity. Therefore, in order to apply this provision, an abusive application of the law/right must be exercised by the tax entity. In this context, it is necessary to define the concepts of the circumvention of the law and abuse of law/rights *(abusus iuris)* which are both present in civil and tax law, but with some differences, particularly in terms of legal consequences.

Bypassing (circumventing) the law is defined in the legal theory of civil law[9] in such a way that the legal act does not contradict the explicit wording of the statutory provision, however its consequences aim not to observe the objective of the law. Here the law refers

not only to the Civil Code (Act No. 40/1964 Coll., the Civil Code), but also to other laws that have the force of an Act. Bypassing (circumventing) a law by legal action, *in fraudem legis,* is a behaviour that is based on the fact that someone does not act contrary to the law *(contra legem),* but in such a way as to deliberately achieve a result not foreseen by the law and/or a result that is undesirable.[10] The Constitutional Court of the Slovak Republic stated that circumvention of the law consists of the exclusion of a legally binding rule of conduct with the deliberate use of means which are not forbidden by the law *per se,* as a result of which the established state of affairs appears to be incontestable in terms of law. Procedure *in fraudem legis* is a procedure whereby someone is formally acting under the law, but deliberately delivers a result that is prohibited, unforeseen or undesirable under legal rule.[11] A legal act obstructing the law is invalid under § 39 of the Civil Code (§ 39 of the Civil Code reads: "A legal act whose content or purpose are at variance with an act, circumvent the act or are at variance with good manners shall be invalid." The fact that such conduct does not enjoy protection, can be derived from § 3 (1) of the Civil Code: *"Exercise of rights and duties following from civil legal relationships must not groundlessly infringe rights and lawful interests of others and must not be at variance with good manners."*

A broader understanding of circumvention in tax law vs. civil law is that it does not only deal with legal acts (the mere legality of the acts/of the conduct) but also with other matters that are critical for the discovery, collection or levying of taxes. For example, based on the case law of the Supreme Administrative Court of the Czech Republic, such a fact may be setting up and doing business through multiple companies in order to avoid the legal status of a value added tax payer.[12] Another difference is in the legal consequences – while civil law relates circumvention of law with a legal consequence in the form of the invalidity of the legal act to which the circumvention relates (see above), tax law does not examine the question of the validity of the legal act at all, the circumstance circumventing the law, even if it was a legal act, is just simply not taken into account in tax proceedings/for taxation (tax) purpose (while not impacting in any way the very legal effect of the act itself).[13] It is, therefore, a system of protection against *abusus iuris* (and thus also an instrument of protection of public interest) in the proceedings of the administrative body (the tax authority), who is under a duty to investigate whether a tax activity – showing otherwise – signs of a perfectly legal action, does not show signs of *abusus iuris.* If this is the case, the tax authority will evaluate this act as *abusus iuris* (e.g. an act damaging the public interest, such as reducing the tax liability of the person) with the relevant legal consequences not "accepting" that act for taxation (tax) purposes without directly affecting the legality (lawfulness/validity/binding effects) of the act itself.

In addition to the Tax Code (in the procedural regime), the Code on Administrative Judiciary (Act No. 162/2015 Coll.) also regulates the abuse of rights. Under § 28 of the Code on Administrative Judiciary, "The Administrative Court may exceptionally refuse actions brought by natural and legal persons, which are of a clearly vexatious nature or which pursue an abuse of law or its application to no avail. The administrative court may also sanction the parties' procedural acts that serve to abuse the laws, in particular to achieve delays in the proceedings." This provision of § 28 of the Code on Administrative Judiciary may be perceived as another ground for dismissing an action in connection with

§ 98 (1) h) of the Code on Administrative Judiciary ("if so shall be established by this Act").

The basic parameters that need to be addressed (§ 28 of the Code on Administrative Judiciary) are as follows:

1. the application of such rejection is discretionary on the side of the court
2. exceptionality
3. dismissal of the action is carried out by a court decision
4. the grounds for refusal are
   a) clearly vexatious nature of the action
   b) *abuse of law/rights* (by the applicant)
   c) unsuccessful application of the law (by the applicant)

The refusal of an action under § 28 is therefore a qualitatively different refusal than a refusal under the grounds set out in § 98 of the Code on Administrative Judiciary. Rejection of an action for the reasons set out in the aforementioned provision of the Code on Administrative Judiciary is based on substantive facts relating to the action brought, while the concept of § 28 is completely different. § 28 covers the dismissal of an action, which is, in essence, an indirect penalization of the applicant for bringing an action, with a certain content or negative purpose (see above).

It should also be pointed out that there are several qualitative differences between the rejection of the application with reference to § 98 and with reference to § 28 of the Code on Administrative Judiciary – for example:

- the grounds for refusal under § 98 of the Code on Administrative Judiciary are in fact factually positive, objectively verifiable and without the discretion of the court, on the other hand – the grounds for refusal under § 28 of the Code on Administrative Judiciary are based exclusively on the court's own discretion (the vexatious nature of the action, or, as the case may be, on the Court's reasoning on the *abusus iuris* by the applicant), which should then be detailed, particularly regarding the *abusus iuris* as an instrument for the protection of public interest
- while § 98 of the Code on Administrative Judiciary regulates the so-called "mandatory" refusal of the action, the provision of § 28 regulates the option/possibility of an administrative court to reject the action (not its duty/obligation).

The purpose of the provisions of § 28 of the Code on Administrative Judiciary is to prevent lawsuits from being brought into the system of administrative justice without real substantive justification, which would cause a slowdown in the overall performance of justice, both in the individual case before the court and in general too. The fact that the provision § 28 of the Code on Administrative Judiciary is a tool for the protection against obvious abuse of the law/rights, also stems from the explanatory memorandum to the provision in question: This provision lays down the principle of the prohibition of obvious abuse of law/rights. The filing of an action by a natural person or a legal person abusing the law or following a harsh or expressly unsuccessful exercise of rights justifies its refusal under § 98 par. (1) h.

The existence of a prohibition of abuse of law/rights is derived primarily from the theory of law as a general legal principle, which is further developed by the case law of civil courts, administrative courts and of the Constitutional Court. The scholarly doctrine which one can refer to (see above), defines *abusus iuris* as a situation in which someone performs his or her subjective right thus causing unjustified harm to someone else or *society* – if so, such behaviour results in the illicit and is only apparently/formally permissible.[14] This is the case of only apparently/formally permissible behaviour, because the law does not perceive a behaviour that could be both permissible and non-permissible at the same time. In the legal theory, the abuse of law/rights means the use of a legal rule inconsistent with its purpose.[15] It is therefore an action apparently/formally permissible, that – however – eventually results in the circumvention of the law (circumventing its spirit and meaning) in order to deliberately achieve the result of a legal norm that is unforeseeable and undesirable.[16]

The Supreme Court of the Slovak Republic was also dealing with actions having vexatious, or "abusive" character in its judgement – file no. *5Sži/6/2012* in which the following opinion was expressed: "Concluding, the Supreme Court shall disclose that the Freedom of Information Act should not serve as a pretext for criticizing public authorities but as a tool of social control. The Supreme Court does not deny the applicant's right to information, but it is essential that this right be enforced effectively, i.e. only those requests that are genuinely required by those persons are to be addressed, i.e. requests for information within the scope of their decision-making activities. This is the only way to talk about effective social control of public administration. Otherwise, claimants could use this right as a pretext for formalistic and pointless disputes. One cannot overlook the fact that the control itself was carried out by the defendant in 2009 and the claimant as a civic association that 'watches politicians and points out where they steal, cheat and where they should behave more honestly, and proposes solutions to bring more decency and honesty to the political and public life' unnecessarily continued the administrative and legal proceedings for another three, or four years, although no more requested information could be provided by the directly concerned obligated person." i.e. in the explanatory statement (the reasoning) of the decision, the court indirectly identified the circumstances which could be subsumed under § 28 of the Code on Administrative Judiciary and at the same time under the heading of academic disputes (which – under standard circumstances – shall not be protected by the law and/or by courts). The Collection of Opinions and Decisions of the Supreme Court of the Slovak Republic – no. 5/2014 case no. 82 – also contains the following legal sentence *(ratio decidendi):* "The request for disclosure of information pursuant to Act no. 211/2000 Coll. on the free access to information (the Freedom of Information Act), as amended, *is to serve only as a tool of social control and not as a means of misuse of law.*" (Judgment of the Supreme Court of the Slovak Republic of 28 February 2013, file no. 5Sži/6/2012) thus confirming the fact that in the conditions of the Slovak Republic, judicial protection should not be sought or exercised in such a way as to exercise a right that is harassing or abusive (by the party to the proceedings).

The Constitutional Court of the Slovak Republic in a resolution dismissing the complaint in the above-mentioned case (as manifestly ill-founded) accepted the procedure and the outcome of the Supreme Court of the Slovak Republic (see above), but at the same

time pointed out the specificity of the case and the fact that such an approach cannot have a so-called template nature ("For the sake of completeness, in order to prevent misinterpretation, it must be added that the way in which the matter in question was legally understood can in principle be relied on in clear cases where it is clear that it is information from one office which is part of the loaned documentation that must be returned and does not become an information acquisition of the office to which the file was borrowed." [SVK: Pre úplnosť veci, v záujme zamedzenia dezinterpretácie, je nutné dodať, že spôsob, akým bola právne uchopená predmetná vec, môže byť v zásade uplatnený pri jednoznačných prípadoch, kde je zrejmé, že ide o informáciu z jedného úradu, ktorá je súčasťou zapožičanej spisovej dokumentácie, ktorá musí byť vrátená a nestáva sa takpovediac informačnou akvizíciou úradu, ktorému bola zapožičaná.]) – decision of the Constitutional Court of the Slovak Republic, file no. II. ÚS 482/2013, dated 3 October 2013. The Constitutional Court of the Slovak Republic thus "approved" the procedure (and the outcome) of the Supreme Court of the Slovak Republic in the matter, but at the same time, by means of some restrictive interpretation, it attempts to limit the application of the principle defined by the Supreme Court (in the above case) – by stating that this approach must not be considered to be a general rule and that all cases must be assessed on an individual basis.

It follows from the abovementioned short "legal trip" (to the *Code on Administrative Judiciary*) that, with effect as of 1 July 2016, the law of the Slovak Republic includes a positive, expressly stated right of the administrative court to refuse the administrative action (brought before it by an applicant) on the grounds that it has a vexatious character or presents an abuse of law/rights. However, with reference to the decision-making activity of the Constitutional Court of the SR, it must always be a sensible decision of the court (taking into account all the relevant circumstances of the particular case). Notwithstanding the above, it must be concluded that the abuse of law cannot be subject of evidence as a legal institute. The factual situation that is the result of the evidence obtained can be – once such factual situation is settled – legally assessed to be an abuse of law. Conclusion on the fulfilment of the facts of the abuse of law/rights is the result of a legal assessment of the settled state of affairs (facts). (Resolution of the Constitutional Court of the Slovak Republic of 7 June 2016, file no. III 355/2016-16)

3. Public Interest and Its Protection in Specific Cases (Slovak Republic/Czech Republic)

Public interest is (in most cases) a vague term, but this does not mean that the content of this term is to be formulated (or made up) by the administrative authorities themselves.[17] The Supreme Administrative Court of the Czech Republic has unequivocally pronounced the legal opinion according to which "The principle of protection of the public interest does not mean that the public authorities should formulate public interest, more precisely public interests, themselves, which is, in principle, the task of legislative authority. It is the task of the administrative authorities, when applying the laws that define individual public interests, to specify – in particular cases – the generally expressed public interests." File no.

6 As 65/2012, decision dated 10 May 2013, whereas the Constitutional Court of the Czech Republic several years before this decision of the Supreme Administrative court of the Czech Republic had established that "public interest in a particular case should be investigated during the administrative procedure on the basis of the measurement of a wide range of particular interests, after consideration of all contradictions and comments. The explanatory statement (the reasoning) for the administrative decision must then clearly indicate why the public interest outweighed a number of other specific interests. Public interest should be found in the decision-making process..." (28 June 2005, file no. Pl. ÚS 24/04).

Although the wording of the Czech Administrative Proceedings Code (in reference to public interest) is not identical to the verbal expression of the protection of public interest in the Slovak Republic (§ 3 [1] of the Administrative Proceedings Code), when it comes to the protection of public interest, the decision of the Czech Supreme Administrative Court can be useful. The said court in file no. 6 As 65/2012 stated that "The principle of protection of public interest by seeking and adopting solutions that are in accordance with the public interest is also one of the basic principles of administrative proceedings enshrined in § 2 (4) of the Administrative Proceedings Code. The formulation 'the accordance of the solution adopted with the public interest' then means the application of the provisions of laws expressing generally individual public interests in specific cases. In the administrative proceedings, several public interests are often against each other (or at least not completely in line) and it is not possible for the decision ultimately to be in line with all the public interests involved in the case. Furthermore, it is important to point out that administrative authorities should not formulate public interest themselves; this is, in principle, the task of the legislature; on the other hand, 'the task of the administrative authorities, when applying the laws that define individual public interests, to specify in particular cases the generally expressed public interests.'" (for more see: J. Vedral, *Administrative Procedure: Commentary,* 2nd Edition, Prague, Ivana Hexnerová – Bova Polyglon, 2012, p. 100).

It follows from this that public interest as a concept is not only vague without specific (general and universal) content, but rather – when deciding individual cases – it would be desirable to deal with various (and all relevant) specific public interests. Undoubtedly, there are many of such interests and they will not always be consistent (e.g. there may be a discrepancy between protection of the environment (as one specific public interest) and the public interest in the construction of motorways). It is unlikely that it would be possible to fully comply with all the particular interests in all cases. The decision-making of the Czech (administrative) courts – and in particular of the Supreme Administrative Court of the Czech Republic – (file no. 6 As 8/2010 dated 23 June 2011) confirms the concept of *balancing* when it explicitly requested that it was the duty of the administrative body "to weigh the collision of the public interest in the construction of this motorway and of the public interest in the protection of specially protected plant and animal species and to 'assess whether the proposed highway route is the optimal solution for the protection of specially protected plant and animal species'". Similarly, the Municipal Court in Prague (file no. 11 Ca 41/2006 – decision dated 31 August 2006) concluded: "the distinct predominance of another public interest over the interest of nature conservation in

accordance with § 56 of the Nature and Landscape Protection Act may be given only where the other public interest cannot be satisfied otherwise, without adversely affecting the natural development of specially protected species… It is the duty of the administrative authority to assess the consequences of the harmfulness of the construction intervention in relation to particular endangered species and to assess the particular facts to a greater extent, in connection with the existence of a distinctly overriding other public interest over the interest of nature conservation."

The assessment of public interest (sometimes occurring as a conflict of several subordinate/partial public interests) is therefore a matter of individualizing the decision-making process in a particular regime, in a particular legal context and taking into account the specific facts of the matter under consideration. Again, this is very well expressed in the decision of the Supreme Administrative Court of the Czech Republic (case no. 6As/65/2012), which states: "The Supreme Administrative Court, however, points out that even if the respondent had convincingly stated that the construction ad 1) was actually carried out in the public interest, it would have to be assumed that the public interest is a category with a specific content, in each case, which is dependent to the circumstances of the case". It is therefore necessary that "the public interest be explicitly formulated by the administrative authority in relation to the matter specifically addressed. It has to be deduced from the legal regulation and its components, from legal policy and assessment of various aspects according to the tasks of administration in the relevant fields (social, cultural, environmental protection etc.)" (Hendrych, D., cited above, p. 358).

