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Articles

Tax Administration of Large Taxpayers in Some CEE and CIS Countries

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Abstract: We compare tax administration of large taxpayers in Croatia, the Czech Republic, Russia, Poland and Kazakhstan. Our hypothesis is that these units of tax administrations play an important role in collecting public revenue as well as preventing tax evasion in a dynamic global economy.

We provide evidences about the most important characteristics of large taxpayer offices, their normative definitions, scope of work and positive as well as negative aspects of their practice. Some data are compared between countries and some for each country separately, due to the fact that differences in the above-mentioned countries, in size, economic and political aspects, vary substantially. Moreover, we were confronted with the limited scope of available information what made our comparison even more challengeable. Therefore, this work is, in a way, a "pioneer" attempt to compare specific national LTOs in one place. Our findings support the discussion that prove the hypothesis and enable recommendations.

Keywords: Large Taxpayers' Office; tax administration; public revenue; Croatia; Russia; Poland; the Czech Republic; Kazakhstan

1. Introduction

Experience of many countries in developed economies shows that the creation of specialised control mechanisms over the activities of large taxpayers has led to better tax compliance and increase in the efficiency of tax administrations, including the optimisation of their functions. Existence of special tax units gives tax authorities the opportunity to focus on a relatively small group of taxpayers, which pay a large percentage of all tax revenues.[1]

To date, special units for large taxpayers (hereinafter: Large Taxpayers' Office, LTO) have been created in most OECD countries.

Despite the fact that the tax system is a primarily national economic and legal phenomenon, research of the practice of tax regulation in different countries gives wide opportunities for improving the tax system of a particular state.

The present article offers the analysis of large taxpayers' administration in Croatia,[2] the Czech Republic, the Russian Federation, Poland and the Republic of Kazakhstan.[3]

Our hypothesis is that LTOs became strategic organizational units for developing countries and their existence is of great importance for tax administrations with the aim to cope with the fast changing global environment.

The paper is structured as follows. As a basis for the determination of similarities and differences of the history and practice of the LTOs in the aforementioned countries, definitions of the large taxpayers' authorities responsible for their administration, positive and negative experiences, as well as data on their roles and responsibilities are presented in Chapter 2. Discussion on the proofs of the hypothesis is given in Chapter 3 which briefly concludes and gives recommendations.

2. Methods and Data

With the aim to compare, discuss and make conclusions on the benefits of the existence of the large taxpayers' offices in our countries, their development and possible improvements, we were confronted with two main challenges.

Firstly, there are the obvious and huge differences in size, population, history and economic realities between them. The environment, social, economic and technological development throughout time and at present of the analysed countries narrowed our research to several aspects that can be rationally compared.

Another challenge which we faced at the very beginning and during our research is the "rather limited" amount of information on operation of Tax Administrations and evidence on their effectiveness. Moreover, there are some documents that we could use as a literature review on the topic,[4] but information collected and analysed within these projects were limited to the basic explanations and definitions of the LTO, together with explanations and developments of LTOs in countries that are rarely covered with our research. Since we want our paper to contribute to new knowledge in the field, following the previous projects, we decided to continue with the work in a way it would be a combination of the legislative analysis and field research.

There is no accurate data on the revenues generated by large taxpayers, i.e. very little data are available (as is the case with other information in the area of taxation in our countries). Most of the information and attitudes of this paper were based on personal experiences or conversations we had with people employed in tax administrations, or the offices, and with large taxpayers.

For lack of exact data, we have used some available information on the historical development and roles and responsibilities of the respective offices.

To be more precise, these data are probably handled by the Intra-European Organization of Tax Administration (IOTA), but they are only available to some authorised users from each member state, i.e. the tax administration.

The very diversity of the countries we are concerned with, because each scientist presents their specific country situation, causes the absence of an accurate comparison of all the data and conclusions that you are looking for.

However, given the available information, we decided that these offices are important and useful parts of tax administration and that there are some good and some bad experiences that can serve the further advance of developing countries.

Therefore, we proceed our research in two phases. Firstly, we give general information on the definition of the large taxpayers and units of tax administrations which govern them for each country. We stress the main differences between their practice and experiences in contrast to other tax administration units that deal with other taxpayers. To support discussion on the subject matter, we also provide findings on the problems these offices face in their daily operations. Secondly, we collected and arranged data on the development, roles and responsibilities of the LTOs in these countries so that our exploration of the importance of these offices within each State Tax Administration become more transparent and rationalised (Table 1).

2.1. Definition of large taxpayers

2.1.1. Croatia

In accordance with the Bylaw on the conditions for the fulfilment of the criteria for the appointment of the large taxpayers under responsibilities of the large taxpayers' office,[5] one of the following conditions has to be met:

1. Taxes equal or are above HRK 150 m (approximately Euro 20 m).
2. Business activity of:
   a) insurance, leasing and telecommunications with revenues above HRK 15 m (approximately Euro 2 m), or
   b) banks, regardless of the amount of revenue.
3. Large projects with the expected revenue exceeding HRK 150 m to which a significant number of taxpayers can be associated (e.g. subcontractors).

In addition to the strict conditions, flexibility of the appointment is assured by the possibility of the Large Taxpayers' Office (e.g. simultaneous controls to be carried out on related persons) to propose to the Director General to issue a decision on the responsibilities of the Large Taxpayers' Office for the taxpayers that do not meet prescribed conditions.

Once a taxpayer is recognised as a "large" one, he/she stays under the responsibility of the LTO for three tax periods. The LTO deals with approximately 650 taxpayers.[6]

2.1.2. The Czech Republic

According to Section 11(2) of the Financial Administration Act, large taxpayers are legal entities with turnover higher than CZK 2,000,000,000 (approximately Euro 75 m).

The Specialized Tax Office is a *sui generis* financial office and has jurisdiction over certain special entities:

- large taxpayers – legal entities with turnover higher than CZK 2,000,000,000 (approximately Euro 75 m)
- banks and credit unions, including branches of foreign banks
- insurance companies, including branches of foreign insurance companies
- investment funds and their management companies
- pension companies and their funds
- lottery operators
- members of groups according to the Value added tax act

The Specialized Tax Office currently manages taxes on about 1,500 taxpayers.[7]

2.1.3. Russia

The role of large taxpayers in the formation of the budget of the Russian Federation is constantly increasing. Their share in tax revenues of the state according to different sources ranges from half to two thirds.

There is no definition of large taxpayers in the Tax Code of the Russian Federation. Criteria for recognition of taxpayers as large ones are specified in the Order:[8]

1. Indicators of financial and economic activities for the accounting year according to accounting and tax reporting of taxpayer.
2. Interdependence and influence of the taxpayer on the economic results of activities of associated taxpayers.
3. Special permission (license) for conducting specific activities by taxpayer (banking activity, insurance activity, etc.).

Depending on the value of indicators of financial and economic activities, large taxpayers are divided into two types:

1. Large taxpayers administered at the federal level.
   The taxpayer should meet the following indicator: the total sum of received revenues exceeds 35 billion Rubles (approximately Euro 480 m).
   In addition, organizations that are subject to tax administration at the federal level include those that do not meet the established criteria, but the Federal Tax Service has decided to classify them as the largest taxpayers.
2. Large taxpayers administered at the regional level (the taxpayer should meet all the following indicators at the same time):
   – the total sum of received revenues ranges from 2 to 35 billion Rubles (approximately from Euro 25 m to Euro 480 m)
   – assets rated from 100 m Rubles (approximately from Euro 1.25 m) or the total amount of federal taxes exceeds 75 m Rubles (approximately Euro 1 m)
   – the average number of employees exceeds 50 persons

The status of large taxpayer is kept for the next three years following the reporting period in which indicators of financial and economic activities no longer meet specified limits.

2.1.4. Poland

The tax office and tax chamber act does not provide an explicit definition of a large taxpayer, but its Article 5, item 9c implies that taxpayers should be selected for specialised tax offices based on a value criterion and an industry criterion. The first criterion states that a large taxpayer is an entity with end-of-the fiscal year net revenue amounting to an equivalent of at least Euro 5m. There are some exceptions to this rule that will be presented below. The criterion is invalid in case of organizations that meet the industry criterion, according to which large taxpayers are:

1. tax capital groups
2. banks
3. insurance companies
4. organizations conducting business regulated by the act on trade in financial instruments of 2005 and investment funds laws
5. organizations conducting business regulated by the act on the organization and operation of pension funds
6. branches or representative offices of foreign corporations
7. incorporated and unincorporated entities that:
   a) At the end of the previous fiscal year had a net income (as defined by accounting regulations) from the sale of goods, products and services amounting to an equivalent of at least Euro 5 m, converted at an average exchange rate of the National Bank of Poland, or
   b) being resident entities as defined by the foreign exchange law directly or indirectly participate in the management or control of foreign-based enterprises, or have capital shares in them, or
   c) are directly or indirectly managed by a non-resident entity as defined by the foreign exchange law or a non-resident entity has at least 5% of votes at an assembly of shareholders or a general assembly, or
   d) being resident entities as defined by the foreign exchange law directly or indirectly participate in the management or control of a domestic enterprise and a foreign enterprise at the same time, or have capital shares in such enterprises at the same time.

Natural persons are not considered large taxpayers even if their net revenue exceeds the aforementioned amount of Euro 5 m, because Article 5, item 9b explicitly limits this category of taxpayers to incorporated entities and unincorporated organizations. General partnerships are excluded for the same reason.