In the case which was the subject of the decision of the administrative authorities and of the subsequent judicial review (see above), the administrative authorities have concluded that the construction for which the permit was sought was in public interest (i.e. it was in public interest to issue the permit). However, the administrative authorities failed to explain and assess how that element of public interest identified by them (interest in construction), related to and/or outweighed other public interests in the case. The Supreme Administrative Court of the Czech Republic stated (file no. 6/65/2012): "The Supreme Administrative Court therefore summarizes that it has come to the conclusion that the Municipal Court did not make a mistake when finding that the respondent has failed to provide adequate reasons for the public interest in the construction in the relevant locality where such construction affects the protection of specially protected species. Had there perhaps been an urgent public interest in the construction, it would not have been proven that it couldn't be satisfied with another solution that would achieve the desired intention while minimizing possible intervention in the protection of specially protected species of animals. In the case of the weighing of two public interests at conflict, as in the case of a collision of fundamental rights, the administrative authority must first identify and individualise the two public interests and then compare the gravity of both, while the intervention in either of the two protected public interests must not outweigh its positive effects. In addressing conflicts of public interest, it is necessary to maintain the maximum of the two conflicting interests, identifying the core and periphery of public interest, and at least the core of both public interests in play should be maintained."

The perception of public interest for the purpose of illustration in Slovakia could be carried out via the decision of the Regional Court in Košice in file no. 8S/26/2018 by

which the administrative court ruled that the administrative action will not be granted a suspensive effect, (based also on the ground that the applicant had failed to establish that the suspensive effect – which he had requested – was not contrary to the public interest it follows from § 185 lit. [a] the Code on Administrative Judiciary). The application for the suspensory effect of the administrative action was based on the specifics of the application as follows: on the basis of a legally enforceable first instance decision in conjunction with the decision of the second instance administrative body: a registration at the Land Registry would allow to the relevant parties to the proceedings to acquire ownership of the properties included in the administrative decision/the Project, including those parties who did not pay compensation for the land or co-ownership interest in the account of the public body (the Fund), and did not show the will to become the landowners (etc.). On the question of the public interest, the application stated: 'The public interest in granting the suspensory effect of an administrative action in this case is not affected.' As stated above, pursuant to § 185(a) of the Code on Administrative Judiciary, the administrative court may grant a suspensive effect (to the claim) if the immediate execution or other legal consequences of the contested administrative decision of the public authority or the measure of the public authority would threaten to cause serious damage, whether substantial financial damage or economic damage, damage to the environment or any other serious irreparable consequences and *the granting of a suspensive effect is not contrary to the public interest.*

With the introduction of a suspensory effect by law or admission under a decision of the administrative court under § 185 of the Code on Administrative Judiciary, the effects of the contested decision are suspended. The suspensory effect shall cease to be valid by the decision of the administrative court in the main proceedings (§ 186 [1], 2 Code on Administrative Judiciary). If the administrative court does not accept the application, it will reject it (§ 188 Code on Administrative Judiciary). As is clear from the wording of § 185 (a) of the Code on Administrative Judiciary, the potential granting of suspensory effect to an action (i.e. to set aside the effects of the challenged administrative decision) is assessed by the court at the request of the applicant and after the defendant's statement has been provided. The granting of a suspensory effect is conditional, and the court must be satisfied that ordering a suspension would not be against public interest. The administrative court in the case under consideration has reached the following conclusion: (Regional Court in Košice, file no. 8S/26/2018) "… the wording of § 185 let. (a) of the Code on Administrative Judiciary provides for the applicant's duty in connection with his request for a suspensive effect to be granted by the court, not only to *claim, but also to prove by means of evidence* that the immediate execution or other legal consequences of the contested decision of the public authority threaten the consequences defined in § 185 (a) Code on Administrative Judiciary. [….] The applicant did not prove the facts in question before the administrative court and *therefore the court did not even have to deal with the assessment of the potential contradiction between the granting of the suspensory effect and public interest when deciding on whether suspension shall be granted.*"

Apart from the fact that the administrative court in this case did not perceive the applicant (the Slovak Republic on whose behalf the Slovak Land Fund was acting) as an entity whose subjective rights may be affected by the decision, the application for the

suspensive effect of the action was dismissed by the court on the grounds that in the court's view "the risk factors that the legislator refers to in relation to the possibility of a procedure were not proven by the applicant. The threat of serious harm, material, economic damage, financial damage, serious damage to the environment, or other serious irreparable damage, have not been substantiated and legally supported by the applicant in the case under review." The other element the court has to assess when deciding on the suspensory effect of a claim as per the Code on Administrative Judiciary, is the matter of potential contradiction with public interest (shall the suspension be granted). In this connection the court stated (in this very case) that "The Court further considers that, with regards to the public interest protected by the same dictum of §185 let. (a) Code on Administrative Judiciary, any admission of the suspensory effect of an administrative action would not be in accordance with the case. The concept of "public interest" is an indeterminate legal concept which cannot be sufficiently defined, and its application depends on the assessment in each individual case. However, the settled case law regards the public interest as a generally beneficial interest, the bearer of which is the society and whose purpose is to ensure its optimal development. In the case in question, in the opinion of the administrative court, it is not disputed that the legal effects of long-term processes of arrangement of ownership relationships in gardening facilities are a *priority public interest of the society.*"

It follows from the abovementioned explanatory statement of the court that the issue of public interest has been dealt with (by the court) in the case despite the fact the applicant did not specify any specific material arguments (details) relating to the public interest in his application (see above). We approve of such assessment of public interest by the court (despite of the applicant not providing any supporting arguments in his request for a suspension).

At the conclusion of this paper on the practical protection of public interest (within the framework of the activities of public bodies i.e. courts and administrative bodies), we would like to point to the decision of the Regional Court in Banská Bystrica (file no. 23S/118/2014), in which the court deals with the potential abuse of law/right (by the claimant) – and the lawfulness of the action brought to court by the applicant in the context of the Freedom of Information Act. In accordance with the Act on Free Access to Information (No. 211/2000 Coll. – "the FOIA"), the applicant requested a very extensive set of information from the District Court of Zvolen (the applicant requested disclosure of all court proceedings which meet the following characteristics: a) the proceedings started at the District Court of Zvolen; b) the proceedings were registered in one of the "C", "Cb", "Ro" or "Rob" registrars in accordance with the Decree of the Ministry of Justice of the Slovak Republic No. 543/2005 Coll., Annex No. 1, Chapter II, part B, point 1, or part (1) or part (J); c) in the proceedings, the court has the obligation under Article 49 (1) of the relevant Act to deliver documents (addressed to the claimant) only to Ulianko & Holčík, s.r.o or Ulianko & partners, s.r.o, with SNP 27, 960 01 Zvolen, or if there are more claimants, the above duty of the court exists only to one of them; d) in the proceedings, the respondent, if he is a natural person, is not resident in the Zvolen district, or if he is a legal entity, he is not domiciled in the Zvolen district (district according to § 2 par. 33 of Act No. 371/2004 Coll.). From the procedures thus selected, the applicant requested information in the extent of:

- file number assigned to the case at the District Court of Zvolen,
- the name of the judge managing the case,
- whether the matter was terminated at the District Court of Zvolen by transferral of the case to another court as per § 105 par. 2 of the relevant Act.

The District Court of Zvolen (acting as the first instance administrative authority within the FOIA proceedings) rejected the request for information and did not provide the information requested by the applicant. The appellate authority (the Regional Court in Banská Bystrica – acting as an appellate administrative authority) upheld the administrative decision of the first instance administrative decision. The Regional Court in Banská Bystrica (acting as the relevant Administrative Court) subsequently examined the decision of the District Court of Zvolen as well as of the Regional Court in Banská Bystrica – on the basis of an administrative action brought by the applicant – *and dismissed the action.* The court also partially resorted to the abuse of law in its decision, claiming that "the new Code on Administrative Judiciary in § 5 par. 12 (Basic Principles of the Proceedings) establishes a novelty when the administrative court exceptionally may reject providing judicial protection to the rights of the natural person and the legal entity, and the application is subject to obvious abuse of rights. The provision in question refers to the protection of rights or to the legitimate interests of natural persons and legal persons and to avoid the execution of practices that are vexatious or are abusing the right to judicial protection to the detriment of other parties to legal relationships or public authorities."

The Regional Court in Banská Bystrica, expressed the legal opinion that the information requested by the applicant from the District Court of Zvolen (when looking at the quantity and the extent of the requested information) "is considered by the court to be an abuse of law/rights, as the Ulianko & Holčík Law Firm in Zvolen, has been providing legal services for more than twelve years". The Court stated that: "From this point of view, the abuse of law/of the right to information may also be considered as a specific ground for refusing the claim brought to the court. In the present case, the applicant requested to provide a large amount of information from one entity – *inter alia* – whether 'the court has a duty under Article 49 of the relevant Act – to deliver the claimant's documents only to the Ulianko & Holčík Law Firm, or Ulianko & Partners, with registered seat at Nám. SNP 27, Zvolen, or – if there are more claimants – if such duty exists to at least one of the claimants' – taking into consideration – that the law firm has been active for more than twelve years. Requiring such information does not provide for a reasonable arrangement of social relations, such conduct by the applicant may be an abuse of a subjective right and even have a vexatious nature. Providing such information is in violation of § 5 par. 12 of the Code on Administrative Judiciary and the Administrative Court in such cases where the action is vexatious or would contain an abuse of rights, does not provide the applicant with legal protection."

4. Conclusion

The protection of public interest is implemented in the Slovak Republic by both substantive and procedural law provisions. While in some cases it is clearly identifiable that the protection of public interest is the primary purpose of the rule introduces by a source of law (in particular through the mandatorily expressed obligation of the administrative authority to take into account concepts such as "public interest", "general interest", "interest of society" etc.), in other cases, protection of public interest is carried out by other means (rather than expressly stating for the protection of public interest). It appears that both the Czech Republic and the Slovak Republic have accepted that public interest is a vague term in most cases without a clear definition of its content. Nevertheless, public interest must always have a legal basis and administrative authorities are not the ones tasked with "making up" the contents of public interest, rather, they are obliged to identify the specific interests involved in a particular case – either based on the very legal definition of public interest in a particular case (shall there be such definition expressly stated in the source of law) or specifying public interest(s) by looking into the very core of the laws they are applying in the decision-making. At the same time, it is without any doubts that "public interest" does not have a specific "universal" content, but public interests of different kinds should be – as a rule – perceived as complementary. On the other hand, sometimes inconsistency between particular public interests cannot be ruled out. In such cases, it is the duty of the administrative authorities not only to point to the factual and legal relevance of public interest versus private interest, but also to the links and relationships between the various partial public interests that may exist in the case. Balancing in categories of partial public interests should be clearly specified in the decision of the public authority. In the event of the existence of several partial public interests, the administrative authority should also deal within the reasoning of its decision, how it dealt with a specific public interest and why it was granted a specific/priority status over other interests involved. This does not relieve the administrative authority of the duty to act in such a way that the interference with all the particular interests concerned is as minimal as possible.

References

1 As a preliminary point, we hereby note that the essence of this article is not the examination of the institute of public interest in the context of Act no. 357/2004 Coll. on the protection of public interest in the performance of functions of public officials, according to which *"Public interest for the purposes of this Act is such an interest which brings property benefits or other benefits to all citizens or to many citizens."*

2 In some sources of law, the lawmaker expressly uses the term "public interest" and defines what that public interest is. However, often this is not the case and the source of law frequently lacks a clear definition of the term public interest.

3 Constitution of the Slovak Republic, www.prezident.sk/upload-files/46422.pdf (accessed 5 February 2018)

4 Constitution of the Slovak Republic, www.prezident.sk/upload-files/46422.pdf (accessed 5 February 2018)

5 With § 39 para 1 defining what "public interest" would be for the purposes of the relevant Act.

6 For reasons of clarity, in the text the symbol § is used to refer to an article in a source of law, i.e. in an Act passed by the National Council of the Slovak Republic (the Parliament).

7 See also Soňa Kosiciarova, *Správny poriadok. Komentár. [Administrative Procedures Act – Commentary]* 24 (Šamorín, Heuréka, 2013). – "The second sentence of § 3 enshrines the tasks of administrative authorities in the exercise of their powers. They – by law – have the duty to protect the interests of the State and of the society. Currently a more modern term is used to describe this – namely public interest. It [public interest] refers to a legitimate public interest that enjoys legal protection. It is a general or a generally beneficial interest."

8 Lilla Garayová, *Regulácia voľného pohybu osôb v kontexte protiteroristických opatrení v EÚ. [The Regulation of the Free Movement of Persons in the Context of Counter-terrorism Measures]* 1, Paneurópske právnické listy, 80–86 (2018).

9 For example, Jaromír Svoboda. et al. *Občiansky zákonník, I. diel,* Komentár. *[Civil Code, Commentary]* 75 (Eurounion 1996).

10 Dušan Hendrych et al. *Právnický slovník, [Legal dictionary]* (3rd. edition, Prague, C.H. Beck, 2009).

11 Finding of the Constitutional Court of the Slovak Republic – file no. III. ÚS 314/07 dated 16 December 2008.

12 Judgment of the Supreme Administrative Court of the Czech Republic 5 Afs 75/2011.

13 See in Karin Prievozníková, Implementácia zákazu zneužitia práva do daňového poriadku. [Implementation of the prohibition of abuse of rights in the Tax Code] 161 et seq. in Vladimír Babčák, Anna Románová, Ivana Vojníková (eds.) *Daňové právo vs. daňové podvody a daňové úniky [Tax Law vs. tax frauds and tax evasion]* (Košice, Univerzita Pavla Jozefa Šafárika, 2015).

14 Lilla Garayová, *Spoločnosť proti terorizmu? [Torture as a just means of preventing terrorism?]*, 360–364 (Plzeň, Aleš Čeněk, 2016).

15 Viktor Knapp, *Teorie práva [Legal Theory]* 184–185 (Prague, C. H. Beck, 1995).

16 Aleš Gerloch, *Teorie práva [Legal Theory],* 184 (Plzeň, Aleš Čeněk, 2013).

17 The content of the public interest is either expressly stated in the Act (e.g. § 39 of the Act on Mineral Waters – Act No. 538/2005 Coll.) or can be derived from the relevant act by looking into the aims and purpose of the regulation.

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Structure of Revenues and Impact Thereof on the Rate of Indebtedness of Municipalities

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Abstract: In this article, the author examines in detail the structure of revenues of municipalities and the level of indebtedness thereof in particular periods. The author´s assumption is that the high rate of revenues obtained by the municipalities from the state, have a negative impact on indebtedness of the municipalities. The aim of the article is to prove that there is a relation between the indebtedness of municipalities and the kinds of revenues thereof. Therefore, the hypothesis the author will try to prove or disprove in her work, reads as follows: "The sources of municipal revenues are a very important aspect that may have a substantial effect on the economic results of every municipality." The author in particular uses the method of analysis, synthesis and mostly in the second part of her work she also uses the comparative method.

Keywords: budget; revenue; subsidy; tax; indebtedness

1. Introduction

Recently a great emphasis has been put on the struggle against indebtedness. Total indebtedness has been rising, both at the level of states, territorial units, and its citizens. The logical consequence of this condition is the effort to prevent the debtors from getting into excessive debt. Due to the last economic crisis, conditions for all subjects were tightened. Evidence for this may be, for example the proposed amendment to the Czech National Bank Act, by which the Bank will try to set stricter conditions for the provision of mortgages.[1]

Even though the European Union put a special emphasis on the overall indebtedness of individual states in the beginning, now, by means of Directives, the Union has been trying to implement into national laws limits of indebtedness at lower territorial levels. Therefore, in 2017 it was implemented into the Czech legal order EU Directive 2011/85 on requirements for budgetary frameworks of the Member States that has brought in many changes and the strengthening of requirements for the composition of the budget. However, all these measures mean that the problem has been solved from the outside. This kind of solution in general will not bring the desired results and often receives a large portion of criticism from the addressees, even though it is them whom it is intended to serve in the end.

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I consider what prevention could be offered to the municipalities to help them reduce their indebtedness from the inside. A key to this change could be, at the municipal level, the larger independence of the municipalities and the larger extent of their own revenues within their budgets. The aim of this article is therefore to find out and emphasize what percentage of their own revenues the municipalities are capable of influencing, and to highlight the risks that municipalities will have to face. Considering the above stated, I have set down the following hypothesis: "Sources of municipal revenues are a very important aspect that may have a substantial effect on the economic results of every municipality." With regard to the scope of the issue, I will concentrate only on municipalities in the territory of the Czech Republic. The established facts could be valid, considering similar historic and political development, also in neighbouring countries, in particular in the states of the so-called Visegrád Four group.

In my work, I will at first use the descriptive method, in order to depict the conditions of the concerned issue, while the analytical method will be used later. Upon analysing the information from available sources, I will apply the method of synthesis on the analysed facts. By means of synthesis the analysed information is linked to logical units, out of which are deduced partial conclusions. In addition, the comparative method will be used in order to compare the found facts, so that relevant conclusions and *de lege ferenda* recommendations can be made.

The author has been dealing with similar issues for a long time. It is worth mentioning her publication *Exclusive tax revenues of municipalities,*[2] in which the author tries to determine the level of fiscal autonomy of municipalities, or, for example articles *The Issue of Tax Revenues of Local Councils*[3] and *The Municipal Autonomy in the Czech Republic.*[4]

2. The Structure of Revenues in Municipal Budgets in the Czech Republic

As to the structure of revenues, it is true since the early 1990s, that most revenues of municipalities in the Czech Republic (CR) are those that municipalities do not have any control of in respect of the level thereof. The largest percentage share of the budgets is subsidies from the state, subsidies from European funds, and shares of the state-administered taxes (personal income tax, corporate tax, and value added tax,[5] hereinafter jointly referred to as shared taxes). Revenues that can be influenced by the municipalities are in particular local fees, immovable property tax, and revenues from their own assets and the management thereof. The rates of revenues that can or cannot be influenced are shown in the table[6] below. Revenues can be divided into "state" (revenues the level of which the municipaliy cannot influence) and "own" (revenues the level of which the municipality can influence).[7] The following table displays data since 2000; I have not succeeded in finding older ones. In the 1990s when District Authorities still existed, revenues of both municipalities and districts were registered within the state budget under the same designation. After so many years, it is therefore very difficult to find sufficient sources of information, and to distinguish the revenues of municipalities from the revenues of districts.

Table 1.

Year	1993	1994	1995	1996	1997	1998	1999	2000
State	?	?	?	?	?	?	?	70 %
Own	?	?	?	?	?	?	?	30 %
Year	2001	2002	2003	2004	2005	2006	2007	2008
State	76.9 %	77.6 %	80.7 %	80.8 %	77.9 %	78.3 %	79.5 %	79.1 %
Own	23.1 %	22.4 %	19.3 %	19.2 %	22.1 %	21.7 %	20.5 %	20.9 %
Year	2009	2010	2011	2012	2013	2014	2015	2016
State	78.2 %	79.7 %	78.6 %	74.5 %	76.1 %	78.2 %	81.8 %	80.5 %
Own	21.8 %	20.3 %	21.4 %	25.5 %	23.9 %	21.8 %	18.2 %	19.5 %

Source: Compiled by the author.

The table clearly shows that municipalities in the CR can in fact influence only about 20% of their respective revenues. This fact negatively affects the necessity to plan municipal expenditures. Municipalities must be aware of the fact that they are reliant on the state for most of their revenues. How then can the local government draw up a balanced budget, as required by law,[8] when they are not able to estimate or have control over 80% of the revenue part of their budget? The amount of finance provided to the municipalities by the state completely differs year by year. The biggest differences can be found in shared taxes, which make around 50%[9] of the overall volume of the revenues of municipalities. With regard to the fact that the state is bound by law to provide municipalities with a tax share, while those shares are expressed in percentage of the overall tax revenues, it is only logical that the volume of means provided to the municipalities must vary every year. Many variables count in this case.

One of them is the growth of the economy, which always affects tax collection. A number or factors affect the economy, such as GDP, the value of the Czech crown (exchange rate), inflation or the unemployment rate. The first big drop in the Czech economy was seen in the early 1990s, when due to the changeover to a market economy the Czech Republic had to face many problems. Roughly, by the mid-1990s the Republic managed to improve the situation, but then came other downswings caused by changes in the exchange rate. Economic growth was renewed only after 1999. A little slowdown in the economy came in 2001–2003, and the consequences of the world financial crisis started to affect the CR in 2007. The situation still worsened, so in 2009–2011 the economy recorded a significant drop, which was followed by a GDP decrease in 2012 and 2013. Since then, an important slowdown has not yet been recorded.[10]

Although Table 1 does not show much correlation between that information, it can be calculated from the state final accounts. The most remarkable drop in tax revenues was recorded in 2009. Tax revenues of CZK 544 billion in 2008 dropped down to CZK 480 billion[11] in 2009 and it took the next three years to recover to the value of revenues of 2008. The municipalities definitely felt the decrease in revenue volume, without having any chance of solving the situation.

Another important factor that influences the level of tax collection is the value of tax rates. From the beginning, municipal budget revenues included personal income tax

(DPFO) and corporate income tax (DPPO). From 1 January 2001, VAT was added. The development of the respective rates is shown in the following table.

Table 2.

Year	1993	1994	1995	1996	1997	1998	1999	2000
DPFO12	15, 20, 25, 32, 40.44%	15, 20, 25, 32, 40.43%	15, 20, 25, 32, 40.43%	15, 20, 25, 32, 40 %	15, 20, 25, 32, 40 %	15, 20, 25, 32, 40 %	15, 20, 25, 32, 40 %	15, 20, 25. 32%
DPPO13	45%	42%	41%	39%	39%	35%	35%	31%
Year	2001	2002	2003	2004	2005	2006	2007	2008
DPFO14	15, 20, 25.32%	15, 20, 25.32%	15, 20, 25.32%	15, 20, 25.32%	15, 20, 25.32%	12, 19, 25.32%	12, 19, 25.32%	15%
DPPO15	31%	31%	28%	24%	26%	24%	24%	21%
VAT	22 and 5%	22 and 5%	22 and 5%	19 and 5%	19 and 5%	19 and 5%	19 and 5%	19 and 9%
Year	2009	2010	2011	2012	2013	2014	2015	2016
DPFO16	15%	15%	15%	15%	15%	15%	15%	15%
DPPO17	20%	19%	19%	19%	19%	19%	19%	19%
VAT	19 and 9%	20 and 10 %	20 and 10 %	20 and 14 %	21 and 15 %	21 and 15 %	21, 15 and 10 %	21, 15 and 10 %

Source: Compiled by the author.

The last important issue that is closely connected to tax rates are Acts determining percentual rates of shares from tax revenues, which belong to municipal budgets. Allocation of revenues to the state and to the municipalities is determined from the early 90s by the Act on budgetary rules of the Czech Republic.[18] The revenues of municipalities were regulated by Section § 23. At that time, state-allocated taxes were only personal income tax and corporate income tax. On 1 January 2001, the Act on budgetary allocation of taxes came into effect,[19] which significantly changed the rules.[20] The development of tax shares that belonged to the budgets of municipalities is shown in the table below.

Table 3.

Year	1993	1994	1995	1996	1997	1998	1999	2000
DPFO [21]	100%[22]	100%[23]	100%[24]	100%[25]	100 %[26]	100 %[27]	100 %[28]	100 %[29]
DPPO [30]	0	0	0	20 %	20 %	20 %	20 %	20 %
Year	2001	2002	2003	2004	2005	2006	2007	2008
DPFO[31]	20.59%	20.59%	20.59%	20.59%	20.59 %	20.59 %	20.59 %	21.4%[32]
DPPO	20.59%	20.59%	20.59%	20.59%	20.59 %	20.59 %	20.59 %	21.4 %
VAT	20.59%	20.59%	20.59%	20.59%	20.59 %	20.59 %	20.59 %	21.4 %

Year	2009	2010	2011	2012	2013	2014	2015	2016
DPFO[33]	21.4 %	21.4 %	21.4 %	21.4 %	23.58%[34]	23.58%[35]	23.58%[36]	23.58%
DPPO[37]	21.4 %	21.4 %	21.4 %	21.4 %	23.58%	23.58%	23.58%	23.58%
VAT	21.4 %	21.4 %	21.4 %	19.93%	20.83 %	20.83 %	20.83 %	20.83%

Source: Compiled by the author.

Data from Tables 2 and 3 can be compared to data from Table 1. The growth of the share of state revenues up to 1% a year may be rather a consequence of the growth in the economy enabling the increased collection of particular taxes. The first substantial increase of the state revenues share is seen between 2000 and 2001. It was caused by the inclusion of VAT into the shared taxes, when starting from 2001 the municipalities received a share of the VAT in amounting to 20.59%. The reason for the next, though not so high increase of state revenues as compared to their own revenues in 2003 cannot be seen from the tables. It was caused by the dissolution of the districts, when powers thereof were devolved to the municipalities, and the state started to provide new subsidies to the municipalities as remuneration for the execution of those devolved powers. Further, the table shows an obvious decrease in state revenues in 2005. The reason was a change in the funding of school education; previously the subsidies for funding school education were sent to the municipalities, but since 2005 they have been directly sent to the schools.[38]

Between 2007 and 2008 there was a decrease of revenues obtained by the municipalities from the state, though the tax share of the municipalities increased in all shared taxes. This phenomenon was caused by the financial crisis, and by a reduction in the income tax rates. A small increase in 2010 was probably caused by the growth of VAT rates. Even though tax rates did not decrease until 2012, the amount of revenues obtained by the municipalities from the state decreased compared to their own revenues. The reason for this was the impact of the economic crisis. The receding economic crisis and a decreased share from the VAT received by the municipalities then caused a relatively large downswing in the revenues received by the municipalities from the state in 2012. The VAT share received by the municipalities was cut mainly because the VAT rates were increased, but the legislator evidently failed to properly estimate and take into account the consequences of the crisis. The state thus caused considerable trouble in the municipal budgets.[39] It was probably also for this reason that the state again increased the share of VAT for the municipalities in the year after. Along with the growth in tax rates, that step brought in a visible increase in the proportion of revenues received by the municipalities from the state and its own revenues. Thanks to the growth in the economy, the share of the state revenues received by the municipalities from the state in comparison with the share of own revenues in the following years kept increasing. The reason for a decrease in 2016 of the proportion of revenues received by the municipalities from the state and their own revenues was a reduction in the volume of subsidies provided from European funds.[40]

3. Development of Debts of Municipalities Since 1990 to the Present

With the establishment of the Czechoslovak Federative Republic,[41] self-government slowly started to be renewed at the territorial level. That tendency continued also in the newly established Czech Republic.[42] Among the most important provisions was Article 101 of the Constitution of the Czech Republic that enshrined the right of municipalities to their own property, and management and administration of their own budget.[43] However, rather high demands were placed on the municipalities from the very beginning. Even though they were not indebted in the early 1990s, the conditions slowly changed. Provazníková states that a major part of expenditures was due to capital expenditures. Furthermore, they were expenditures that would not bring any real profit to the municipality in the future. Therefore, projects already carried out would not contribute in the future to pay off the debts caused by those projects. That is why the indebtedness of municipalities rapidly grew in the 1990s.[44] The course of the growth of indebtedness is shown in the table below. It presents the level of overall debt of all municipalities in the Czech Republic in billion Czech crowns from 1993 to 2016.[45] Concerning 2017, the Ministry of Finance has not published any data yet.

Table 4.

Year	1993	1994	1995	1996	1997	1998	1999	2000
Debt	3.4	14.3	20.3	28.3	34.4	39	40	41
Year	2001	2002	2003	2004	2005	2006	2007	2008
Debt	48.3	55.8	70.4	74.8	79	80.9	79.2	80.1
Year	2009	2010	2011	2012	2013	2014	2015	2016
Debt	80.6	83.3	82.4	90	92.2	88.9	86.9	71.9

Source: Compiled by the author.

From the stated data, about 50% of the indebtedness falls on the biggest Czech cities – Prague, Brno, Pilsen, and Ostrava. It is noteworthy that indebtedness applies to only about 50% of the Czech municipalities which is around 3,100 municipalities. The other municipalities manage to run without debts. The Ministry of Finance also states that the indebtedness of a municipality increases with the growth in its population.

The table shows that Czech municipalities over recent years have succeeded in redeeming their debts and decreasing their indebtedness. This is in accordance with the current trend over the past years, where individual states actively endeavour to reduce their respective debts after the world financial crisis, and the European Union also forces the states to do so.

Another tremendous risk concerning indebtedness is in the hidden use of EU funds. These subsidies are often several times higher than the total amount of the revenues of the municipality. In the case where the municipality breaches budgetary discipline[46] in connection with the funds, it will have to return the subsidy, which may throw the

municipality into financial turmoil and lead it to becoming debt ridden. This, however, would be a topic for a separate article.

Czech municipalities continue to succeed at redeeming their debts mainly thanks to the positive balance of their respective budgets that they have reached in recent years. Shared taxes, revenues of which have recently grown, contributed significantly to the current situation and today they constitute, as I have already noted, about 50% of the overall revenues of the municipalities. However, the question is what the next financial crisis would do to the indebtedness of the municipalities. Considering the above stated facts, I am convinced that when the next downswing of economy comes, the municipalities will start getting into debt again. It is only a matter of time. At the moment when 50% of revenues of a particular unit have a variable level and furthermore that unit cannot flexibly respond to that outage by replenishment from other sources, the unit is forced to get into debt. In my opinion, the municipalities have no other way out. This is not the best of prospects when economists forecast the coming of another financial crisis.

4. Conclusion

The increase of the share of the municipalities in tax revenues is a trend in the Czech Republic over the last years. This is the way how the state increases the revenues of the municipalities in accordance with their own requirements, in order to improve the financial situation. In my opinion, it is not a good step forward.