2.1.5. The Republic of Kazakhstan

The list of large taxpayers, subject to further monitoring, is approved by the government of Kazakhstan no later than December 25 of the year prior to the year of the enactment of the list. The list includes the first *300 large taxpayers* with the highest aggregate annual income (without including the adjustment provided for in Article 99 of the Tax Code of the Republic of Kazakhstan).[9] A taxpayer is considered large on condition that the total book value of all assets is not less than the 325,000-fold monthly calculation index provided for in the Budget Code of the Republic of Kazakhstan, and the number of employees is 250 or more. The approved list of large taxpayers is effective for two years from the date of enactment and is not subject to revision during this period.

The following methods are used to compile a list of large taxpayers, subject to monitoring:

a) estimating the aggregate annual income based on the corporation income tax return data for the tax period prior to the year of the approval of the list of large taxpayers;
b) estimating the book value of assets based on the annual financial report data for the year prior to the year of the approval of the list of large taxpayers;
c) estimating the number of employees based on the personal income tax return and social tax deduction data for the last month of the first quarter of the year prior to the year of the approval of the list of large taxpayers.

The monitoring of large taxpayers involves the analysis of their financial and operating performance with the purpose of determining their actual tax base, control of compliance with the Republic's tax regulations, and the market prices employed in transfer pricing. Large taxpayers should submit an account of monitoring in the form of an electronic document certified by a digital signature. An account of monitoring includes a balance sheet, reports on the goods manufactured and purchased, work done and services rendered; costs of goods manufactured, work done, and services rendered; a report on the financial and operating performance; and an explanation of accounts receivable and accounts payable.

2.2. Authorities responsible for the administration of large taxpayers

2.2.1. Croatia

The Croatian Tax Administration organization consists of three parts: Central Office, Regional offices (six being responsible for regions and one Large Taxpayers' Office at the national level) and 57 branches on the local level (in towns and municipalities, subordinated to regional offices). Its headquarters are in Zagreb, supported by three dislocated units in Osijek, Rijeka and Split. The total number of officials in the LTO is 112.[10]

Historically, LTO in Croatia have been developed from the unit responsible for the audit and collection of taxes from the largest companies, with the continuous and logical evolution resulting in an office for the sophisticated approach to the large taxpayers on a daily basis, as well as for its audit. Chronologically, the most important phases were the following:

– 2003: The Unit for Large Taxpayers' Audit have been established within the Zagreb Regional Office.[11]
– 2009: Establishment of the two units for large taxpayers: Office for Large Taxpayers' Audit and the separate Zagreb Branch for Large Taxpayers,[12] both within the regional office in Zagreb.[13]
– 2012: Establishment of the Large Taxpayers' Office in Zagreb with three branches (dislocated units) in Split, Rijeka and Osijek.[14] The LTO integrates the work of the audit and the daily collection of taxes for large taxpayers.[15] More than 600 large taxpayers were identified with the share of the 46% of all taxes and contributions paid to the budget in 2011. Thus, in addition to 20 regional offices in Croatia,

the separate 21st office was established with "specific internal organization" that is necessary for such assignments. The Large Taxpayers' Office with headquarters in Zagreb was responsible for all large taxpayers in Croatia.

– 2014: Decrease in the number of regional offices,[16] but LTO remains one of the crucial organizational units within the Croatian Tax Administration, being one of the seven "regional offices" (see *supra*). Roles and responsibilities of the office have not change in comparison to the 2012 Decree, hence the continuity in work.

The LTO employees are engaged as team members in the cooperation with colleagues from different departments and the Central Office. The internal and external cooperation of the LTO employees with the public officials in other institutions (e.g. Croatian National Bank, Croatian Financial Services Supervisory Agency), and thematic meetings with the private sector stakeholders, show their willingness to cooperate in line with the values and ethical principles stated in the Strategy of the Tax Administration[17] and to overcome the traditional vertical and horizontal fragmentation in public administration in Croatia.[18]

The LTO staff is provided with "special training courses in order to acquire the specific knowledge and skills and apply the modern techniques required for tax audit and desk audit, including risk analysis".[19] This task is closely connected with the following aspect.

They achieve international cooperation with the EU, OECD, IOTA, IMF and the World Bank, as well as bilaterally, in the fields of risk management, audit, procedures and techniques, and IT. Various projects, pilot-projects, funds, seminars, workshops and exchange of employees with Member States strongly supported the employees' and the management's skill development.

2.2.2. The Czech Republic

As mentioned in previous research papers,[20] tax administration in the Czech Republic is divided between Financial Administration of the Czech Republic and Customs Administration of the Czech Republic. Tax administration *sensu lato* is also carried out by municipal offices (local and administration charges), other offices (administration charges) and courts (court fees). This division of tax administration has existed de facto since 2004 when the Czech Republic joined the EU. Then it was decided that the bodies of Customs Administration would be in charge of the administration of selected excise taxes and VAT on imports. As for Financial Administration, until 2012, there were financial offices as first-instance bodies, financial directorates as second-instance bodies and the Ministry of Finance with an internal organizational unit – Central Tax and Finance Directorate. The General Financial Directorate, which was established in 2011, was followed by the Specialized Tax Office, which was introduced just a year later. The new Act no. 546/2011 Sb., on Financial Administration of the Czech Republic (Financial Administration Act) took over, to a certain extent, these existing institutions so that a logical and properly arranged three-instance system of bodies of Financial Administration of the Czech Republic could be launched as of 1 January 2013. The establishment of the system of the Financial Administration bodies brought mainly a unified central control of a system of

bodies which, despite being formally subordinated to the Ministry of Finance, are de facto managed by the General Financial Directorate with general jurisdiction. The newly established Financial Administration meets the parameters of a possible future system of bodies called JIM (*jedno inkasní místo,* i.e. single collection place) so that the Financial Administration could, if given more power, continue without having to change its structure.

The General Financial Directorate's function is mainly directive and methodological in the field of tax administration. The directorate closely cooperates with the Ministry of Finance in the legislative, analytic and conception activities and in the area of international relationships (international administrative cooperation and recovering financial receivables). The appellate financial directory is an administrative body directly superior to financial offices. It also deals with administrative offences and it also acts as a contact body for the agenda of recovering some receivables. As for the area of international cooperation in tax administration, it administers the records and registries needed for operation of the Financial Administration bodies. At the basic level, there are fourteen financial offices, i.e. one for each region and one office for Prague. Aside from them, there is a Specialized Tax Office (not only) for large taxpayers. Financial offices have local offices, usually in the place where the original financial offices had been prior to the reform of 2013. As for the subject-matter jurisdiction, financial offices carry out almost all powers granted to the bodies of Financial Administration; they are especially in charge of the administration of taxes at the first instance.[21]

The Specialized Tax Office represents tax administration on the national level. The seat of the Specialized Tax Office is Prague, but it has several regional offices (Plzeň, Hradec Králové, Ústí nad Labem, Brno, Ostrava a České Budějovice). The Director of the Specialized Tax Office is appointed and removed by the Director General of the General Financial Directorate. The Specialized Tax Office provides the following activities:[22]

- performs the administration of taxes, with the exemption of immovable property tax and immovable property transfer tax, and administrative, court and local charges/fees
- carries out the proceedings about administrative offences
- transfers collected tax incomes
- performs supervision over lotteries and other gambling games
- collects and enforces pecuniary compliance imposed by them
- keeps records and registers, which are needed for the performance of activity of the financial administration bodies
- performs financial control
- performs investigations according to the Accounting Act and imposes fines
- under the authorisation of the Ministry of Finance, it fulfils a role of Liaison Office for the recovery of financial claims and provide international assistance in the administration of taxes
- under the authorisation of the Ministry of Finance, it reviews the economy of Regions, the Capital of Prague and regional councils of regions cohesiveness and performs a supervision over the reviewing of economy of municipalities, voluntary associations of municipalities and the city districts of the Capital of Prague

2.2.3. Russia

On the basis of levels of state administration and administrative-territorial division of the Russian Federation, the structure of the tax authorities in Russia consists of four levels:

- federal level that is the Federal Tax Service of Russia
- federal-regional level – interregional inspections of the federal districts
- regional level – tax administrations of the subjects of the Russian Federation
- local level – tax inspections that is the lowest unit of tax authorities' system

The structure of the tax authorities also includes specialised interregional inspections (federal level) and specialised interdistrict inspections (regional level).

The system of tax administration of large taxpayers in Russia appeared in 2001. Nowadays administration of large taxpayers at the federal level is implemented by interregional inspections for large taxpayers. At the moment there are nine interregional inspections for large taxpayers that are specialised by industrial principle: oil; gas; manufacturing industries, construction and trade; electric power industry; metallurgical industry; transport services; telecommunication services; military-industrial complex; banks and insurance companies.[23]

At the regional level large taxpayers are administrated by interdistrict inspections for large taxpayers. Interdistrict inspections are created in the structure of tax administrations of the subjects of the Russian Federation. In case if such interdistrict inspections are not created in certain tax administrations, large taxpayers are administrated by the tax inspection at the location of originations but control over their administration are implemented by tax administrations of the subjects of the Russian Federation.