The hazard potential of this kind of revenues has become evident several times, when lower tax income occurred due to a decline in the economy or a decrease in tax rates. Logically, this caused a lower volume of means that the state paid out to the municipalities as their share of tax income. Lastly the economic crisis significantly affected the Czech Republic in 2009–2011. The aftermath thereof was no way catastrophic, however it does not mean that something worse may not happen over the next few years. Currently another problem is on the agenda at the municipal level, connected with the share in tax income. It concerns the amendment prepared by the Ministry of Finance that should decrease overall taxation of a certain kind of taxable entities,[47] i.e. employees, and from 1 January 2019 to repeal so-called super-gross wages.[48] Since income tax, which will be affected by the amendment, is a significant source of revenue for municipal budgets, the Union of Towns and Municipalities of the Czech Republic immediately objected to the amendment. If the amendment to the Act is approved, it will deprive municipal budgets of about CZK 5.3 billion.

As I have already noted, municipalities are not able to flexibly respond to such an outage. They can influence about 20% of their respective revenues, and the possibilities to increase their share within this 20% are rather limited.

In addition, the municipalities are under pressure due to the rules set by the implemented Directive 2011/85/EU on requirements for budgetary frameworks of the Member States. It has been implemented into the Czech legal order as the Act on the rules of budgetary responsibility[49] and as an associated act that amended[50] over dozens of the legal regulations. These new duties, where the state defines for the municipalities the level of the highest possible indebtedness, also impose new sanctions as well. Pursuant to

Section 17, the municipality is obligated, on the balance sheet date, to keep its debt below 60% of its average revenues received over the last four budgetary years. If the municipality exceeds the limit, it is obligated to cut the budget down in the following calendar year by at least 5%. If it fails to do so, the state may suspend a transfer to the municipality of its share in shared tax income.[51]

As expected, the Union of Towns and Municipalities objected to the provision. It raised the objection that there has been a breach of the constitutional right to administer their own property and their own budget, which is the expression of the right to self-government of every municipality. However, the objections remain unheard and the provision in law is valid. Thus, the municipality may easily get into serious problems that it will not be able to solve, as the state does not provide the municipality with sufficient options to gain its revenues independently of the state.

Thus, it is more than obvious that the legislator should consider in the future an extension of the municipal competences as it concerns different kinds of revenues. It has been suggested that municipalities be given an option to introduce new municipal fees, such as advertising fees, or to enable municipalities to determine a surcharge on taxes, as it is practiced in several Nordic countries.[52]

Regarding the above stated, I dare say that the objective of the work has been reached and the hypothesis "Sources of municipal revenues are a very important aspect that may have a substantial effect on the economic results of every municipality" has been proven.

References

1 Vladan Gallistl, Zárodky krizí vznikají v nejlepší době [The emergence of crises emerges in the best times], ČNB, www.cnb.cz/cs/verejnost/pro_media/clanky_rozhovory/media_2018/cl_18_180424_mora_e15.html (accessed 24 April 2018).
2 Kristýna Řezníčková, Výlučné daňové příjmy obcí [Exclusive tax revenues of municipalities], 230 (Olomouc, Iuridicum Olomoucense, 2016).
3 Kristýna Řezníčková, The Issue of Tax Revenues of Local Councils, 333–342, in Pavel Smolen (ed.), *Selected Issues in Taxation and Tax Authorities in Central Europe* (Lublin, Wydawnictwo KUL, 2016).
4 Kristýna Müllerová, The Municipal Autonomy in the Czech Republic, 325–337, in Petr Mrkývka (ed.) *System of Financial Law: General Part: Conference Proceedings* (Brno, Masaryk University, Faculty of Law, 2015).
5 Since 2017, tax from gambling has been added to shared taxes.
6 Information source: Own calculations are based on data from the Ministry of Finance of CR, and Kristýna Řezníčková, Výlučné daňové příjmy obcí [Exclusive tax revenues of municipalities], 82 (Olomouc, Iuridicum Olomoucense, 2016).
7 More on the issue of distinction of state and own revenues see Kristýna Řezníčková, Výlučné daňové příjmy obcí [Exclusive tax revenues of municipalities] (Olomouc, Iuridicum Olomoucense, 2016).
8 Section 4 para 4 of Act No. 250/2000 Sb., on budgeting rules of territorial budgets, as amended.
9 Kristýna Řezníčková, Výlučné daňové příjmy obcí [Exclusive tax revenues of municipalities], 81 (Olomouc, Iuridicum Olomoucense, 2016).
10 Česká národní banka [Czech National Bank], www.historie.cnb.cz/cs/menova_politika/prurezova_temata_menova_politika/1_ekonomicky_vyvoj_na_uzemi_ceske_republiky.html (accessed 24 April 2018).
11 Source: Ministry of Finance of CR.
12 Personal income tax.
13 Corporate income tax.
14 Personal income tax.
15 Corporate income tax.
16 Personal income tax.
17 Corporate income tax.
18 Act No. 576/1990 Sb., on rules of management of budgetary means of the Czech Republic and of the municipalities in the Czech Republic (Budgetary rules of the Czech Republic), as amended.
19 Act No. 243/2000 Sb., on budgetary allocation of revenues from taxes to territorial self-governing units and to some state funds (Act of budgetary allocation of taxes).
20 Explanatory memorandum to Act No. 243/2000 Sb., on budgetary allocation of taxes.
21 Personal income tax.
22 Total revenues from income tax of natural persons having residency in the territory of the municipality, +40% of revenues from income tax on dependent activities and from fringe benefits, paid by the payer in the territory of the municipality.
23 See also note no. 22.
24 See also note no. 22.
25 Total revenues from advance income tax of natural persons having residency in the territory of the municipality, + 10% of revenues from income tax on dependent activities and from fringe benefits, paid by the payer in the territory of the municipality.
26 See also note no. 25.
27 See also note no. 25.
28 See also note no. 25.
29 See also note no. 25.
30 Corporate income tax.

31 In addition, it applies for the whole line that the municipalities are entitled to 30% from revenues from advance income tax of natural persons, having residency in the territory of the municipality.
32 In that year so-called super-gross wages were introduced, which increased the real taxation of employees.
33 Personal income tax. In addition, it applies for the whole line that the municipalities are entitled to 30% from revenues from advance income tax of natural persons, having residency in the territory of the municipality.
34 Excluding fringe benefits, paid by the employer, where the value 22.87% applies.
35 See also note no. 34.
36 See also note no. 34.
37 Corporate income tax.
38 State final balance statement for 2005, Ministry of Finance, www.mfcr.cz/assets/cs/media/Statni-zaverecny-ucet_2005_F-Hospodareni-rozpoctu-uzemnich-samospravnych-celku-za-rok-2005.pdf (accessed 24 April 2018).
39 Final economic statement of territorial self-government for 2012, Deník veřejné správy, www.dvs.cz/clanek.asp?id=6608210l (accessed 24 April 2018).
40 Ministry of Finance CR, www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2016/statni-zaverecny-ucet-za-rok-2016-31478 (accessed 5 May 2018).
41 On 29 March 1990, by Constitutional Act No. 81/1990 Sb., on the change of the name of Czechoslovak Socialist Republic.
42 The Czech Republic was established on 1 January 1993.
43 Article 101 para. 3 of Constitutional Act No. 1/1993 Sb., Constitution of the Czech Republic.
44 Romana Provazníková, Olga Sedláčková, Financování měst, obcí a regionů: teorie a praxe [Financing cities, municipalities and regions: theory and practice], 196 (2nd amended edition, Prague, Grada, 2009).
45 Source of data contained in the tables: Deník veřejné správy [Journal of Public Administration], www.dvs.cz/clanek.asp?id=6432000 (accessed 25 April 2018) and Ministry of Finance CR, www.mfcr.cz/cs/verejny-sektor/uzemni-rozpocty/zadluzenost-uzemnich-rozpoctu/2016/zadluzenost-uzemnich-rozpoctu-v-roce-201-30092 (accessed 24 April 2018).
46 See in Michal Koziel, Breach of Budgetary Discipline as a Direct Consequence of the Breach of Conditions in the Management of the EU Funds, in Eva Kovářová, Lukáš Melecký, Michaela Staníčková (eds.), *Proceedings of the 3rd International Conference on European Integration 2016* (Ostrava, VŠB-Technical University of Ostrava, 2016).
47 For further reading on the topic see Zdenka Papoušková, Vybrané aspekty pojmu daňový subject [Selected aspects of the term tax entity], 197–209, in Zdenka Papoušková, Michael Kohajda et al., *Aktuální otázky finančního práva ve středoevropském prostoru* (Olomouc, Iuridicum Olomucense, o. p. p., 2013) or Zdenka Papoušková, Daňové subjekty ve světle nové právní úpravy [Tax entities in the light of new legislation], 7–15, in Zdenka Papoušková et al., *Vybrané instituty správy daní po změně právní úpravy v ČR a na Slovensku* (Olomouc, Univerzita Palackého v Olomouci, 2012).
48 Municipalities will lose 5.3 billion due to tax allowances of the state. Union of Towns and Municipalities of the Czech Republic, www.smocr.cz/cz/tiskovy-servis/tiskove-zpravy/obce-prijdou-o-5-3-miliard-vlivem-danovych-ulev-statu.aspx?referrerID=94 (accessed 25 April 2018).
49 Act No. 23/2017 Sb., on the rules of budgetary responsibility.
50 Act No. 24/2017 Sb., amending certain laws in connection with the adoption of budgetary responsibility regulations.
51 More on the new rules of budgetary responsibility: Michal Koziel, New Rules of Budgetary Responsibility and Their Impact on Public Finances, 223, in Ivana Pařízková, Eva Tomášková (eds.), *Interaction of law and economics 2017: conference proceedings.* Publications of Masaryk University, theoretical series, edition Scientia, File No. 604. (Brno, Masaryk University, 2017).
52 Paweł Swianiewicz, Finanse lokalne, teoria i praktyka [Local finance, theory and practice], 47 (Warsaw, Municipium, 2004).

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Rationalization of Legally Determined Expenditure as a Condition for Strengthening Financial Accountability

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Abstract: The main purpose of this article is to analyse the relationship between financial accountability and legally determined expenditure. According to the adopted research hypothesis, increasing the financial accountability requires taking specific actions in the field of the legally determined expenditure. As the article is theoretical, it does not present the results of the empirical research; the formal-dogmatic method was used to interpret the content of legal acts and jurisprudence of the Constitutional Tribunal, as well as 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 principle of common good, the financial accountability, and the legally determined expenditure will be first explained. Next, the solutions for the rationalization of the legally determined expenditure will be proposed. We conclude that their implementation should increase the financial accountability to strengthen the constitutional principle of the common good.

Keywords: financial accountability; common good; legally determined expenditure; flexible expenditure; spending rules; multi-annual planning

1. Introduction

According to Art. 1 of the Constitution of the Republic of Poland of 2 April 1997, the Republic of Poland is the common good of all citizens. On the grounds of the Polish legislation, the common good is the constitutional value as well as the constitutional

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principle. On the grounds of the financial law, the public financial funds and an appropriate way of spending them should be the basis, though obviously not the only one, the instrument of the realization of the common good value (principle). This was confirmed by the Constitutional Tribunal recognizing a properly constructed (and balanced) budget as a necessary condition for the state to realize the goal of caring for the common good.[1] However, the legally determined expenditure introduced without a sufficient analysis of social needs and the financial consequences of their implementation can be an important barrier to the implementation of the common good principle, as the resignation from the legally determined expenditure requires the positive intervention of the legislator.[2]

Therefore, the main purpose of this article is to analyse the relationship between financial accountability and legally determined expenditure. According to the adopted research hypothesis, increasing the financial accountability requires taking specific actions in the field of the legally determined expenditure. As the article is theoretical, it does not present the results of the empirical research; the formal-dogmatic method was used to interpret the content of legal acts and jurisprudence of the Constitutional Tribunal, as well as 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 principle of common good (section 1), the financial accountability (section 2) and the legally determined expenditure (section 3) will be first explained. Next, the solutions for the rationalization of the legally determined expenditure will be proposed (section 4). We conclude that their implementation should increase the financial accountability to strengthen the constitutional principle of a common good.

2. Implementation of the Common Good Principle in a Representative Democracy

An essential feature of the contemporary democratic systems is the choice of citizens' representatives to take the public decisions, including the financial ones, in their interest, and therefore in accordance with the common good. The implementation of the state's expenditure policy in the public interest, however, faces difficulties, as in today's democracies the activity of citizens generally is limited to the participation in the elections.[3] Using the words of A. de Tocqueville, "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".[4]

The election of the citizens' representatives in the elections process is accompanied by the principal-agent problem, which is the basis for explaining many phenomena in the sciences of public administration. This problem consists in that the rulers should not seek to pursue their own interests but they should take actions that serve only the public interest; however, in practice the citizens are unable to enforce their representatives and public administrators acting on their behalf not to pursue their own goals but the goals of society.[5] Thus, the implementation of a policy that provides special privileges to groups that have narrow self-goals that run counter to the interests of particular voters and society as a whole does not serve the public interest.[6]

The basic cause of the problem of the principal-agent problem is the information asymmetry, as the information about the actions of public decision-makers is considered the common good.[7] Lack of the reliable and transparent information on the implementation of the common good principle is a manifestation of the information asymmetry in the budgetary issues, analysed in this study.

An important role in strengthening transparency, and in consequence of the effectiveness and efficiency of public policy implementation, and thus the implementation of the common good principle can play the performance budgeting. However, in Poland, after several years of work on this instrument, launched in 2007, it has not become a subject of discussion in the parliament, nor even of more interest to citizens, hence its development boils down to a large extent to the formal implementation of labour-intensive obligations stemming from the Act of public finances[8] and executive acts. However, even if the problems pointed out were solved, the performance budgeting alone would not solve the problem of the excessive legally determined expenditure, if not accompanied by additional instruments enabling rationalization of the non-elastic expenditure.

3. Financial Accountability as an Instrument Supporting the Implementation of the Common Good Principle

N. Dias notes that nowadays all over the world we observe the disappointment with the representative democracy system.[9] Similarly, A. Toffler sees the problem of modern democracy, where the mass of voters are so far removed from their elected representatives that the politicians are becoming less and less accountable to the citizens.[10] Therefore, striving to propose the effective mechanisms for the implementation of the constitutional value of the common good, it was considered legitimate to consider the concept of accountability as the basis for further considerations, as the traditionally understood legal responsibility does not allow the effective enforcement of the common good principle.

While there are no definitional doubts regarding the legal responsibility, which means the incurrence or potentiality of certain entities to incur normatively determined negative consequences (sanctions) of certain events or state of affairs,[11] there is a lack of the commonly accepted definition of the term "accountability". As A. Sroka notes, this term is most often used as a kind of "conceptual umbrella" under which various definitions are located.[12] Accountability is based on various values and criteria, the most commonly used ones being procedural correctness, transparency, effectiveness, efficiency, usefulness, and sustainable development.[13]

Although the concepts of contemporary accountability researchers are not fully consistent, T. Schillemans,[14] having made a synthetic analysis of 230 publications, determined that the minimum conceptual consensus in the area of accountability includes the following issues:

- Accountability is about providing answers towards others with a legitimate claim in some agents' work.
- Accountability is a *relational* concept: it focuses our attention on agents who perform tasks for others and thus may be held accountable by others.