2.2.4. Poland

Until the end of 2003, all taxpayers in Poland regardless of their size were handled by tax offices with jurisdiction over the taxpayer's place of residence, registered address or registered business address. However, complicated relations between domestic and foreign companies, Polish and international capital groups, raised many doubts as to the reliability of their tax settlements. Phenomena such as transfer prices and tax optimisation schemes emerged, which had never or rarely been observed before. The situation was aggravated by the high turnover of the tax office staff, insufficient training of the staff in dealing with taxpayers assisted by large consultancies, and, quite frequently, by confirmed suspicions that taxpayers were trying to evade the payment of taxes. As a result, the tax office act was amended and 20 Specialised Tax Offices (STOs) were appointed to exclusively handle large taxpayers from 1 January 2004. The new approach has not solved problems related to the operations of large taxpayers, though.

STOs have the single purpose of handling large taxpayers. As mentioned, twenty STOs have been selected to provide service to large taxpayers, i.e. four more than there are voivodeships in the country. These additional STOs are based in the Mazowieckie Voivodeship (2) and in the Silesian and Wielkopolskie Voivodeships (1 extra in each). They were

created because of significant numbers of large taxpayers in these voivodeships and the need to provide high-quality service. STOs operate on the same rules as other tax offices do. The highest number of large taxpayers is registered in the Mazowieckie Voivodeship, particularly in the capital city of Warsaw. Research shows that of 96,903 large taxpayers that Poland had in 2013 approximately 45,659 (ca. 38.5%) were based in that voivodeship.[24] It must be noted, however, that some taxpayers are not active, meaning that not all of them pay corporate income tax (CIT). In 2013, only 52,960 taxpayers (ca. 55.5 %) filed CIT-8 returns. 14,013 taxpayers (ca. 26.4% of the active ones) reported net revenue in excess of the equivalent of Euro 5m.

On 1 January 2016, the Tax Administration Act establishing the National Specialised Tax Office (physically, the 1st Mazowiecki Tax Office in Warsaw) for taxpayers with net revenue exceeding the equivalent of Euro 50 m (their number was estimated at ca. 3,830, of which around 1,000 had already been serviced by that tax office) was to enter into effect.[25] However, it did not become effective until 1 July 2016, because of the plan to reform the tax, treasury and customs administration (by establishing the National Treasury Administration).

2.2.5. The Republic of Kazakhstan

Tax administration involves tax control by taxation bodies, implementation of methods that would ensure the fulfilment of overdue tax obligations, tax enforcement and provision of public services to taxpayers (tax agents) and other authorised public bodies according to the established procedure. A first mention of the responsible body for the large taxpayers was prescribed in 1999.[26] Tax administration on the national scale, as well as tax administration of large taxpayers is performed by the State Revenue Committee of the Ministry of Finance of the Republic of Kazakhstan.[27] The monitoring of large taxpayers is performed by analysis of financial and economic activity of large taxpayers in order to determine their actual tax base, control of compliance with tax legislation of the Republic of Kazakhstan and the applicable market prices in order to monitor transfer pricing. During the monitoring, the authority may demand from the large taxpayers subject to monitoring, submission of documents confirming the correctness of tax calculation and timely payment of taxes and other obligatory payments to the budget and financial statements of the taxpayer (tax agent), including financial statements of its subsidiaries.

2.3. Positive aspects of the LTOs practice

2.3.1. Croatia

The Large Taxpayers' Office consolidates the largest Croatian taxpayers from different sectors (industry, trade, banking, insurance) and theirs related companies. The work scope requires of the LTO officials a good education and knowledge about the international and Croatian accounting standards, taxation, IT, law and economics, the same as to be familiar

with the taxpayers' business environment. Covering both direct and indirect taxes, enabling a focus to the "whole of taxpayer" within the administrative taxpayers' affairs, the LTO staff is dedicated to broaden a close relation with the taxpayers with complex and considerable transactions. Audit of the transfer prices and thin-capitalisations are at the top of the tax issues in the EU and globalised world, the same in complexity as in the amounts. Therefore, it is crucial that the LTO employees work in teams, exchange information and continuously learn and develop professional skills. While these issues are advisable for other public officials, for the LTO officials they are indispensable.

The LTO in Croatia is recognised as a strategically important unit since the conducting audit "is the most important aspect of the overall control function of the Tax Administration",[28] at the same time being involved in cooperation with the large taxpayers that "deserve special status and services. [...] Tax Administration will continue to develop services and a special way of communication with large taxpayers".[29]

The development of special skills and knowledge of the LTO staff can be recognised in the way they deal with the largest taxpayers in the country. They apply:

– an individual approach to each taxpayer
– team work and open communication within the headquarters in Zagreb, as well as with the employees in regional offices dedicated to the large taxpayers; the Head of the LTO participates in the daily work and communication, giving additional support to the staff
– acting in real time and up-front, increasing openness and dialogue with taxpayers in order to prevent the problems as they occur; this approach is supported by a legal basis that gives opportunity to the Tax Administration and taxpayers to cooperate with the aim to decrease tax risks on both sides *(horizontal monitoring)*[30] as well as the number of audits and disputes *(voluntary adjustments of the submitted tax returns)*[31]

Due to the incremental development of the Large Taxpayers' Office, which modestly began in the early 2000s, Croatia now has a national office that can be recognised as a centre of excellence within the Tax Administration. Its employees are involved in many national and international projects, contributing to working groups by their knowledge and experiences from a complex and sophisticated field. Their work is also recognised by the taxpayers who expressed their trust and reliability in this office.[32] Continuous development of their partnership with the largest taxpayers in the country forms a basis for further development and importantly contribute to the improvement of the whole Croatian Tax Administration organization.[33]

2.3.2. The Czech Republic

Generally, there are no differences between the large taxpayers' administration by the Specialized Tax Office and administration of all other taxpayers by "normal" tax offices. The essential difference lies in the extent of territorial jurisdiction: the Specialized Tax Office's territorial scope is nationwide. For the purposes of tax administration by the

Specialized Tax Office so called sectoral breakdown of selected entities is accentuated. Tax administration is performed by the team of specialists for specific sectors, always with respect to the operating conditions of a particular industry in which the selected entity carries out its activities.

The main benefit of a team tax administration is to obtain a comprehensive insight into the activities of the tax entity or to the activities of the group of entities. The working team shares any information about this group, so there is no loss, fragmentation or omission. A prerequisite for a team tax administration is constant communication among all staff members, information sharing and joint solution of problems.[34]

In February 2015, the Specialized Tax Office initiated a controlling operation in order to verify the correctness of setting the transfer pricing between companies that are personnel or property related. The main aim of the operation was to prevent possible tax evasion. The tax entities were chosen for control due to the analysis of data gained from questionnaire voluntary filled in by tax entities last year and from data obtained by searching activities of the Specialized Tax Office.[35]

The Specialized Tax Office has its Price Control Unit. Controls are focused on the compliance of the way of price regulations set by the Price Act and further on assessment whether in the area of non-regulated prices did not occur an abuse of economic position. State control over betting games and lotteries is another area of the Specialized Tax Office's competencies. This state control is performed by employees of the State Control and it is focused on compliance with the Lotteries Act and conditions resulting from the permissions to run lotteries and other like games.[36]

2.3.3. Russia

The practice of tax administration considers the following features that are inherent to large taxpayers:

– maintenance activities on large territories belonging to different regions of the Russian Federation
– extensive organizational and management structure
– broad participation in the processes of international integration and cooperation

Organizational and regulatory support of administration of large taxpayers is exercised on the basis of general provisions of the Tax Code of the Russian Federation. However, the specificity of tax administration of this category of taxpayers is determined in the different regulations (orders, instructions, methodical guidelines) of the Ministry of Finances of Russia and the Federal Tax Service.

Thus, there are detailed rules of registrations of large taxpayers that provide procedures and time limits different from the general rules.[37]

There are also some peculiarities of tax reporting; however, they are caused by the presence of special subjects (interregional and interdistrict inspections) of tax control.

At the same time, tax control over activities of large taxpayers is provided in the form of tax audits, which are carried out according to the general rules fixed in the Tax Code.

Thus, it is fair to say that generally, the tax administration of large taxpayers is only slightly different from the tax administration of other legal entities.

As it was mentioned with regards to considering countries, the main advantage of the tax administration of large taxpayers namely by specialised tax units is their focus on working only with this category of taxpayers. As a result, there are the following positive trends:

- improving of efficiency of tax administration
- cost optimisation of tax authorities for implementation of tax control measures
- improving of tax compliance of large taxpayers

2.3.4. Poland

The establishment of specialised tax offices for taxpayers provided an opportunity for staffing them with very competent workers, capable of making reliable assessments of taxpayers' real and legal situation and of being their partners in tax settlement processes. Because of the complexity of large organizations' business relations, the control bodies must have the appropriate knowledge to resolve a considerable proportion of disputable situations without involving the court.

2.3.5. The Republic of Kazakhstan

Kazakhstan takes drastic measures to improve tax administration. The implementation of a tax administration improvement program in 2010–2011 took the Republic's tax system to a brand new level of quality, providing convergence with international practices. Over 50 amendments dealing with issues of tax administration have been made to the Tax Code of the Republic of Kazakhstan. The process of improving the legal mechanisms of tax administration in terms of combating tax evasion is ongoing. This pertains to large taxpayers, as well.

2.4. Problems the administration of large taxpayers are facing

2.4.1. Croatia

The positive practice and experiences gathered during the 13 years of existence of the Croatian Tax Administration team of large taxpayers need to be used and fatherly developed especially with regards to the following:

1. Staffing the team with experts from the fields of accounting, finance, corporate, financial and intellectual property law, international tax law and IT, is a necessity to keep the pace with the large taxpayers, both in terms of the daily cooperation and of their audit.