- Accountability is retrospective – ex-post – 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.[15]

In the definitions presented in the literature, the accountability is defined either as a social, administrative or political mechanism, institutional relation or arrangement in which a given person can be held accountable by another person or institution, or, less often as an advantage, the desired quality (value) of the state, governments or officials.[16]

Accountability is not a single moment or situation, but is a multi-stage process consisting of three analytically distinct phases:

- *The information phase,* when the agent renders an account on his conduct and performance to a significant other.
- *The debating phase,* when the principal assesses the information (transmitted orally or in writing) and both parties often engage in a debate on this account. The principal may ask for additional information and pass judgment on the behaviour of the agent. The agent will then answer questions and if necessary justify and defend his course of action.
- The *sanctions* or *judgment phase*, when the principal comes to a concluding judgment and decides whether and how to make use of available sanctions.[17]

Definitional difficulties, at least partially, result from the existence of the varieties of the accountability, of which only a part has been precisely explained. B. Wampler[18] noted that the configuration of the three types of accountability, separated on the basis of the subjective criterion (the accounter) plays a particularly important role in strengthening financial accountability, i.e.:

- The vertical accountability is realized by the citizens (society) towards to public officials, the elected ones and expansively to administration subordinated to them,[19] using its basic instrument (the election), during which voters can, at least in theory hold accountable for decisions realized in public interest. The main disadvantage of this approach limits 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 horizontal accountability, being the extension of the vertical accountability, is based on the distribution of authority among different departments or branches of government and the system of checks and balances.[20]
- The social accountability is realized by widely understood institutions of civil society. This kind of accountability, even if it is not legally institutionalized, can be particularly effective in strengthening the basic mechanisms of vertical and horizontal accountability. For example, vertical accountability may strengthen the disclosure of illegal practices of politicians, jeopardizing election results. In turn, horizontal accountability may lead to the destruction of the reputation of a corrupt public official, a lawsuit against public transport unit or a school that segregates in a racial manner.[21]

In turn, by applying the criterion of the subject (matter), to which accountability refers, among others, the educational accountability, the accountability in health care, or the ecological accountability can be distinguished. However, given the fact that almost every public policy requires public finances, the accountability for making decisions in the area of public expenditure and revenues (i.e. the financial accountability) seems crucial for the strengthening the common good principle.

In the literature as well as in government documents (in English) the terms "financial (fiscal) accountability"[22] as well as "budgetary accountability"[23] do exist, however, there are no definition or distinctive features. Analysing the context of the use of these terms, it can be stated that sometimes these terms are used interchangeably,[24] however, more often the budgetary accountability means the accountability for the implementation of expenditure and revenues already planned in the budget, whereas the financial accountability is used in a broader context, as it is not limited to planned expenditure and revenue but covers public finances as a whole without budgeting them. Financial accountability refers to the potential use of public funds, it is not limited by the content of financial (budgetary) documents of an authorizing and planning nature, with a view to making the best use of available resources in the public interest. The analysis of the literature can also give the impression that in practice attempts are made to implement fiscal accountability, while financial accountability in the public sector still remains in the sphere of postulates and scientific considerations.

Thus it can be stated that on the ground of the financial law, the accountability, as opposed to legal responsibility, may not necessarily result from the legal norm. Moreover, accountability, unlike in the case of legal responsibility, does not have to be accompanied by the possibility of applying a legal sanction.

4. Essence of Legally Determined Expenditure

The legally determined expenditure is the part of public expenditure that the state is obliged to realise under the national or international law, contracts or court judgments. The etiology of this concept is therefore legal in nature,[25] but it is distinguished primarily due to the systemic and organizational effects and economic consequences. The legally determined expenditure limit the freedom of decisions of state authorities regarding the optimal use of public funds, as they bind these authorities when determining the state budget expenditure. This can have negative effects on the improvement of expenditure efficiency, the size of developmental expenditure and the possibility of state intervention in emergency situations (e.g. the natural disasters, the economic crises).[26]

There are doubts related to the content of the legally determined expenditure of the state budget, and thus the question of what types of expenditure should be included in this category. Traditionally among the legally determined expenditure are classified: the subsidies for local government units, subsidies to the Social Insurance Fund and the Pension Fund, the expenditure on road infrastructure, the debt service of the Treasury, the national defence, the offices of the supreme state authorities, the control and protection of the law, the judiciary, the social pension, the family benefits (including financing the "500+

program" providing monthly payment of PLN 500 for the second and subsequent child) and benefits from the maintenance fund, the benefits from Child Support Fund, payments from Social Insurance Institution and Agricultural Social Insurance Fund, the social and health insurance contributions covered from the state budget, co-financing of projects with the participation of European funds, the pension benefits paid from the state budget, the subsidies for the State Fund for the Rehabilitation of Disabled People, own resources of the European Union.[27]

However, due to the fact that the concept and scope of the legally determined expenditure are not directly regulated by law, such selection will always be subjective. In the literature, other categories of public expenditure are sometimes considered as the legally determined expenditure, close to the legally determined expenditure or the quasi-legally determined expenditure.[28] This applies in particular to the expenditure of the state budget for multi-annual programs, for grants to local government units (especially commissioned tasks), etc. It seems necessary, at least for planning purposes, to develop an official methodology for determining (and possibly listing) the legally determined expenditure.

Most of the doctrinal studies regarding the expenditure of the legally determined expenditure concentrate on the establishment and the global criticism of the size of this expenditure. It is estimated that in Poland they cover about 75%, whereas the flexible expenditure is about 25% of state budget expenditure. Very often, this global criticism, postulating a reduction in the level of the legally determined expenditure, ignores their diverse character regarding both the possibility of affecting their amount of state authorities, as well as the developmental character of some of them. We are against the method of the globalization of the legally determined expenditure, which in extreme cases may lead to the administrative determination of their border, advocating the need for individualized analysis of them and – as a result – the individual rationalization of the legally determined expenditure of the state budget.

The doctrine also postulates numerous and detailed changes in the scope of the legally determined expenditure. It is worth paying attention to two proposals, which may be of significant importance for further discussions of the rationalization of the legally determined expenditure. First, it is postulated to progressively withdraw from the so-called indexed expenditures in which changes relate to certain amounts or changes in other expenditure groups.[29] This is not about the mere parametric construction of the regulations, which was treated as a specific achievement in legislation, but about the fact that often indicated parameters are not up-to-date because they come from many years ago, and deprive state authorities of the possibilities of flexible, current action. Second, in the opinion of some authors, the legally determined expenditure, the exceeding of a certain level (e.g. 75% of total budget expenditure): it should give the parliament the obligation to review *sui generis* "laws" giving rise to payment of benefits to third parties for the purpose of repealing them or the for future changes.[30] It would also be an opportunity to renew the content of the social contract without revolutionary or fundamental system changes.[31]

Despite the critical attitude of the legal doctrine to the legally determined expenditure and their basic categories, it can be stated that in practice they grow from year to year in absolute numbers as well as in relation to total state budget expenditure. So there is a classic

example of the contradiction between science and practice, which is quite common in the area of public finances and financial law (e.g. regarding target funds, de-budgeting, the simplicity of tax law, etc.). In 1998, the legally determined expenditure amounted to around 47% of state budget expenditure[32] and were hence subject to constant, absolute and relative growth, with the exception of some decline in 2004–2006. In 2007 they reached the level of 73% of state budget expenditure[33]. In the report of the Council of Ministers on the implementation of the state budget for 2012, it is stated that the legally determined expenditure constitutes about 75% of the total state budget expenditure.[34]

The management of public finances in Poland in the last decade is subject to extremely opposite scientific assessments. Regardless of their reasons, two weaknesses in the fiscal policy of this period can be pointed out, also regarding the formation of the legally determined expenditure. The first one results from too little analysis of the risk of internal and external decisions regarding the public expenditure, the second is the failure to take or undertake with a long delay the necessary public finance reforms. The political struggle exerting a particular influence on the formation of the legally determined expenditure is intensified as part of election campaigns. Even if we assume that only a part of the election announcements will be implemented, their impact often increases the legally determined expenditure, making it difficult to achieve the balance of public finances. Fiscal policy directed at the rationalization of the legally determined expenditure should, therefore, concentrate on the first two reasons for shaping them, striving to eliminate (or limit) the other factors mentioned above.[35]

5. Conditions of Rationalization of Legally Determined Expenditure Planning

The critical attitude of the public finance science and financial law towards the amount and the structure of the fixed state budget expenditures has, to a small extent, affected the fiscal policy pursued in this area. Apart from some exceptions (e.g. J. Hausner's policy in the years 2004–2006), the public authorities limited their actions to single, uncoordinated activities, which cannot be called a detailed policy. In the recent period, even the notion the legally determined expenditure has been omitted in both the budget documents and the Multiannual State Financial Plan. The problem of the rationalization of the legally determined expenditure will not be solved spontaneously and automatically by the expenditure rules, multi-annual planning or performance budgeting – these are the instruments for an appropriate use in conducting detailed fiscal policy regarding the legally determined expenditure. Therefore, starting with the realization of spending review by the Polish Ministry of Finance should be positively assessed, unfortunately, they cover relatively narrow areas and to make it worse, not in a comprehensive way.

In this context, it will be particularly important:

- to develop a methodology to classify certain expenditure as the legally determined expenditure (broad or narrow approach),
- to present the problem and the amount of the legally determined expenditure structure for discussion to the government and parliament, using the detailed

information about this expenditure in the justification of the budget bills and the descriptions of the Council of Ministers' reports on the implementation of the budget,
- to determine the treatment of the legally determined expenditure of the non-uniform nature, from the point of view of their flexibility and the impact on economic development (e.g. subsidies for local government units, the legally determined expenditure in the form of 2% of GDP on defence, which implies that at least 20% will be intended for property purposes),
- to develop the effective ways of encouraging the legislative bodies (Parliament, the Senate) to participate in the process of the rationalization of the legally determined expenditure, at the level of development of the assumptions and methodology of this process. The legally determined expenditure is an expression of the action of these bodies, not always acting on the request of the government. So imposing the principles and methodology of the rationalization of the legally determined expenditure by the executive bodies and the public managers may result in the indifference or the obstruction of the legislative bodies and repeat the negative experiences in this area with the introduction of performance budgeting in Poland,[36]
- to optimally use the existing achievements of bodies dealing with the introduction of performance budgeting in Poland, and partially also the rationalization of public expenditure, not to commit the error that new people are starting from the beginning to solve problems, already partly or completely resolved,[37]
- understanding that methods of limiting public spending should not be treated as the best (or even the only one) method of the rationalization of the public expenditure. Often, it may be in the interest of Poland to increase public expenditure or to reduce in a very slow peace. The point here is to launch mechanisms that on the one hand will replace one public expenditure with others, and on the other hand to cover new public expenditures with discretionary budget revenues. This conclusion fully applies to the rationalization of the legally determined expenditure.[38]

6. Conclusions

The conditions of rationalization of the legally determined expenditure presented above constitute an important, though obviously not the only one condition to increase the financial accountability in the field of public expenditure, both in terms of horizontal, vertical and social accountability. In the vertical and social dimension, the introduction of the transparent, reliable methodologically and the efficient methods for classifying the legally determined expenditure will allow meeting the needs of citizens (i.e. the principal in the electoral process) to a greater extent than before, limiting the electoral goals of politicians (i.e. agents). On the other hand, in the horizontal dimension of the accountability, determining the existing and desired scope of the legally determined expenditure will strengthen the rationality of planning, execution, and control of state

budget expenditure. The above considerations allow confirming the research hypothesis adopted in the introduction, according to which the increase of financial accountability requires taking certain actions in the scope of the legally determined expenditure. However, it is conditioned by the existence of the reliable information and analysis of budget expenditure, and within them of the legally determined expenditure, carried out on the regular basis. It seems valuable to use British experience in this area.[39]

In conclusion, without denying the pertinence of the existence of certain categories of the legally determined expenditure, it should be borne in mind that they should serve the implementation of the common good principle, not accidentally expressed in the first article of the Constitution of the Republic of Poland.

References

1 PL: Constitutional Tribunal, SK 36/07, III.4.
2 Urszula Kinga Zawadzka-Pąk, *Shaping Financial Accountability Via Participatory Budgeting – Theoretical Framework For Axiological And Legal Analysis*. Paper submitted for the XVII Center Conference entitled "Currency, Taxes and Other Institutes of Financial Law in the Year of the 100th Anniversary of the Founding of Czechoslovakia", Prague 2018. https://doi.org/10.15290/acr.2018.11.11
3 In this regard the activity of civil societies acting in frame of the participatory (deliberative) democracy should be positively assessed – from the perspective of the political science, and in the frame of governance assessing from the perspective of the science of public management. Cf. Urszula Kinga Zawadzka-Pąk, *op. cit.*
4 Alexis De Tocqueville, *Democracy in America,* (Indianapolis, Liberty Fund, 2010).
5 Joseph Stiglitz, *Ekonomia sektora publicznego [Economy of the public sector],* 238–239 (Warsaw, PWN, 2013).
6 Arye Leo Hillman, *Public Finance and Public Policy. Responsibilities and Limitations of Government,* 73–74 (Cambridge, Cambridge University Press, 2004).
7 Ibidem. 76.
8 Public Finance Act of 27 August, as amended; compare: Eugeniusz Ruśkowski, Urszula Kinga Zawadzka-Pąk, Activity-based budget in the light of theoretical principles and practical experiences of selected countries, 622–633, in Radim Boháč (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* (Prague, Leges, 2010); Eugeniusz Ruśkowski, Urszula Kinga Zawadzka-Pąk, O możliwości wykorzystania w Polsce doświadczeń zagranicznych w zakresie budżetu zadaniowego [On the possibility of using foreign experience in Poland in the field of performance budgeting], 139–150, in Barbara Woźniak, Marta Postuła (eds.), *Budżet zadaniowy metodą racjonalizacji wydatków [Performance budgeting as the method of the expenditure rationalization]* (Warsaw, CeDeWu, 2012).
9 Nelson Dias, Twenty-five years of Participatory Budgets in the World: A New Social and Political Movement? 21–27, in *Hope for Democracy – 25 Years of Participatory Budgeting* (São Brás De Alportel, Nelson Dias, 2014).
10 Alvin Toffler, *Szok przyszłości [Future Shock]*, 472 (Poznań: Zysk i S-ka, 1998).
11 Wiesław Lang, Jerzy Wróblewski, Sylwester Zawadzki, *Teoria państwa i prawa*, 385. (Warsaw, PWN, 1986).
12 Anna Sroka, *Rozliczalność w badaniach jakości demokracji (na przykładzie Polski i Hiszpanii) [Accountability in research on the quality of democracy (on the example of Poland and Spain)],* 17 (Warsaw, Elipsa, 2011).
13 Krzysztof Olejniczak, *Organizacje uczące się. Model dla administracji publicznej [Learning organizations. Model for public administration],* 54. (Warsaw, Scholar, 2011). https://doi.org/10.7366/9788373836327
14 Thomas Schillemans, *The Public Accountability Review: A Meta-Analysis of Public Accountability Research in Six Academic Disciplines*. Working Paper. 13–14. (Utrecht University School of Governance, 2013).
15 Ibidem.
16 Robert Goodin, Thomas Schillemans (eds.), *The Oxford Handbook of Public Accountability*, 7–10. (Oxford, Oxford University Press, 2014). https://doi.org/10.1093/oxfordhb/9780199641253.001.0001
17 Thomas Schillemans, *The Public Accountability Review*, op. cit., 13–14.
18 Brian Wampler, *Participatory Budgeting in Brazil Contestation, Cooperation, and Accountability*, 17 (Pennsylvania, Penn State University Press, 2007).
19 Guillermo O'Donnell, *Horizontal Accountability in New Democracies*, 3, Journal of Democracy (1998).
20 Adam Przeworski, Susan Stokes, Bernard Manin, *Democracy, Accountability, and Representation,* 50, (New York, Cambridge University Press, 1999). https://doi.org/10.1017/CBO9781139175104
21 Catalina Smulovitz, Enrique Peruzzotti, Societal and Horizontal Controls: Two Cases of a Fruitful Relationship, 311, in Scott Mainwaring, Christoper Welna (eds.), *Democratic Accountability in Latin America*. (New York, Oxford University Press, 2003). https://doi.org/10.1093/0199256373.003.0010
22 Anwar Shah (ed.), *Participatory Budgeting*, 2 (Washington, The World Bank, 2007). https://doi.org/10.1596/978-0-8213-6923-4