2. Even though the notion of support to the work of the LTO is continuously repeated in strategic documents and can be easily recognised within the organizational hierarchy (see supra), the encouragement is sometimes missed. It must be taken into consideration that Croatia does not provide a business-friendly environment[38] and that the work of the LTO staff is sometimes not recognised on behalf of other public officials or by the general public, which may cause obstacles in their daily work.
3. Officials of the Large Taxpayers' Office are often being hindered in their work with a variety of denunciations from other state entities that have no particular connection with their work and responsibilities, and it often turns out that it does not have a great material significance, either.

2.4.2. The Czech Republic

As the above mentioned benefits of the existence of the Specialized Tax Office prevail, not every taxpayer or selected entity is satisfied, especially those from smaller cities. Mostly till the end of 2011, such a selected entity was usually (one of) the largest taxpayers in the territorial jurisdiction of a tax office and it had an "eminent position". Not in the sense of lower taxes, of course, but the tax office was ready to help, give advice, cooperate, as the main purpose of the tax administration is to assess taxes right (the correct amount, on time). Nowadays such a selected entity is one of many similar selected entities and it has no longer the privileges it had before.

2.4.3. Russia

Despite the 15 years of existence of the system of large taxpayers' administration by special tax bodies and its positive aspects, there are negative sides of such a system and challenges for its improvement.

Neither the concept of large taxpayers and their criteria, nor the specificity of the administration of large taxpayers is fixed in the Tax Code of the Russian Federation. Regulations of the Ministry of Finances of Russia and the Federal Tax Service that regulate legal relations on large taxpayers' administration are often changed. Moreover, interregional and interdistrict inspections frequently interpret norms differently. It is necessary to fix in the Tax Code the following: the concept of large taxpayers, the criteria for recognition of organizations as large taxpayers, the rights and obligations of tax authorities and large taxpayers in the implementation of large taxpayers' administration, other provisions that differ from the general procedure of tax administration.

Negative moments of large taxpayers' administration include complication of the system of tax payments' accounting by authorised bodies and increase of errors in this field, as well as the duplication of tax inspections' functions.

For a significant number of large taxpayers administrated at federal level, there is a problem of distance from the place of actual location and conducting business to the

interregional inspection where such taxpayers are registered as most of the interregional inspections are situated in Moscow. Considerable distance causes additional costs for large taxpayers.

2.4.4. Poland

After a decade of the STO's activity, a conclusion was reached that its scope was too broad. "Since the very onset of their activity, specialised tax offices have been handling, according to their designation laid out in Article 5 item 9b of the Tax Offices and Tax Chambers Act of 21 June 1996, the same catalogue of enterprises. Their structure, defined following the general organizational model of tax offices, has not changed, either. It lacks systemic solutions accounting for the special needs of taxpayers for which STOs were established. Moreover, the general model of relations with taxpayers takes little account of the fact that the STOs' clients are entities of strategic importance for the development of the national economy, so they need to be approached on an individual basis."[39] Instead of concentrating on strategic enterprises conducting complicated business operations at home and abroad, STOs handled all active taxpayers indicated in the act, including those with small business volumes. As a result, they were less effective than they could be, as well as less competent and friendly to taxpayers. The findings led to changes in the manner of operation of the STOs, and to the redefinition of a large taxpayer.

2.4.5. The Republic of Kazakhstan

General problems of tax administration in Kazakhstan are substantially topical for large taxpayers. The tax administration in Kazakhstan needs to be drastically improved so that it would contribute to the modernization and diversification of the economy, fight against violations of tax regulations and tax evasion, and withdrawal of operating business structures that serve as sources of income for the budget from the shadow sector. According to the Accounts Committee, tax control measures adopted by the public taxation bodies to react promptly to the cases of tax evasion are not effective enough. Taxation bodies often fail to document violations of tax regulations during audit, which is detrimental to the budget of the Republic. Credit resources are often misallocated. There are no approved norms for prices on work and services rendered. Agreement terms are not met, which leads to delays in public purchases and, ultimately, to the failure to achieve direct and end results from the use of intended transfers.[40]

Low quality of the services rendered by the tax administration results in the violation of rights and legitimate interests of all taxpayers including large ones. Thus, in 2014, the Association of Taxpayers of Kazakhstan examined the complaints of taxpayers about the actions of taxation bodies during tax administration. The examination revealed the following problems: lengthy tax audits; unsatisfactory qualification of tax auditors; lack of transparency of tax audits.

The issue of the implementation of *E-audit* instead of (or along with) the conventional tax control requires thorough examination. The use of E-audit would allow identifying, suppressing, and punishing tax violations. It is recommended by the OECD and is widely used in foreign practices. The same is true for the incorporation of the General Anti-Avoidance Rule into the national tax legislation.

The Strategy for the development of Kazakhstan until the year 2050 makes provisions for the introduction of favourable tax treatment for the objects of taxation involved in the production and advanced technologies. It also aims to continue the policy of liberalisation of tax administration and systematisation of customs administration. At the business level, the tax policy should stimulate internal growth and national export to foreign markets and be socially-oriented. Meanwhile, at the level of population, it should stimulate savings and investments. All these strategic tasks provide substance to the long-term public tax policy.

2.5. Some facts on the growth of the LTOs

With the aim to compare relevant information of the LTOs, we tried to emphasise some facts that are possible to be collected, and to show them in a way as much transparent as possible. On the other hand, we tried to find information that will show growth in importance of the LTO in every country, since comparison between countries will not be rational. Therefore, some data should be compared between countries and some for each country separately.

Table 1.
Growth, roles and responsibilities of the LTOs (by country)

	Croatia	Russia	Poland	The Czech Republic	Kazakhstan
Year of establishment	2003[41]	2001	2004	2012	1999
Number of employees at the first establishment	15	n/a	2,639	137	n/a
Number of entities administrated at the first establishment	1,100	n/a		990	220
Number of employees (2015–2016)	136[42]	n/a	2,300	460	n/a
Number of entities administrated (2015–2016)	650	n/a	53,000[43]	1,500	300
Position of the office within the TA	State level	From federal to local	Regional	State level	State level
Responsibilities:					
direct taxes	Yes	Yes	Yes[44]	Yes	Yes
indirect taxes	Yes	Yes	Yes[42]	Yes	Yes
contributions (for the employees)	Yes	No[45]	Yes	Yes	Yes

	Croatia	Russia	Poland	The Czech Republic	Kazakhstan
coordination with foreign revenue bodies (e.g. simultaneous tax audits, exchange of information)	Yes	Yes	Yes	Yes	Yes
tax compliance of the LT	Yes	Yes	Yes	Yes	Yes
tax control of the LT	Yes	Yes	Yes	Yes	Yes
Teams dedicated for specific/ important/key sectors and industries	Yes	Yes	No[46]	Yes	n/a
Employees dedicated for every large taxpayer; contact-persons for large taxpayers (compliance, contacts)	Yes	Yes	Yes	Yes	n/a
Employees participate in strategic projects (working groups, pilot-projects or similar decision-making processes *etc.* of the Ministry or Central Tax Administration Office)	Almost always	Often	Almost never	Almost always	Almost always

Source: Compiled by the authors.

Data shows that, where available, very similar facts can be found in the scope of the responsibilities of the LTOs, their teams and employees dedicated to the specific taxpayers and their industry. Also, in the majority of cases, these offices are of strategic importance for the tax administrations, due to the fact that they are established at the state (federal) level and their employees participate in strategic projects of the Ministry of Finance or Central Tax Administrations. Some opposite conclusions can be found in case of Poland, which has LTOs established on regional level and their employees do not participate in strategic projects. Huge and surprising fact is that Polish LTOs deal with 97,000 taxpayers (53,000 active legal persons) but the number of employees decreased in the 12 years of the existence of the Office. It is contrary to the practice of modern tax administrations and cannot be justified by any of the basic arguments of the establishment of such a unit. Instead, Poland chooses the establishment of the Large Taxpayers' Office who actually deals with the thousands of medium and small legal entities. On the other hand, the facts show (where available) that LTOs in other countries grow in size (number of employees); this can be a good sign of the recognition of its benefits for the tax administration in general.

3. Discussion and Conclusions

Each country has a vastly different tax system, their own economic realities and different experiences of large taxpayers' administration and the analysis shows that although each country uses different approaches to organizing the administration of large taxpayers, benefits obtained and problems they face are rather comparable.

Therefore, we compared the history and practice of every large taxpayer staff in each country aiming to make conclusions of its advantages and disadvantages, as well as to compare it between the countries in scope.

In all analysed countries, criteria for recognition of legal entities as large taxpayers can be conditionally divided into two groups:

- economic and financial criteria (turnover, amount of taxes paid, revenues received, value of assets, etc.)
- organizational criteria (type of activity, license for conducting certain type of activity, number of employees, interdependence of taxpayers, etc.)

The mentioned criteria may be applied for certain categories of taxpayers both separately and collectively.

In all studied countries, except Kazakhstan, special units of tax authorities for administration of large taxpayers have been created:

- The Large Taxpayer Office in Croatia
- Specialized Tax Office (not only) for large taxpayers in the Czech Republic
- Interregional tax inspections (federal level) and interdistrict tax inspections (regional level) in Russia
- Specialised Tax Offices in Poland

In the Republic of Kazakhstan, the State Revenue Committee of the Ministry of Finance of the Republic of Kazakhstan performs the administration of large taxpayers.

The lack of significant differences in the administration of large taxpayers compared with the administration of all other legal entities is emphasised. The differences are largely due to the presence of the special subject of administration, that is a special unit of tax authorities (for instance, special rules of registration as large taxpayer, etc.).

Among the positive sides of administration of large taxpayers by specialised tax units, the following are marked:

- comprehensive insight into the activities of large taxpayers, as well as an individual approach to each taxpayer
- higher competence of the employees of specialised tax units responsible for large taxpayers' administration
- improving of efficiency of tax administration and tax compliance of large taxpayers
- cost optimisation of tax authorities for implementation of tax control measures

Although the above-mentioned benefits are achieved in different countries to varying degrees, these benefits are undoubtedly important objectives of large taxpayers' administration.

It should be noted that the large taxpayers' administration in different countries has a number of disadvantages, among which are the following:

- the problem of distance from the place of actual location and conducting business to the specialised tax unit where large taxpayers are administrated which, in particular, causes additional costs for taxpayers (the Czech Republic, Russia)

- the lack of systemic solutions accounting for the special needs of taxpayers for which LTOs were established; being less effective than LTOs could be, as well as less competent and friendly to taxpayers (Poland)
- the lack of legal regulation of large taxpayers' administration at the federal level (Russia)
- some lack of the encouragement for LTO's work, a variety of denunciations from other state entities that have no particular connection with the LTO's work (Croatia)
- the absence of the separate large taxpayers' unit(s) for their administration and control (Kazakhstan)

Nevertheless, it appears that the work of specialised tax units for large taxpayers represents an effective mechanism of tax administration, which over time will be evolving and improving in the interests of the state, as well as taxpayers.

Having in mind all these benefits of the practice of the LTOs, we can conclude that our hypothesis is proven to a great degree, due to the fact that such organizational units grow in roles and responsibilities, as well as in the importance for every tax administration where they are established. The special skills, teamwork and understanding of the big business in a globalised world, makes public servants in those specialised units capable for challenges that tax administrations and taxpayers face regarding tax collection, legal tax certainty, tax evasion and administrative cooperation. Since large taxpayers usually account for the majority of the tax revenue, their existence and improvement in the operations might hugely increase efficiency and effectiveness of the tax administrations in general.

If we give respect to the disadvantages of the practice of LTOs in respectable countries, we can conclude that our hypothesis is not discredited, giving the fact that tax administrations in developing countries faces considerable problems in keeping on track with the practice of modern states. Therefore, some of the issues that create difficulties for achieving its full success can be expected as inevitable problems that can be solved with the help of the experiences of other countries. Kazakhstan, as the only country between the analysed states that failed to establish a separate LTO, can learn from the practice of the developing countries that experienced the benefits of such organizational units. Poland, on the other hand, might learn the most from its own misconceptions. Due to the fact that tax administrations around the globe, in developed and developing countries, are not immune to the problems in organization, effectiveness or "complifications", we think that our findings can be useful for many of them. However, we look forward to see improvements of these offices in our countries.

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4 Large taxpayers are mostly addressed by the OECD and the IMF, but non of their reports have exact data on the amounts surveyed by these offices, the data are not structured in a way to enable identifying this issues; instead, we have used the data from reports made by the experts coming from these respective organizations and used the results as a basis for their further research. See, for example: OECD (2015) Tax Administration 2015: Comparative Information on OECD and other Advanced and Emerging Economies, or OECD (2010) Forum on Tax Administration, Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series.
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The Participation of Tax Authorities in Insolvency Agreements[1]

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Abstract: The contribution deals with a problem if and when Polish tax authorities should support insolvency agreements. Tax authorities are bodies of public law; however, they have to act within insolvency agreement proceedings as a private law subject, e.g. participate in negotiations. It creates many legal problems. The aim of the contribution is presenting possible guidelines which should allow tax authorities to make a decision if and when to support insolvency agreements. Additionally, it presents a possible amendment of the Polish law (de lege ferenta) on the basis of German experience.

Keywords: insolvency agreement; tax law; restructuring law; fiscal principle; internal administrative guide

1. Introduction

Insolvency agreement as an institution of the insolvency law that has existed in many legal systems for many years. It was already regulated e.g. in paragraph 160 et seq. of the German Bankruptcy Law *(Konkursordnung)* from 1877[2] and in Article 171 et seq. of the Polish Insolvency Law *(Prawo upadłościowe)* from 1934.[3] It allows the bankrupt and non-secured creditors to sign an agreement about the bankrupt's debts. According to Article 161 of the German Insolvency Law from 1877, the insolvency agreement has to regulate at what rate obligations would be paid by the bankrupt and which securities would be provided by the bankrupt. However, the insolvency agreement does not require consent of all non-secured creditors what has been the hallmark of this institution. The insolvency agreement requires consent only from (some), the majority of non-secured creditors. Therefore, it is possible to reach the insolvency agreement in spite of the opposition of some creditors, e.g. tax authorities.

The issue became more important after preference of public debts in insolvency (liquidation) proceedings was cancelled. Nowadays, private and public law debts are in principle equally paid in the insolvency proceedings. It was introduced in Germany by the new Insolvency Law Act[4] in 1999 and in Poland by the Restructuring Law Act[5] in 2016, which regulates the insolvency agreement in Poland now. Therefore, tax authorities are imposed to join negotiation of insolvency proceedings. Liquidation proceedings do not provide them the preference in payment as it was before.

If only the majority of creditors is required to reach the insolvency agreement, there is a place for negotiations. Of course, the insolvency agreement has a frame of formal proceedings. Under insolvency law, there are formal regulations for: filling insolvency agreement proposal, conduct a general meeting to vote on the proposals, legal control of insolvency agreement provided by court and fill a plaint to court against the insolvency agreement. However, creditors decide to support or reject the insolvency agreement proposals after negotiations with the bankrupt and each other, not after legal subsumption that is typical for tax authorities' activities.

The Polish law does not define what negotiations mean, but it is said that negotiations are a reciprocal impact (communication interaction) between parties with the aim to sign a contract. Unlike offer negotiations, they do not constitute any specific shape or resolutely decision.[6] Additionally, the core of any acts in law, including the support of insolvency agreements is the declaration of intent *(Willenserklärung)*. Irrespective of the dissonance between legal theories about the declaration of intent which concentrates on its interpretation, initially, the declaration of intent derives always from the internal intent of man.[7] Tax authorities, as legal bodies, do not have such internal intention. In tax law, acts of law stipulate specific precondition and specific content of tax decision for any specific facts of the matter.[8]

In fact, tax law, as well as administrative law, does not provide a general regulation how tax authorities shall act if they have to act as subjects of private law. The position of administrative authorities as a subject of private law is regulated in many particular regulations, like public procurement law or public–private partnership, but there is no such regulation regarding the participation of tax authorities in insolvency agreements, especially in the Polish Restructuring Law Act or in the German Insolvency Act. Therefore, the question if tax authorities should support particular insolvency agreements remains unanswered in acts of law. The Author presents below four possible guidelines which should allow tax authorities to make a decision.

2. Market Economy Creditor Principle

First of all, tax authorities may act in the insolvency agreement proceeding according to the principle of market economy investor. The principle was introduced by the European Commission in 1984 to allow better control of state aid in the EU and it has been developed by further European Commission texts, decisions and the EU Court of Justice. According to this principle there is no state aid, if "public authorities invest on terms and in conditions which would be acceptable to a private investor under normal market economy conditions".[9] The principle of market economy investor was also extended to situations when the state is a creditor, i.e. the state claims pay back of arrears – market economy creditor principle.[10] Pursuant to the principle of market economy creditor tax authorities should act the same as private law subjects which want to get back its liabilities taking into consideration the taxpayer's financial problems.[11] Moreover, tax authorities should try to actively recover at least a marginal amount of unpaid taxes in the insolvency

agreement.[12] The principle takes as a dogma that a private investor is looking for profits and it is his basic criterion for any decision.[13]

Following the principle of market economy, creditor tax authorities should act as private law creditors what would solve the problem. However, the principle is only a theoretical construction for EU aid law. In fact, if tax authorities followed the principle, they would not be private law creditors. They are always public law subjects. Additionally, there are two arguments against using the principle as a solution in the analysed case.

First, the aim of the principle is to create limits for the state's activity, not be a guide for such an activity. EU state aid law was created as a means of protection for market competition against the state's negative effect,[14] public expenditures self-restraint.[15] Therefore, the principle stipulates only limits which tax authorities should not exceed. However, tax authorities should know what to do, but the principle said only what not to do. Second, the principal is a part of the EU state aid law, not the Polish tax law, so it cannot be formally a legal basis for acts of Polish tax authorities. Therefore, as far as the Author is concerned, the market economy creditor principal should not be used as a guide for tax authorities in insolvency agreement proceedings. Of course, the principle should be used to determine if the participation of tax authorities in insolvency agreements complies with EU state aid law, but it is another issue.