23 Becky Carter, *Evidence on budget accountability and participation* (Birmingham, GSDRC, 2013).

24 Public Financial Accountability. Budget Documents, Quebec Gouvernement du Québec, 2017. Yves Herzberg Sintomer, Giovanni Carsten Allegretti, *Participatory Budgeting Worldwide*. 25 (Dialog Global, 2013). http://portugalparticipa.pt/upload_folder/table_data/c3164679-c343-4715-b198-576aee3d4ad1/files/dialog-global.pdf (accessed 20 April 2018)

25 Teresa Dębowska-Romanowska, Charakter, Charakter prawny i klasyfikacja tzw. wydatków sztywnych a granice swobody politycznej władz państwa [Character, legal character and classification of the legally determined expenditure and the limits of political freedom of state authorities], in Jan Głuchowski, Alicja Pomorska, Jolanta Szołno-Koguc (eds.), *Uwarunkowania i bariery w procesie naprawy finansów publicznych [Conditions and barriers in process of public finances repair*], 279 (Lublin, KUL, 2007).

26 See: e.g. Piotr Russel, *Wydatki budżetowe w Polsce [Public expenditure in Poland]*, Studia Biura Analiz Sejmowych [Studies of Parliamentary (Sejm's) Analysis Office] 3, 6 (2010); Agata Bury, *Wydatki prawnie zdeterminowane w budżecie państwa, Zeszyty Naukowe Uniwersytetu Szczecińskiego [Legally determined expenditure in the state budget, Scientific Notes of University of Szczecin]* 38, 33 (2011).

27 This list of the legally determined expenditure is presented by Budzyński, Tomasz, *Opinia o ustawie budżetowej na rok 2013 [Opinion on the Budget Act for 2013], Opinie i Ekspertyzy [Opinions and Expertises],* 198, 10 (2012).

28 Cf. Agata Bury, op. cit., 32; Alicja Kasperowicz-Stępień, *Kształtowanie się wydatków publicznych w Polsce w latach 2005–2009 [Public spending in Poland in 2005-2009], Zeszyty Naukowe Polskiego Towarzystwa Ekonomicznego [Scientific Papers of Polish Economic Society]* 10, 88 (2011).

29 Cf. Alicja Kasperowicz-Stępień, op. cit. 91.

30 Therefore, the findings and recommendations included in two parts of the report of the Ministry of Finance on Spending Reviews related to the issue of the legally determined expenditure should be positively assessed. Cf. *Przegląd wydatków publicznych: Mechanizmy waloryzacyjno-indeksacyjne oraz uwarunkowania prawne determinujące poziom wydatków sztywnych, w szczególności w obszarze wydatków socjalnych. Część I i II [Valuation-indexation mechanisms and legal conditions determining the level of legally determined expenditure, in particular in the area of social spending. Part I and II]* (Warsaw, Ministerstwo Finansów [Ministry of Finance], 2017).

31 Teresa Dębowska-Romanowska, op. cit., 292.

32 Alicja Kasperowicz-Stępień, op. cit. 87.

33 Cf.: Jerzy Żyżyński, *Budżet i polityka podatkowa. Wybrane zagadnienia [Budget and tax policy. Selected Issues]*, 97–98 (Warszawa, PWN, 2009).

34 Sprawozdanie z wykonania budżetu państwa za okres od 1 stycznia do 31 grudnia 2012 r. Omówienie [Report on the implementation of the state budget for the period from 1 January to 31 December 2012. Description], 54 (Warsaw, Rada Ministrów [Council of Ministers], 2013).

35 For more details on the essence of the legally determined expenditure cf.: Eugeniusz Ruśkowski, *Wydatki sztywne budżetu państwa [Legally determined expenditure of state budget]*, *Zeszyty Prawnicze Biura Analiz Sejmowych [Legal Notes of Parliamentary (Sejm's) Analysis Office]*, 10–17 (2015).

36 Eugeniusz Ruśkowski, Urszula Kinga Zawadzka-Pąk (ed.), *Prawne problem konstrukcji i funkcjonowania budżetu zadaniowego we Francji. Wnioski dla Polski [Legal problem of the construction and functioning of the performance budgeting in France. Applications for Poland]*, 103 and the following (Białystok: Temida 2, 2010).

37 Marta Postuła, *Instrumenty zarządzania finansami publicznymi [Public finance management instruments],* 150 and the following (Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego [Scientific Publisher of the Faculty of Management at the University of Warsaw], 2015).

38 Eugeniusz Ruśkowski, *Wydatki sztywne [Legally determined expenditure],* op. cit., 20–21.

39 Urszula Kinga Zawadzka-Pąk, Instrumenty nowego zarządzania finansami publicznymi w Wielkiej Brytanii [Instruments of the New Public Financial Management in the United Kingom], 151–174, in Eugeniusz Ruśkowski (ed.), *Instrumenty nowego zarządzania finansami publicznymi w wybranych krajach Unii Europejskiej [Instruments of New Public Finance management in selected European Union countries]*, (Białystok: Temida 2).

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Macroeconomic Legal Trends in the EU11 Countries

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Abstract: This contribution deals with the macroeconomic legal trends in the Eastern member states of the European Union, so called EU11: Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Romania, Slovakia and Slovenia. The paper discusses the development from the 1990s to nowadays, emphasizing the initial changes and the consolidation after the financial crisis. Therefore, the fiscal policy bears a major attention: fiscal and budgetary stability, government debts, fiscal controls (auditing and independent fiscal councils), for a more comprehensive overview, some ports of the monetary policy will be examined: national banks and price stability. The main aim of the contribution is to confirm or disprove the hypothesis that there is any identifiable or verifiable correlation between the legislation and the macroeconomic trends: sustainable balanced budget and government debt, economic growth, inflation. The research is based on law and economics, especially law and finance methodology with quantitative analysis, because of the cross-discipline nature of the topic. The paper contains some comparative statistics to evaluate the certain results upon figures, because it is even important to match the legal provisions with the economic performance.

Keywords: llaw and finance; law-making; EU countries; macroeconomics; government debt; inflation; economic growth

1. Introduction

The main aims of the article are to summarise the economic and legal development of the eastern member states of the European Union. The terminology EU11 countries refer the Central, Eastern and Baltic European member states which accessed in 2004 and after: in 2004 the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, and the Slovak Republic; in 2007 Bulgaria, Romania; and in 2013 Croatia. In the recent years, numerous reforms related to public law and finance can be found. Therefore, it is interesting to demonstrate the close or loose relationships between the legislative and the macroeconomic trends, in order to find out how public finances are developing with or without legal background. Because of the fact that the EU11 countries are rule of law states, and particularly even the prescriptions of the Maastricht criteria and the Stability

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- a national budget deficit at or below 3 percent of the gross domestic product (GDP);
- national public debt not exceeding 60 percent of the gross domestic product, a country with a higher level of debt can still adopt the euro provided its debt level is falling steadily;
- long-term interest rates should be no more than two percentage points above the rate of the three EU countries with the lowest inflation over the previous year;
- the national currency is required to enter the ERM 2 exchange rate mechanism two years prior to entry.

At the national level, after the financial crisis, a relatively new trend can be identified: finances increasingly become enfolded even into the level of constitutionalism. In addition to some general and common fiscal provisions (economic system, budgeting, taxation, state audit, central bank, national currency, national wealth or assets) in some of the EU11 countries, a separate chapter deals with macroeconomics and public finances: Hungary (Chapter: Public Finances, Articles 36–44), Lithuania (Chapter XI Finances and the State Budget), Poland (Chapter X. Public Finances), Slovenia (Part VI. Public Finance). These sections contain more and more detailed regulations on a balanced budget and interim, temporary rules, budgetary settlements and accounting, state audit and controls, the decisions or the management of the general government debt, central bank or the state treasury.

3. Fiscal Stability

Two criterions of the Maastricht criteria focus on fiscal issues: an annual deficit below 3% and a general government debt below 60% of the GDP. The *Stability and Growth Pact* (SGP), which was introduced as a framework to ensure price stability and fiscal responsibility, adopted identical limits for governments budget deficit and debt as the convergence criteria. Due to the fact that several countries did not exercise a sufficient level of fiscal responsibility during the first ten years of the euro's lifetime, two major SGP reforms were introduced. The first reform was the *Sixpack* which entered into force in December 2011, and relates to the following regulations and guidelines for fiscal and monetary policy:[7]

- Regulation 1173/2011: On the effective enforcement of budgetary surveillance in the euro area;
- Regulation 1174/2011: On enforcement action to correct excessive macroeconomic imbalances in the euro area;
- Regulation 1175/2011 amending Regulation 1466/97: On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies;
- Regulation 1176/2011: On the prevention and correction of macroeconomic imbalances;

- Regulation 1177/2011 amending Regulation 1467/97: On speeding up and clarifying the implementation of the excessive deficit procedure;
- Directive 2011/85/EU: On requirements for budgetary frameworks of the Member States.

Later, in January 2013, it was followed by the even more ambitious Fiscal Compact, which was signed by the EU member states. This *Twopack* contains two regulations to reform a part of the Stability and Growth Pact for Eurozone member states:

Regulation 473/2013: On common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area,

Regulation 472/2013: On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened by serious difficulties with respect to their financial stability.

3.1. Budgetary Stability and Government Debt

The *budgeting* follows a historically and internationally accepted concept. The legislature assesses – by an act – the central budget and with a separate action adopts its implementation, final account for each year. The executive is responsible for submitting the proposal, and authorised (by the legislative adoption of the act on the central budget) to implement it, by collecting the revenues and disbursing the expenditures. The state audit of the government budget and the expenditures is an essential control element in public finances.

The constitutions establish a separate public organ, which is independent, and/or subordinated to the legislature (parliament or the national assembly), strengthens the system of checks and balances, and its president or the chief accountant elected for a longer term than the parliamentary election: 6–12 years. The naming is different, the most common expressions are the following: supreme, state audit institution, chamber, committee office or court, furthermore instead of audit control can be found, it reflects the auditors or accounts. The list of EU11 countries supreme audit institutions: Сметна палата (Bulgaria), Državni ured za reviziju (Croatia), Nejvyšší kontrolní úřad (the Czech Republic), Riigikontroll (Estonia), Valsts kontrole (Latvia), Valstybës kontrolë (Lithuania), Állami Számvevőszék (Hungary), Najwyższa Izba Kontroli (Poland), Curtea de Conturi (Romania), Računsko sodišče (Slovenia), Najvyšší kontrolný úrad (Slovakia).

After the Mortgage-Debt Financial Crisis and the European Debt Crisis, it can be observed that the principle of balanced, transparent and sustainable budget management became more and more important.[8] Therefore, the general government debt and the deficit are the crucial areas.

Table 2.
General government deficit/surplus (% GDP)

	2005	2008	2009	2010	2013	2015	2017
BGR	1.8	1.6	–4.1	–3.1	–0.4	–1.6	0.9
HRV	–3.4	–2.8	–6	–6.5	–5.3	–3.4	0.8
CZE	–2.2	–2	–5.5	–4.2	–1.2	–0.6	1.6
EST	2.9	–2.7	–2.2	0.2	–0.2	0.1	–0.3
HUN	–9.3	–3.7	–4.5	–4.5	–2.6	–1.9	–2
LVA	–0.5	–4.2	–9.1	–8.7	–1.2	–1.4	–0.5
LTU	–0.3	–3.1	–9.1	–6.9	–2.6	–0.2	0.5
POL	–3.6	–3.6	–7.3	–7.3	–4.1	–2.6	–1.7
ROM	–2.1	–5.4	–9.2	–6.9	–2.1	–0.8	–2.9
SVK	–3.6	–2.4	–7.8	–7.5	–2.7	–2.7	–1
SVN	–1.2	–1.4	–5.8	–5.6	–14.7	–2.9	0
Avr.	*–2.0*	*–2.7*	*–6.4*	*–5.5*	*–3.4*	*–1.6*	*–0.4*

Source: Own compilation based on Eurostat: General government deficit/surplus, 2018

The balance of the budget is the surplus (sufficit) or the deficit, which essentially compromises the change of the *government debt.*

Table 3.
General government gross debt (% GDP)

	2000	2005	2008	2009	2010	2013	2015	2017
BGR	71.2	26.8	13	13.7	15.3	17	26	25.4
HRV	35.5	41.1	39	48.3	57.3	80.5	83.8	78
CZE	17	27.9	28.3	33.6	37.4	44.9	40	34.6
EST	5.1	4.5	4.5	7	6.6	10.2	10	9
HUN	55.3	60.5	71.6	77.8	80.2	77.1	76.7	73.6
LVA	12.1	11.4	18.2	35.8	46.8	39	36.8	40.1
LTU	23.5	17.6	14.6	28	36.2	38.8	42.6	39.7
POL	36.5	46.4	46.3	49.4	53.1	55.7	51.1	50.6
ROM	22.4	15.7	12.4	22.1	29.7	37.5	37.7	35
SVK	49.6	34.1	28.5	36.3	41.2	54.7	52.3	50.9
SVN	25.9	26.3	21.8	34.6	38.4	70.4	82.6	73.6
Avr.	*32.2*	*28.4*	*27.1*	*35.1*	*40.2*	*47.8*	*49.1*	*46.4*

Source: Own compilation based on Eurostat: General government gross debt, 2018

Nonetheless, the average of the government debt in the EU11 countries is nearly 46%, but the deviation is great, because the lowest figure is 9% (Estonia), but the highest is 78% (Croatia). Only three countries are affected by high government debt: Croatia, Hungary and Slovenia (over 70% of the GDP), while Slovakia and Poland fulfil the Maastricht

requirement, but only with 10% below the threshold. Nevertheless, there is no excessive deficit procedure against one of the Member States. The trend shows that the sovereign debt ratio to the GDP in most of the countries has been rising, and after the financial crisis, and the introduction of the national provisions and the implementation of the Stability and Growth Pact,[9] a general slight decrease can be observed in the countries with higher debt ratio to the GDP than it is stated in the Maastricht criteria (Croatia, Hungary, Slovenia). On the one hand, the excessive deficit procedure,[10] and the possibility of fining proved to be effective, but even the national legislation can coerce the state for relevant efforts.