3. Fiscal Principle

Tax obligations are not anonymous obligations. They belong to the State Treasure which is represented by tax authorities. Therefore, the State Treasure may have also its own subjective interest in restructuring proceedings. Identification between the State Treasure participation in insolvency agreement proceedings and larger and faster fulfilment of tax obligations express the principal of fiscalism. In fact, tax authorities must follow a fiscal principle, which ensures the proper functioning of the state.[16] The importance of this principle for tax law is emphasised in the Polish legal doctrine. R. Mastalski pointed out that the main reason to introduce taxes was a fiscal aim. Other reasons have an extraordinary character.[17] The principle is based on article 220 point 1 of the Polish Constitution. According to this article the Government is responsible for budgetary discipline.

Primarily, the insolvency agreement may provide a larger or faster fulfilment of tax obligations than it would be in liquidation or enforcement proceedings. This point of view is based on the principle that no creditor may be detrimental by the introduction of an insolvency agreement in comparison to liquidation proceedings. If the creditor may achieve more in liquidation proceedings, the insolvency agreement proceedings should not be commenced. On the other hand, if an insolvency agreement provides larger fulfilment of tax obligations than liquidation proceedings, tax authorities should support the insolvency agreement. Tax authorities should take fiscal interests of the State Treasure into consideration when they take part in insolvency agreement proceedings.

4. Economic and Social Aims

Following the only fiscal principle by tax authorities in insolvency agreement proceedings would be easy and convenient. Nevertheless, the explanatory memorandum to the Restructuring Law Act indicates that a direct increase of the State Treasure's incomes was not the aim of the Act. The aim was the "introduction of an effective instrument which allows to carry out restructuration of debtor's company and to prevent its liquidation".[18] In further parts of the explanatory memorandum, non-fiscal aims of the insolvency agreement are also emphasised. It also includes notes about tax annulment and instalments scheme. The legislator states that the decrease of the State Treasure's direct incomes from not-paid tax obligations due to the insolvency agreement are compensating with interests by the increase of incomes from taxes paid by the debtor and its contractors and by the general benefits for economy due to higher efficiency of insolvency proceedings. The introduction of a new insolvency agreement in the Restructuring Law Act should help preserve workplaces in the debtor's company and its cooperators' companies. As a consequence, the State Treasure should decrease its expenditures related to unemployment benefits or social services.[19]

Moreover, taking part in the insolvency agreement proceedings, tax authorities should not be guided only by the fiscal principle because it is against the principle of social market economy stipulated in article 22 of the Polish Constitution. According to this principle, it is not allowed to follow only the fiscal principal. Tax authorities should take into consideration if support to the insolvency agreement, i.e. support for tax annulment or instalments scheme makes more positive or negative results not only for the state budget, but also for the society.[20] According to a prevailing part of the Polish legal doctrine, the state should not only play a role of regulator, coordinator and stabilizer of economy, but it should, by way of exception and in frames provided by acts of law, admit running business activities with the aim of protecting overriding public goods.[21]

These aims look ambitious and the legislator's actions for more competitive economy should be positively appraised. However, as far as the Author is concerned, tax authorities should not follow them taking part in the insolvency agreement proceedings, especially these aims should not be decisive if tax authorities support tax annulment and instalments scheme in the insolvency agreement. It is because these aims have a general and policy character. In case of a broad understanding of these aims, tax authorities would support any insolvency agreement, including tax annulment or instalments scheme. In the majority of cases, it is possible someway to demonstrate that long term cost including indirect costs of the debtor's company liquidation (incomes from taxes paid by the debtor's cooperators and costs of social services) would be higher than the costs of the insolvency agreement implementation. Such demonstration is possible, because long term costs, as well as indirect costs are imprecise expressions which could be interpreted flexibly.

Insolvency agreements should not only provide higher incomes for the State Treasure in the long term, but it should help to reduce its expenditures on social services. However, it is worth emphasising that according to the principle of unity of budget expenditures on social services are realised separately from particular incomes. Therefore, profits from

increasing incomes or decreasing expenditures may also not be associated directly with each other. Moreover, the State Treasure's profits from increasing incomes and decreasing expenditures do not concern particular subjects, but all its cooperators or even the whole national economy.

The analysed aims also look partly incomprehensible with tax law. In legal doctrine several aims of tax law are presented. Fiscal aim is a main aim of tax regulation. Besides, taxes may realise economic and social aims, however these aims should be realised almost supplementary.[22] Tax annulment in the frame of insolvency agreement may drive to increase the budget's income in the middle or long term, but in the short term, it always drives to decrease the budget's incomes. The active realisation of economic and social aims is not in compliance with the principle of tax neutrality towards economy. With regard to income tax, the principle of tax neutrality is more a proposal, especially from liberal economists,[23] but in case of VAT tax, it is a basic principle expressed in point 5 of the explanatory memorandum of the EU Directive No. 2006/112 on the common system of value added tax.[24]

The participation of tax authorities in shaping economic and social aims of taxes also gives constitutional grounds for concern. According to the constitutional principle of parliament, exclusive right to enact taxes stipulated in article 227 of the Polish Constitution, the most important elements of tax should remain under the control of Parliament.[25] The Parliament should decide in the form of an act of parliament about the potential economic and social aims of tax. The realisation of these aims at the Parliament level also has technical justification. As it is emphasised in the legal doctrine, the introduction of non-fiscal aims in taxes requires the knowledge and skills of specialists to provide a holistic analysis of such an introduction.[26] There are many institutions better prepared for such an instruction than tax authorities, e.g. the Legislation Council working under the Prime Minister.

5. Tax Ordinance

Following non-fiscal aims by tax authorities in the insolvency agreement proceedings may be justified alternatively by Article 67a of the Polish Tax Ordinance. According to this article, tax authorities may annul a tax or introduce instalments scheme if it is substantiated by an important interest of a taxpayer or public interest. It is possible to show many similarities between recourse to economic and social aims and recourse to public interest and important taxpayer's interest, however, tax proceedings under Article 67a of the Polish Tax Ordinance and insolvency agreement proceedings are two different, separate proceedings.

In accordance with the judgement of the Voivodeship Administrative Court in Gliwice of 27 January 2010,[27] only regulations included in the Insolvency Law Act decide about sequence, rules and conditions of fulfilment of tax obligations including interest for late payment. Therefore, if tax authorities used Article 67a of the Polish Tax Ordinance as a guideline in the insolvency agreement proceedings, it should not have any influence on the course of the proceedings.

6. Internal Administrative Guides

In opposite to the above, the analysis problem if tax authorities should support particular insolvency agreement was solved in Germany many years ago when the new Insolvency Law Act took action in 1999. The Federal Minister of Finance published its internal administrative guide regarding the treatment of tax obligations in insolvency proceedings on 17 December 1998.[28] According to point 9.2. of the guide, tax authorities are obliged first of all to assure that tax obligations will not be disturbed in the insolvency agreement proceedings which is a support of the fiscal principal. Then tax authorities should follow regulation aims stipulated in § 163, 222 and 227 of the German Tax Ordinance which are at a rough estimate equivalent of Article 67a of the Polish Tax Ordinance.

The Federal Minister of Finance also put further hints for tax authorities involved in insolvency agreement proceedings. Before a tax authority decides to support an insolvency agreement, it should always test if the insolvency agreement is profitable for the tax authority. If a draft of insolvency agreement provided worse financial conditions for the tax authority than liquidation proceedings, the tax authority has to object the agreement and if it were passed, the tax authority has to file a complaint against the agreement in court.

The participation of tax authorities in pre-court insolvency agreement proceedings for consumers was regulated similarly. The Federal Minister of Finance published its internal administrative guide regarding the participation of tax authorities in the settlement of debts in pre-court proceedings on 10 December 1998,[29] which was replaced by a new internal administrative guide on 11 January 2002.[30]

7. Conclusion

Taking part in the insolvency agreement proceedings, especially voting on the approval of an insolvency agreement or presenting own proposals regarding an insolvency agreement, the Polish tax authority should follow the fiscal principle. There are no legal grounds to allow tax authorities to follow other aims in the insolvency agreement proceedings or market economy creditor principle. It is especially not indicated to allow tax authorities in place of the parliament to share non-fiscal aims of taxes. Which time perspective is appropriate for implementing the State Treasure's fiscal interest remains open. In the Author's opinion, appropriate time perspective is term, in which the insolvency agreement will be carried out.

On the other hand, this analysis would be superfluous if there were similar internal administrative guides like in Germany. The guides solve the problem. Therefore, it is advisable to introduce similar guides in Poland. The guides emphasise that the fiscal principle is the most important for tax authorities in the insolvency agreement proceedings. Additionally, tax authorities should follow the regulation of the German Tax Ordinance. It is also advisable to use the auxiliary Article 67a of the Polish Tax Ordinance in case of the Polish tax authorities, but nowadays, there is no legal basis for it.

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The Amendment of the Religious Registration Law and Its Impact on Freedom of Religion in the Slovak Republic[1]

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Abstract: Church registration represents a legitimate instrument of surveillance over religious groups. In the Slovak Republic, registered churches are funded directly out of the State budget and dispose of a wide range of other financial, as well as non-financial benefits. Slovakia has recently tightened up the already strict registration criterion of a number of supporters. According to the currently effective legislation, a church or religious society applying for registration must provide evidence of having over 50,000 members. The main aim of this article is to analyse the impact of the new Slovak legislation on the freedom of religion with a focus on assessment of whether the range of rights and duties for registered churches are the same as for not registered ones and whether this measure is in conformity with human rights standards applied in the European Union, as well as the Council of Europe.

Keywords: freedom of religion; registration of churches; church funding; discrimination of minority religions

1. Introduction

Increasing religious diversity within societies all around the Globe cannot be overlooked. This phenomenon is mainly caused by migration of ethnic and religious groups seeking better opportunities or fleeing persecution or war in their home countries.[2]

Given the growth of religious diversity, state authorities have the power to evaluate religious groups in order to determine if they should be allowed to function. *The control of religion* is justified in terms of securing peaceful coexistence of different religious groups. Church registration is the most frequent method of surveillance over the religious groups and its implementation is increasing.[3] Notwithstanding the power of the State to control churches and religious societies, the State is still obliged to create such a system of State-Church law which allows a maximum degree of religious freedom and autonomy.[4]

From a bureaucratic point of view, the Church registration represents administrative proceeding carried out by the State authorities. Even though the main purpose is control of religious societies and protection of citizens, church registration is closely linked to financial interests of the State. The Slovak Republic is one of several European countries in which registered Churches and religious societies are *funded directly out of the State budget*.

Financing of Churches out of public funds have always been a topic in Slovakia. However, this is only one of many financial and other benefits resulting from successful registration.

The Slovak Republic (hereinafter referred to as the SR) has recently tightened up the already strict *registration criterion of a number of supporters.* According to the currently effective legislation, a church or religious society applying for registration must provide evidence of having 50,000 members.

Therefore, *the aim of this paper* is to analyse the impact of the new Slovak legislation on the freedom of religion with a focus on assessment of whether the range of rights and duties for registered churches are the same as for not registered ones and whether this measure is in conformity with the European human rights protection instruments.

2. The Role of Religion in the Slovak Republic

Religion has always played an important role on the territory of the SR. The Slovak Constitution acknowledges in its Preamble the spiritual heritage of Cyril and Methodius and in its Article 1 the basic principle is to be found: *"The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound by any ideology or religion." Freedom of religion* is one of the fundamental freedoms *guaranteed in Article 24 of the Slovak Constitution.* This Article contains not only the *individual freedom of religion* including the freedom from religion and the right to change religion freely but also the *collective expression* of the freedom of religion. Religious faith as an individual right *(forum internum)* and as such, it is inalienable and inviolable and therefore, not subject to any legal restrain. In other words, the internal dimension of freedom of religion is absolutely protected.[5] On the other hand, public expressions of religious affiliation as a collective right *(forum externum)* and may be subject to limitation under certain circumstances. The freedom to manifest one's religion may be limited if it is necessary in a democratic society for the protection of public order, health and morals or for the protection of the rights and freedoms of others.[6]

The status of Churches and religious societies (hereinafter referred to as Churches) is provided by *Act No. 308/1991 Coll. on the freedom of belief and the position of churches and religious societies* (hereinafter referred to as the Act). Under the Act, Churches are voluntary associations of persons of the same belief in organizations with their own structure, bodies and internal regulations.[7] The State recognised only Churches that are registered by the registration body, i.e. the Ministry of Culture of the SR. A registered Church is a legal entity taking advantage of a special status and also other rights awarded to all legal entities.[8] Even though the SR proclaims to be a secular state, the Roman–Catholic Church has a strong position arising from the fact that more than 62% of the citizens confess to this Church.[9] An important highlight in the Slovak church policy was the adoption of the Basic Treaty between the Holy See and the SR in 2000. The treaty with the Vatican had far-reaching implications when enacted various responsibilities for the SR, e.g. obligations such as:

a) to subsidise the Catholic church from the State budget

b) to accept conscientious objection[10]

c) to accept the right of the Church to establish Catholic schools
d) to guarantee ten Catholic feast days to be accounted as national holidays
e) to accept pastoral activities in armed and police forces as well as in penitentiary facilities

All this confirmed the privileged position of the Roman–Catholic Church. Although similar agreements were signed with most of the registered Churches in 2002, they simply used the agreement with the Holy See as a template.[11]

The Roman–Catholic Church has a considerable influence on public, as well as political affairs. One example will suffice: During the pre-election period in 2012, the Bishop's Conference held a consultation with the most influential political parties and presented a series of requirements the Roman–Catholic Church wanted parties to meet. These include the prohibition of abortion, further "protection" of heterosexual marriages[12] and the guarantee of Sunday rest.[13]

3. The Legal Background of Religious Registration Processes

As was already mentioned above, the Slovak Republic recognises only Churches that are registered by the Ministry of Culture. The Act sets a number of positive and negative prerequisites which need to be met cumulatively. Under the legislation currently in force *positive preconditions* are:

a) registration proposal submitted by a preparatory Committee
b) fundamental characteristics of the establishing Church
c) a statement that the Church will fully respect Slovak laws and will be tolerant to other Churches, as well as to persons without a confession
d) *affidavits of at least 50,000 adult citizens of the SR* with the right of permanent residence attesting to the membership and support for registration of their church *including their names, surnames, permanent address and their personal identity numbers*

The Act also provides *negative prerequisites preventing the establishment of the Church* which are enshrined within Article 15 of the Act. The Church shall not be registered if its establishment and activity:

a) is not in compliance with:
   1. the Act and Slovak legislation in general
   2. the protection of citizens' safety, health, morality and public order
   3. principles of humanity and tolerance
b) threatens the rights of other legal entities or individuals

In the following text, we will focus more closely on the positive prerequisites requiring solemn declarations of at least 50,000 members. *The quantitative registration rule* has been tightened repeatedly during the short existence of the SR, as last in May 2017 when the number of members has been increased from 20,000 to 50,000.

However, this rule has always been very strict considering the Slovak population of only about 5.4 million people. Firstly, the condition was *20,000 followers* with permanent residence in the SR.

Subsequently, *in 2007* the Slovak Parliament adopted an even stricter law, which required churches seeking registration to have *20,000 citizens domiciled in the SR,* who submit an affidavit attesting to the membership and support for registration of their church and disclosing sensitive personal data, such as their personal identity number and home address.

It follows that even before the amendment of the Act in March 2017, Slovakia had already had the strictest registration requirements in the European Union and possibly even among all 57 participants countries of the OSCE.[14] Further, according to P. Mulík, the 20,000 followers registration criterion had been *"among the most restrictive of any democratic state in the entire world"*.[15] Moreover, based on the 2011 census, only four currently registered groups meet the new member requirement, and half of the currently registered churches and religious societies have fewer than 5,000 members.[16]

On the basis of the above said arises an unavoidable question of the reasons for the passing of an even stricter law which prescribes that religious groups seeking government recognition must provide evidence of having *50,000 adult members with Slovak citizenship.* Some members of Parliament proposed even higher criteria, specifically 250,000 members for an aspiring community. This was supported by only 26 out of the 150 parliamentarians, hence it did not pass.

Incentives and reasons for adoption of the law shall be in general enshrined within an explanatory report. However, in this case *the explanatory report* is disproportionately brief and the declared justification for the new registration law is contained in only one sentence, which stated that the policy *"eliminates speculative registrations that could manipulate the state for financial benefits".* Even though explanatory reports cannot be considered a source of law,[17] it is an important instrument for justification and rationale of any amendment of legislation. Although in this case, the explanatory report is missing any relevant reasoning which calls into question the legitimacy of the new legislation.

As was mentioned by the President of the SR Andrej Kiska, who unsuccessfully vetoed the act in question, the explanatory report does not state why this measure was necessary, as well as reasons why the existing legislation has become insufficient.

On the basis of the above, we believe that it is a purely political decision reflecting the current emotional atmosphere in the Slovak society. It implies a strong anti-Islamic narrative. This is evident from the straightforward statements of the state leaders. The same day when the law was adopted, the President of the Slovak Parliament stated, that *"Islamisation starts with a kebab and it's already underway in Bratislava, let's realise what we can face in 5 to 10 years. [...] We must do everything we can so that no mosque is built in the future".*

In this context, the attention should be drawn to the important fact that since 2007, i.e. since the registration criteria were strengthened for the first time, not a single religious community has been able to register.[18]

4. The Importance of Accessible Religious Registration

After the first religious registration amendment was passed in 2007, the General Prosecutor questioned the legality of the new law and filed a petition to the Constitutional Court of the SR. However, the Constitutional Court held, that *"Registration of the Church or religious society is not an inevitable condition for the exercise of religious freedom. Registration only concerns their existence as a state-recognized Church or religious society and has a legal relevance only from the economic point of view".*[19] We strongly disagree with this ruling on the grounds presented below.

The Church registration does not only represent a control mechanism. Registered Churches dispose of a wide range of diverse benefits and rights. The advantages of registration are significant and we can distinguish between *economic and non-economic benefits.*

4.1. Non-economic benefits of Church registration

First and foremost, churches require legal subjectivity, which enables them to function as a *legal entity.* All of their internal affairs are conducted free from the interference of the government, e.g. they have their own structure and internal bodies, they may appoint their own representatives, they may own their own property and they may issue and enforce internal rules and regulations without the approval of the State.[20]

Registered Churches have an authority to influence different spheres of citizens' everyday life by establishing their own primary and secondary schools, universities and educational institutions,[21] engage in printing and publishing activities and own and operate cultural, medical and social service facilities. The clergy of registered churches can perform State recognised wedding ceremonies[22] and pastoral activities in healthcare facilities, orphanages and child care facilities, armed and police forces, as well as in penitentiary facilities.