In Lithuania, the decisions concerning the State loan and other basic property liabilities of the State shall be adopted by the Seimas on the proposal of the Government.[11] In Poland it is neither permissible to contract loans, nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product.[12] Hungary has the strictest constitutional rule on budgeting and government debt, since that the National Assembly may not adopt an Act on the central budget as a result of which state debt would exceed half of the GDP, and as long as this condition is not satisfied, the National Assembly may only adopt a central budget which provides for state debt reduction in proportion to the GDP, and no such borrowing may be contracted and no such financial commitment may be undertaken.[13] The public financial consolidation is proven to be more important than fundamental rights and constitutional guarantees, because as a further restriction, as long as the state debt exceeds half of the GDP, the Constitutional Court may review the Acts on the central budget and central taxes for conformity with the Fundamental Law exclusively in connection with life and human dignity, protection of personal data, to freedom of thought, conscience and religion, and it may annul these acts only for the violation of these rights. The results are obvious: slight decrease (7%) of the government debt ratio, and the excessive deficit procedure was abrogated, shortly after the adoption of the Fundamental Law (2011).[14] It can be said that without this restriction and limitation, the previous governments originated an excessive state debt by borrowing huge credits and loans. But it has to be noted that the same and higher decrease can be observed without such a provision (e.g. the Czech Republic, Latvia, Slovenia), and others can maintain on a low level (Estonia).

The macroeconomic stabilisation involved lower levels in hierarchy of sources of law: acts, cardinal or organic acts, strategic government decisions etc., for example in Hungary Act CXCIV of 2011 on the Economic Stability was adopted. In some other countries (Poland, Slovenia, Estonia) the acts on public finances define the restrictions.

Table 4.
Structural primary balance and fiscal efforts

	Structural primary balance (% of GDP)					Consolidation effort			
	2012	2013	2014	2015	2016	2013	2014	2015	2016
BGR	0.70	0.40	0.00	0.10	0.00	–0.30	–0.40	0.10	–0.10
CZE	0.10	0.00	–0.30	–0.50	–1.00	–0.10	–0.30	–0.20	–0.50
EST	0.30	–0.20	0.50	0.50	1.00	–0.50	0.70	0.00	0.50
HUN	3.50	3.10	2.10	1.70	1.60	–0.40	–1.00	–0.40	–0.10
LVA	0.90	0.00	–0.10	–0.60	–0.90	–0.90	–0.10	–0.50	–0.30
LTU	–1.90	–0.80	–0.10	0.60	1.30	1.10	0.70	0.70	0.70
POL	–0.80	0.00	0.20	0.30	0.90	0.80	0.20	0.10	0.60
ROM	–1.00	0.20	0.60	0.70	0.70	1.20	0.40	0.10	0.00
SVK	–2.20	–1.00	–0.50	0.20	0.60	1.20	0.50	0.70	0.40
SVN	–0.70	0.10	1.50	1.30	1.50	0.80	1.40	–0.20	0.20
Avr.	*–0.11*	*0.18*	*0.39*	*0.43*	*0.57*	*0.29*	*0.21*	*0.04*	*0.14*

Source: Own compilation based on Berti–Castro–Salto: Effects of fiscal consolidation envisaged in the 2013 Stability and Convergence Programmes on public debt dynamics in EU Member States. 13.

In the interest of fiscal discipline, many countries have reduced the budget deficit, or maintain on a low level, in order to meet the Maastricht deficit criterion, furthermore to reduce the general government deficit ratio. According to the figures, the highest pressure was on the Hungarian government. Even the Slovenian public debt ratio is high, but it has a balanced budget. After the consolidation, a significant proportion of the EU11 countries realized a sufficit in the budget for one or more years.

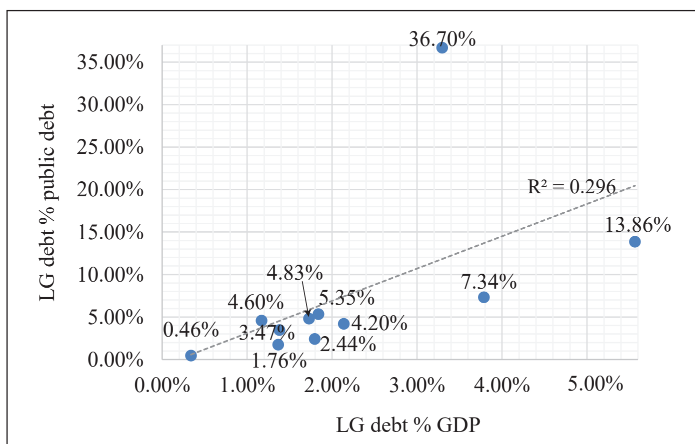

Figure 1.
Local government debts (% GDP and % Public Debt)
Source: Own compilation based on Eurostat Government finance statistics [gov_10dd_logd], [gov_10dd_cgd]

In some countries, since the *local government debt* needs to be calculated into the general government debt, some state introduced different types of limitations for them.[15] In Estonia, limits for local debt were introduced from 2009 to 2012. According to the Financial Management of Local Authorities Act of 2011,[16] the debt ceiling for local governments ranges from 60% to 100% of the current year operational revenues (depending on the municipality self-financing capacity).[17] In Latvia local governments can only carry out long-term borrowing to finance investment projects (golden rule). Loans must be contracted with the State Treasury or within specific funding programmes, or borrowing from another institution must be justified and authorised by the Ministry of Finance. The borrowing in a given year cannot exceed 20% of current revenues.[18] In Poland the Public Finance Act stipulates the sum of local loan instalments and interest payments must not exceed 15% of total debt,[19] and later in 2014 it was declared, that the debt of local governments should not exceed 60% of GDP.[20] In Hungary, the Fundamental law states, that in order to preserve a balanced budget, for any borrowing or for other undertaking of commitments by local governments to the extent determined in the stability act, certain conditions and/or the consent of the Government are required.[21] Between 2011 and 2014 a comprehensive consolidation was carried out in four phases[22] by the central government, while the local debts were overtaken by the government in amount of €4.56 billion (HUF 1,369 billion),[23] which was 2.78 % of GDP and 5.54 % of the public debt. In Slovenia local government borrowing rights are regulated by the Public Finance Act (1999) and the Financing of Municipalities Act (2006),[24] which stipulate, that the municipalities have the right to borrow to finance certain types of investment projects (golden rule), but they need prior consent of the Ministry of Finance. In the Czech Republic, within the new fiscal framework, the law requires that the level of local government gross debt remains below 60% of a four-year average of revenues. The bond issuance must be approved by the Ministry of Finance.[25]

3.2. Independent Fiscal Council

In some cases, in the order of the sustainable fiscality an advisory board involved in the budgetary procedure, by examining the feasibility of the central budget and taking part in the preparation, or the right of veto granted. The Fiscal Council of Croatia has, for example, a high degree of leverage. According to the so-called two-pack,[26] euro area countries should have an independent body in place, such as a fiscal council, which is in charge of monitoring compliance with numerical fiscal rules and, where appropriate, assessing the need to activate the correction mechanism foreseen under the Fiscal Compact.[27] The deadline for setting up a fiscal council was October 2013.[28]

The *independent fiscal councils* were established by the legislator – under different expressions – in Bulgaria (Фискален съвет на България, Fiscal Council, 2015), Croatia (Odborza Fiskalnu Politiku, Fiscal Policy Committee, 2013), Estonia (Eelarvenõukogu, Fiscal Council, 2014), Latvia (Fiskālās disciplīnas padome, Fiscal Discipline Council, 2013), Lithuania (Lietuvos Respublikos valstybės kontrolė, National Audit Office – Budget Policy Monitoring Department, 2014), Hungary (Költségvetési Tanács, Budget Council,

2008), Romania (Consiliul Fiscal, Fiscal Council, 2010), Slovenia (Urad RS Slovenije za makroekonomske analize in razvoj, Fiscal Council, 2015 and Institute of Macroeconomic Analysis and Development, 1995), Slovakia (Rada pre rozpočtovú zodpovednosť, Council for Budget Responsibility, 2012).[29] In Poland no fiscal council was founded.

Most of them are members of the Network of the EU Independent Fiscal Institutions (EU IFIs).[30] The roles and members are different, but generally the effectiveness of fiscal councils will largely depend on whether they are independent from political interference and whether they have functional autonomy. This is even based by a more important law source, for example in Slovenia the Fiscal Council was established by the implementation of the amendment of the Constitution.[31] In Romania, the Economic and Social Council is an advisory body of the Parliament and Government, in the specialised fields stated by the organic law for its establishment, organisation, and functioning,[32] in Hungary the Budget Council can be found in the Fundamental law.[33] Only in Latvia and Slovenia are respective macroeconomic forecasts produced by fiscal councils.[34] Budgetary projections, which are produced in all countries by the government, are only scrutinised by an independent body for endorsement in Romania and Slovakia.[35] In most countries the fiscal council members are academics or experts outside of the government, and their staff is mostly recruited on the basis of competence and experience.[36] Although the members of the Hungarian Budget Council are the President of the Budget Council, the President of the National Bank of Hungary and the President of the State Audit Office, which may call into question the independence of the monetary policy and the audit.

It can be stated, that after the introduction – besides the relevant legal provisions on fiscal stability – the macroeconomic figures slightly moved to a better direction. The correlation is uncountable, because of the various and numerous indicators, but the observation raises the attention on the importance and the raison d'être of the independent fiscal councils.

4. Price Stability

The other main part of public finances is *monetary policy*. The central banks are public institutions which possess the monopoly on managing and implementing the monetary policy of a state or federation. Generally, the constitutions contain the central bank and often the national currency.

The functions of the central banks are the same, but the naming can be different, e.g. national bank: Българска народна банка, (Bulgaria) Hrvatska narodna banka (Croatia), Česká národní banka (Czech Republic), Magyar Nemzeti Bank (Hungary), Narodowy Bank Polski (Poland), Banca Națională a României (Romania), Národná Banka Slovenska (Slovakia); or bank of a country: Eesti Pank (Estonia), Latvijas Banka (Latvia), Lietuvos Bankas (Lithuania), Banka Slovenije (Slovenia). The content of the constitutional provisions is brief and quite different, the details can be found in separate (cardinal or organic) acts, statutes. Besides the monetary policy some central bank even performs the supervision of the financial intermediary system (the Czech Republic, Hungary, Lithuania, Slovakia). The legal, goal, operational and management independences are granted by

different ways. The governor or the president of the central bank is appointed by the President (e.g. Hungary) or elected by the Parliament (e.g. Poland) for a longer term than the parliamentary cycle (five or six years). The monetary decisions lay with a monetary committee or governing council. In accordance with the independence and the sustainable government debt management, the principle of prohibition of monetary financing declares that overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.[37]

In case of some EU11 countries, the national currency is not relevant yet, because they have already joined to the eurozone, therefore they use the common currency: Estonia (2011), Latvia (2014), Lithuania (2015), Slovakia (2009), Slovenia (2007). As it was read in the newspapers,[38] the debt crisis in the eurozone caused that Poland and the Czech Republic rethought their view of deeper monetary integration in 2010. (In March 2018, the governors of the Polish central declared its commitment to joining the eurozone.) The non-euro members are not in ERM II, but obliged to join the eurozone on meeting convergence criteria. The constitutions determine the national currency: the Czech koruna, the Hungarian forint, the Polish złoty, the Romanian leu, but two countries do not declare the legal tender: Bulgaria (lev) and Croatia (kuna).

4.1. Inflation

There are no legal prescriptions on inflation in the examined countries legal system, but it is also important for the EU11 to comply with the Maastricht criterion: inflation of no more than 1.5 percentage points above the average rate of the three EU member states with the lowest inflation over the previous year. The inflation is the rate at which a sustained increase in the general price level of goods and services in an economy over a period of time, and consequently, the purchasing power of the currency is falling.[39] The inflation rate is widely calculated by calculating the movement or change in a price index, usually the consumer price index (CPI).[40]

Table 5.
Annual inflation ratio (%)

	1990	1995	2000	2005	2008	2009	2010	2015	2016
BGR	23.8	62.05	10.32	5.04	12.35	2.75	2.44	–0.10	–0.8
HRV	500	3.95	4.61	3.32	6.08	2.38	1.03	–0.46	–1.1
CZE	..	9.17	3.90	1.85	6.35	1.04	1.41	0.34	0.6
EST	..	28.78	4.02	4.09	10.37	–0.08	2.98	–0.46	0.1
HUN	28.97	28.30	9.78	3.55	6.07	4.21	4.88	–0.07	0.4

	1990	1995	2000	2005	2008	2009	2010	2015	2016
LVA	..	24.98	2.65	6.72	15.43	3.47	–1.07	0.20	0.1
LTU	..	39.66	1.01	2.64	10.93	4.45	1.32	–0.88	0.9
POL	555	28.07	10.06	2.11	4.35	3.83	2.71	–0.99	–0.6
ROU	..	32.24	45.67	8.99	7.85	5.59	6.09	–0.59	–1.5
SVK	..	9.89	12.04	2.71	4.60	1.62	0.96	–0.33	–0.5
SVN	..	13.46	8.88	2.48	5.65	0.86	1.84	–0.52	–0.1
Avr.	..	*25.51*	*10.27*	*3.95*	*8.18*	*2.74*	*2.23*	*–0.35*	*–0.23*

Source: Own compilation based on World Bank: DataBank – World Development Indicators, 2018

In the early 1990s, due to the political changes above-mentioned almost in all the presented countries, there was a double-digit, in some cases a three-digit inflation. The artificial prices – kept by the government in the planned economy – suddenly went out of control, and the constituent governments for the first time did not know how to handle this. The inflation rate, in the examined area, relatively quickly dropped to below 5% by 2000, except Romania. The economies of this decade – similar to the previous one – show a moderate inflation. As a new phenomenon, a slight negative inflation (deflation) appeared in this decade in several countries (Croatia, Estonia, Hungary, Poland, Romania, Slovakia and Slovenia). The main reasons for this is that the world market prices of raw materials greatly fell (particularly in the case of crude oil), the euro exchange rate changed, or because of sluggish corporate investments.

5. Conclusion

The common attribute of the EU11 countries is that all of them have experiences about socialism, but nevertheless, the beginning of the 1990s was just roughly the same. For some of them becoming independent was the major challenge, while others needed to face with poverty and deep dictatorship also. Economically, parallel with the political changes, and the democratic transition, – as a rule of law states – the previous command economies were transformed via the legislation into market economies, and set up or renewed the major macroeconomic factors: budgetary rules, national audit, national currency, central bank. Generally, they shortly encountered the following problems: high inflation, high unemployment, low economic growth and high government debt. By 2000 these economies were stabilised, and sooner or later between 2004 and 2013 all of them joined the European Union. New macroeconomic requirements have arisen for them; the Maastricht criteria became obligatory. Later the Stability and Growth Pact set stricter rules through national legislation by implementing e.g. the regulations and directives of the Sixpack, because the financial crisis was a shocking milestone not just for the EU11, but for the other member states.

Unfortunately, clear and verifiable correlation between the macroeconomic development and the legislation cannot be calculated, since the multitude of the factor and indicators. Not only the legislators, but even the law applicators, the executive branch contributed to the positive results. Only three countries are affected by high government debt: Croatia, Hungary and Slovenia (over 70% of the GDP), while Slovakia and Poland fulfil the Maastricht requirement but only with 10% below the threshold. Nevertheless, there is no excessive deficit procedure against one of the Member States. The balances of the central budget are lower than 3% of the GDP, sometimes change to surplus (sufficit). For the budgetary stability some countries introduced different restrictions, particularly on government borrowings, and adopted limits on the financial autonomy of the local governments. All the EU11 countries founded – under different naming – independent fiscal council, except Poland. In monetary policy the differences based on the eurozone, Estonia, Latvia, Lithuania, Slovakia, Slovenia use the common currency. The economies of this decade – similar to the previous one – show a moderate inflation. As a new phenomenon, a slight negative inflation (deflation) appeared in this decade in several countries (Croatia, Estonia, Hungary, Poland, Romania, Slovakia and Slovenia), which demonstrates sensitivity regarding international developments.

References

1 For summary, see Gerhard Schnyder, *The Law and Finance School: What Concept of Law?* (King's College London, 2016). http://dx.doi.org/10.2139/ssrn.2859950

2 In Hungary, the former constitution (Act XX of 1949, amended in 1989) contained the social market economy in the Preamble, but in the text, Article 9 mentioned only the market economy. According to the interpretation of the Constitutional Court, the preamble is not obligatory for the state organs, therefore the economy is just market economy without any attribute, and the social market economy is just a state goal. 33/1993. (I. 28.) AB resolution, ABH 1993, 247, 249.

3 Constitution of Slovakia, Article 55 (1) The economy of the Slovak Republic is based on the principles of a socially and ecologically oriented market economy.

4 Fundamental Law of Hungary, Article M (1) The economy of Hungary shall be based on work which creates value, and on freedom of enterprise.

5 Tim Callen, *Gross Domestic Product: An Economy's All* (International Monetary Fund, 2012).

6 The provisions are based on Article 140 (ex-article 121.1) of the Treaty on the Functioning of the European Union and in the relevant Protocols

7 "Package of six legislative proposals." Hungarian Presidency of the Council of the European Union. April 2011. Retrieved 11 May 2013.

8 Katia Berti, Matteo Salto, Matthieu Lequien, *An early-detection index of fiscal stress for EU countries*. European Economy Economic Paper No. 475. 2012. and Francesco Caprioli, Sandro Momigliano, *The macroeconomic effects of fiscal policy shocks during good and bad times*, (mimeo. 2012). https://doi.org/10.2765/28160

9 Jocelyn Boussard, Francisco de Castro, Matteo Salto, *Fiscal Multipliers and Public Debt Dynamics, Consolidations.* European Economy Economic Paper No. 460. (2012) and Gianluca Cafiso, Roberto Cellini, *Fiscal consolidations for debt-to-GDP ratio containment? Maybe ... but with much care,* voxeu.org/article/fiscal-consolidations-debt-gdp-containment (accessed 20 March 2012). https://doi.org/10.1007/978-88-470-5331-1_12

10 Treaty on the Functioning of the European Union, Article 126

11 Constitution of Lithuania, Article 128.

12 Constitution of Poland, Article 216.

13 Fundamental Law of Hungary, Articles 36 and 37.

14 Alejandro Guerson, *The Composition of Fiscal Consolidation Matters: Policy Simulations for Hungary*. IMF Working Paper (Fiscal Affairs Department, 2013). https://doi.org/10.5089/9781484305225.001

15 Kenneth Davey (ed.), *Local Government in Critical Times: Policies for Crisis, Recovery and a Sustainable Future*. (Council of Europe, 2011).

16 *Local Government Financial Management Act*, www.riigiteataja.ee/en/eli/523052014001/consolide (accessed 8 June 2018)

17 OECD: Estonia – subnational government country profile. 2017, 2.

18 OECD: Latvia – subnational government country profile. 2017, 2.

19 Gergő Medve-Bálint, Dorothee Bohle, *Local Government Debt and EU Funds in the Eastern Member States: The Cases of Hungary and Poland*. MaXCaP Working Paper Series, 18 (2016).

20 OECD: Poland – subnational government country profile. 2017, 2.

21 The Fundamental Law of Hungary Article 34 (5), Act CXCIV of 2011 on the economic stability of Hungary Article 10-10/D and 353/2011. (XII.30.) Government decree on the detailed rules for the consent to debt-generating transactions.

22 (1st phase) 2011: 20 county local governments, (2nd phase) 2012: 1,740 local governments under 5,000 inhabitants and multi-purpose co-operations, (3rd phase) 2013: 279 local governments above 5,000 inhabitants, (4th phase) 2014: 516 local governments and co-operations

23 Erika Steiner, *Introduction to the Hungarian Local Government System. Hungarian Association of Local Governments* – Norway Grants, 2016, 14.

24 OECD: Slovenia – subnational government country profile. 2017, 2.

25 OECD: Czech Republic – subnational government country profile. 2017, 2.

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Case Study

Practical Issues in Tax Proceedings in the Czech Republic

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Abstract: This contribution deals with practical problems of entities obligated to a tax and of tax administrators. If the collection of taxes and fees is essential to finance the running of the state and its authorities and organizational units, it is necessary to make this process as simple as possible, the least demanding and demotivating. In this paper, the authors will examine in terms of legality and real necessity, and then there may be other legislation ways proposed.

Keywords: tax proceedings; tax administration; administrative burden

1. Introduction

State is defined by spatial and social determinations; this community represents relations formed between persons living in the given territory, between which relations are established. But relations between the state as a legal entity also arise, and these are established primarily in dependence on ensuring the functioning and survival of the system of that state.

From the nature of state-based theory, the state is in a dominant or supreme position in these relations. It enforces its position in creating and enforcing laws and other legal regulations imposing obligations (and giving rights) to citizens and certain persons living in his territory. There may be situations where the legislator is so urgently trying to dictate what and how it should be done that the original idea of relieving the being is transformed into something truncated, formalized, enforced, overlapping in some inefficient bureaucracy. In the context of this article, we will focus primarily on the obligations imposed on legislators by taxpayers. We are talking mainly about the practical procedures involved.

Just like any natural or legal person, the state needs funds too. The state is an entity that has the duty not only to secure itself (as is the main idea for natural and legal persons), but also to secure goods that are destined for use and consumption by its citizens. The theory divides the property into private and public, in the context of the outlined issue, we

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will be interested in a public good that is provided free of charge, because consumers cannot be excluded from consumption, because incompatibility with consumption is a basic feature of public goods. To these goods and to cover the extra costs of the emerging state, the legislator created an apparatus to obtain resources that he redistributes according to the concept prevailing in the state, however, all countries will be a common way of selecting funds in the tax law.

Tax law gives a number of institutes, which in practice causes unnecessary complications for both the taxpayer and the tax administrator. It is often an issue that would be technically easy to solve. These will be further described by a descriptive method and interpretation, an analysis of the legal text will then assess compliance with the law, and through induction their own ideas and possible suggestions will be given for solutions.

2. Forms Used in the Tax Proceedings

The Tax Code regulates the procedure, rights and obligations of the tax administration, taxpayers and third parties. This is a procedural rule which defines the legal framework in which the tax administrator moves in tax administration.

Thus, as we recalled earlier, the costs of the emerging states are covered by the mass of funds generated by taxes, fees, duties and other charges. I mention now some problems with collecting and managing taxes, and those relating to the tax return forms. Each taxpayer has an obligation to require filing a tax return, etc. Submission is evaluated by actual content and is the act of a tax entity/tax payer which goes to the hands of the tax administrator.

Such submissions may be made in writing or electronically, i.e. if the data box is established, the tax entity (even the tax administrator) is obliged to communicate via the data box.

Nevertheless, the legislator tried to make life easier for the tax payer and to create a counterpart through which the tax return must be filed, so the tax entity cannot file a tax return just like, for example, in a Word document, so the submission of the data message must be made in the format and structure published by the tax administrator so as to meet the effects of tax administration.

In a specific case, it was a situation where the taxpayer electronically filed tax returns for value added tax, as required under the law and in the.pdf format but should be submitted in the.xml format

Why in the.xml format? Simply because it was set by the tax administration D-349.[1] Which is a sub-statutory normative act and the only way the executive power in the abstract rules of conduct indeterminate number of persons.

In the tax administrator's cassation complaint, he argued that the court did not deal with the nature of the defect that can be both formal and substantive. The court overlooked the obligation imposed by law and that the data message must be made in the prescribed format (.xml) in order to make the electronic submission negotiable.[2]

The subject was challenged by the capacity of the hearing, as the pdf format did not suffer from any defect, as did the effects of filing. According to the NSS "in general, filing is

effective against administrators and has effects for tax administration from the moment when the filling it comes to the sphere of tax administration".[3] In the conclusion of the NSS, he stated that the submission in pdf format was eligible for discussion and therefore was submitted effectively.

Because the tax administrator was able to work with this format and the subject submission in.pdf format, the tax administrator could not find the taxpayer by an ineffective procedure according to Section 74 (3) of Act no. 280/2009 Coll., on the Code of Tax Procedure. The NSS did not consider filing with the.pdf file according to the current tax regulations, so it is necessary to transform the conclusion of the NSS into the effective wording.

In 2015 there was a change in the tax order and a new Section 72 (4)[4] was introduced, which states that the person filing the filing pursuant to Section 72 (1) has the obligation to submit the data report submitted only in the format and structure of the publication of the tax administrator, i.e. format xml.

"If this did not happen and the submitter makes an electronic submission in an inappropriate format, it will depend in practice on whether this 'inappropriateness' will cause the technical data transfer to be impossible (i.e. the data message will not be delivered to the recipient at all) or not. In the first case, such filing cannot be considered as a submission at all. The tax administrator does not actually know about it, so he cannot react to this fact. In the latter case, it is necessary to distinguish whether the outgoing message is legible or not. If it is unreadable, the tax administrator can determine who it is coming from, and the petitioner asks for the removal of defects. The same holds true if the data message is legible (the tax administrator is able to open the file in the given format). There will be a defect in the form that renders it ineligible for discussion."[5]

The requirement to the tax payer is to submit the tax return properly and in a mannerly time and, of course, in an appropriate form. It is possible to convert almost any document into the.pdf format, so it seems quite exaggerated to request only.xml form. However, the request is clear, and if the submission will not be in format xml, it will have consequences. Why does the tax administrator equire xml compliance? I suppose, this is because of the workability and system facilities of the state administration.

Administration of the Waste Fee in Case of Children

In a broader sense, tax proceedings also include process of setting and collecting fees. Those are categorized as local, administrative and court. They differ from the tax in their function – they are usually a payment for a service provided by a public administrative body. There has long been a problem in the Czech Republic with the collection of a local charge for the operation of the collection, transport, sorting, use and disposal of communal waste, the subject of which is also children.

The Local Taxation Act defines a person obligated to pay this tax as a person who has a permanent residence in the municipality or is staying there in fact for a longer time. It does not consider the age of the taxpayer at all. In the past this has been causing problems for children whose parents have not been able to meet their obligations arising from

parental responsibility. Such children were usually unable to pay the debt, and their repayment was postponed to their maturity when it was many times higher.

It has concluded that a law imposing an obligation on a person who has no possibility of influencing its emergence without the help of another person cannot fulfil it and cannot objectively secure the funds to pay the fee due to other legal restrictions is unconstitutional.

Even before the judgment was issued, this procedure had an effect on the regulation of this charge. Since the debt could not be effectively enforced after reaching the age of majority, and then the debt was too high, the amendment of 2015 to this law introduced a new institute – the so-called payment transfer obligation.

Its nature lies in the fact that, if the fee is not paid until the due date, the obligation of the payment by the legal guardian is passed to him/her. If both parents are legal representatives, they are jointly responsible – i.e. the administrator of the fee can decide which of them will be responsible for the payment of his own liability, or he will split it fairly between both parents. Debt is matched by the adults and the child remains with no debt.

This provision certainly deserves a positive assessment. However, it is possible to raise criticism on the very moment of transfer of the duty. The legislator seems to have forgotten that taxpayers are "only humans" and that their payment obligations are often fulfilled at the last minute.

It is possible that in practice there will be a situation where a child's representative sends a payment marked as a charge for a mandatory child on the due date. The amount will appear on the manager account until the next day. At this point, however, the payment obligation has already been transferred to the child's representative. The child is thus overpaid, while the legal guardian is in delay.

The Code of Tax Procedure allows you to use the overpayment to pay a different tax, even before its due date. In the case of fees, however, this option is not yet specified, besides, the child may not have other tax debts. Even if that was the case, the child's representative is still a debtor, so the situation is still not solved.

This apparent minority thus brings considerable administrative burden and the need for increased attention on behalf of the taxpayers' representatives. This is a task that goes beyond the usual duties of a taxpayer who is also not sufficiently informed about this matter of fact.

The situation would be easily resolved if the legislator had to adjust the payment obligation in such cases in such a way that the liable person had to pay the fee on the due date, i.e. to send the relevant amount to the administrator's account, thus replacing the requirement that the charge on the due date be paid.

3. Conclusion

We have mentioned the two most common cases where there is a totally unnecessary excessive administrative burden in administering taxes and charges, both on the taxpayer's side and on the tax administrator. There are more situations in which disproportionate demands are made.

It is clear that the fulfilment of the duties of all those involved in the administration of taxes and fees can be very complicated and can cause adverse consequences. Laws regulating tax and fee systems are among the most frequently revised ones, making them more complex.

We are convinced that if the collection of taxes is essential to finance the running of the state and its authorities, the process of selecting and related activities must be as smooth and as motivating as possible for taxpayers.

References

1 Since 1. 1. 2016 instruction D-349 is replaced by instruction GFŘ-D-24. www.financnisprava.cz/assets/cs/prilohy/d-zakony/Pokyn_MF_6.pdf (accessed 5 May 2018)
2 Supreme Administrative Court: 2 Afs 25/2015
3 Supreme Administrative Court: 2 Afs 25/2015
4 Act no. 280/2009 Coll., on the Code of Tax Procedure Tax Code, as amended.
5 Josef Baxa. a coll. *The Code of Tax Procedure*. Commentary, part I, 390– 391 (Prague, Wolters Kluwer ČR, 2011). The Local Taxation Act defines a person liable to pay this tax as a person who has a permanent residence in the municipality or is in fact staying there. It does not take into account the age of the taxpayer. This has in the past been causing problems for children whose parents have not been able to meet their responsibilities arising from parental responsibility. Such children were usually unable to pay the debt, and their repayment was postponed to their maturity, when it was many times higher.