4.2. Financial benefits of Church registration

Under *Act no. 218/1949 Coll. on the economic security of Churches and religious societies by the State,* all registered Churches are eligible for financial support from the State budget according to the number of the Church clergy. In 2018 over 42.5 m Euros have been reallocated among 18 currently registered Churches.[23] During communism, an extensive amount of property of the Church has been nationalised. Despite the restitution in the early 1990s, the State is not able to return all nationalised property since most of this property is serving military and public purposes. According to M. Moravčíková, this is *"one of the reasons of preferring the preservation of the old system of financing from the State budget".*[24]

Except direct economic support, registered Churches also enjoy *exemptions from various taxes,* such as value-added tax, land tax, inheritance tax and property tax. In addition, religious objects and gifts for churches are exempt from import duty.[25] Churches may

apply for social, charitable or cultural projects, as well as for grants towards the preservation and recovery of cultural landmarks.[26]

Unregistered churches are not able to benefit from any of the aforementioned rights and privileges. It is clear that obtaining a legal recognition is both practical and vital and that state funding and certain privileges (e.g. tax exemptions) drastically impact the religious groups' ability to function.[27]

One may argue that unregistered religious groups are generally able to function in spite of these obstacles and can register as civil associations or foundations. However, the Act on Citizens' Associations is inapplicable to citizens' associations in Churches or religious societies and under Article 12, the Ministry of the Interior shall dissolve an association if it is engaged in activities reserved to Churches. Even though, such associations[28] are currently tolerated by the State authorities, nevertheless, they are under a constant threat that they could be dissolved practically at any time.

Therefore, we can conclude that *the range of rights and duties is not the same and minority religions are discriminated in the SR*.

5. Assessment of the Amendment with Regards to European Human Rights Standards

The prevailing opinion among lawyers affirms that the number of faithful of a religious group should not constitute an obstacle to getting its legal personality and the required number should be proportionate and adequate.[29]

Asma Jahangir, *the UN' Special Rapporteur on Freedom of Religion and Belief,* in his 2004 annual report stated that *"registration appeared often to be used as a means to limit the right of freedom of religion or belief of members of certain religious communities".* She also added, that *"registration procedures should be easy and quick and not depend on extensive formal requirements in terms of the number of members..."*[30]

Last but not least, back in 1993 *the Human Right Committee* stated that *"The Committee views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities."*[31]

In order to have a more precise picture, it is appropriate to have a closer look at *different numerical requirements for religious organizations across the European countries* in which the registration system is applied. In a number of European States less than 100 individuals may form a Church or religious association; 10 in Ukraine, 12 in Estonia, 20 in Finland and Belarus and 30 in Austria. The prerequisite of 100 members is applied in Poland and Serbia. In Greece the number is slightly higher – 300 members and 500 members is the condition applied in Croatia. There are also countries with different numerical prerequisites for so-called traditional and non-traditional religions. For example, in Denmark in order for a religious community to be registered, it must have at least 150 members, while a congregation, which the Ministry of Culture and Ecclesiastic Affairs considers a group within one of the major world religions (Christianity, Judaism,

Hinduism, Buddhism and Islam), must consist of at least 50 adult members to be approved. The two-tier system is well established in the Czech Republic and Romania. Except for Slovakia, the highest numerical requirement is applied in Hungary (1,000 individuals in case of a non-tradition religion) and Sweden (3,000 persons).[32]

In this context, the new amendment of the Slovak law is clearly *unfounded* (the highest numerical census between all EU and Council of Europe member states), *unnecessary* (due to the fact that not a single religious group had been registered after the last amendment in 2007), *inappropriate, discriminatory against minority religions* and therefore *in conflict with European human rights standards.*

On these grounds, we presume that in case of an application to the European Court of Human Rights (hereinafter referred to as ECtHR), there is a high possibility that the Court will state the breach of relevant European Convention articles. In support of his statement, the ECtHR held relatively recently, that *"even where legislation expressly authorises the operation of unregistered religious groups, that is insufficient if domestic law reserves a whole series of rights essential for conducting religious activities (exclusively) for registered organisations with legal personality".*[33]

As a possible *solution,* we suggest the creation of a *two-step registration model.* The legislation of the Czech Republic can serve as an inspiring model. In the first step, the signatures of 300 adult adherents with permanent residence is necessary for a state registration.[34] In order to be eligible for the wider scope of rights, e.g. benefiting from State subsidies and performing marriage ceremonies with civil effects, a Church needs to have been registered without interruption for a minimum of 10 years and an application has to include signatures of citizens of the Czech Republic or foreigners residing there permanently; their number has to be equal or superior to at least 1/1,000 of the entire Czech population (approximately 10,700 individuals).[35] Admissibility of this model has been already accepted by the ECtHR.[36]

From all of what has already been mentioned is evident that the problem is much more complex and a proposed solution would not resolve the general negative attitude in the Slovak society, as well as the inappropriate approach of politicians. State representatives should set a good example; however, most of them only adopt this unacceptable approach to minority religions and in fact to minorities in general.

As it has been said by L. M. Ondrasek, *"the principal resolution should be primarily in education and dialogue on religious issues that lead to the development of critical thinking and thus to informed conclusions".*[37]

6. Conclusions

Church registration represents the most frequent method of surveillance over religious groups. In the Slovak Republic, the registered Churches are funded by the State budget and dispose of a wide range of other financial, as well as non-financial benefits. Therefore, the registration process and its preconditions are closely linked to financial interests of the State.

Church registration is a legitimate instrument for the protection of State interests, as well as rights and freedoms of individuals. However, the requirements of the registration process have to be clear and predictable and they need to be met realistically.[38] According to the primary objective of this article, it is evident that the recently amended numerical prerequisite is inappropriate, discriminatory against minority religions and inconsistent with the current case law of the ECtHR. It has been demonstrated that the positive precondition of 50,000 members with Slovak citizenship and the right to permanent residence is clearly the highest numerical census between all EU and Council of Europe member states. Since not a single religious group had been registered after the last amendment in 2007, the new legislation is unnecessary and unjustified.

The control of religious groups should always lead to the maintenance of peaceful coexistence and the protection of potential members against intimidation, abuse and authoritative approach of the clergy. A democratic and legal State shall not discriminate ancient traditional religions. However, in the Slovak Republic there is no possibility for religions such as Buddhism, Hinduism and Islam to register.

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The Scope of Public Services Performed by Municipal Local Governments in the Republic of Poland Through Budgetary Establishments

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Abstract: The Act of 27 August 2009 on public finance – which entered into force on 1 January 2010 – and its later amendments have brought about significant changes in the scope of public services performed by the commune's self-governments through budgetary establishments. The key change has been the limitation of these services, which triggered the necessity to implement new organizational methods and new financing solutions for public services hitherto carried out by budgetary establishments. Local government authorities were forced to choose between three organizational forms and three different ways of financing of the said services. At present, public services in a commune can be carried out through: a budgetary unit (a form most closely linked to the commune's budget), a budgetary establishment (a form indirectly linked to the commune's budget) and a municipal corporation (a form that in fact assumes full commercialization of public services).

The aim of the paper is to analyse and evaluate relevant legislation, judicial practice of courts and regional accounting chambers, as well as the doctrine of local government law and public finance law regarding the scope of public services that can be financed through budgetary establishments. The hypothesis that the legislator's implementation of new legal regulations since 2010 has led to implementation of more effective management methods with regard to public services and management of public finance allocated to these services was proven to be right. The legislator's act of giving local government authorities relative freedom as to the choice of organizational and legal forms through which public services will be performed is tantamount to expecting that the authorities shall perform their tasks rationally. The leading method applied in the paper was the dogmatic and legal method, supported by the empirical and analytical method (in particular with regard to the judicial practice of courts and regional accounting chambers).

Keywords: commune; budgetary establishments; public services; commune's budget; access to public services

1. Introduction

January 2010, i.e. since the provisions of the Public Finance Act of August 27, 2009 came into force,[1] the possibility of instituting budgetary establishments as the organisational

form used to implement public tasks has been significantly limited in Poland. The possibility to institute state budgetary establishments was fully eliminated and the authority to create budgetary establishments in the local government area has been reduced to several types of public services (tasks). Formally, budgetary establishments may be set up in all categories of local government units (hereinafter LGU), i.e. municipalities, *powiats* and voivodeships, however there are most likely to be established in the municipalities due to the scope of public tasks performed by the communes in Poland. Taking into account the provisions of Article 4 section 2 of the PFA, ordering proper application of the provisions of this Act regarding LGUs also to the metropolitan unions and associations, the conclusions made herein should also refer to the municipal unions and powiat-municipality unions forming budgetary establishments.

The aim of this paper is to analyse and evaluate the normative material, the decisions taken by courts and regional chambers of audit, as well as the views of the legal scholars, local government law and public finance law regarding the subject–object scope of the authority of the commune to create municipal budgetary establishments. This authority should be understood in a broad manner, i.e. its scope should include not only founding a budgetary establishment from the very beginning, but also transforming the other organisational unit into a budgetary establishment and combining at least two budgetary establishments into one organisational unit. The shape of this authority is determined by the scope of actions (tasks) that may be implemented using the organisational-legal form of a municipal budgetary establishment. The verified hypothesis stated that the legislator, when introducing new legal regulations regarding the creation of budgetary establishments in 2010, determined the application of more effective public services management methods and the management of public finance resources for implementation of these services in the municipalities. The legislator is granting relative freedom to choose the organisational-legal form of implementing public services by the municipal bodies, while expecting rational actions from them.

The municipalities have been granted quite extensive range of freedom, manifested in the ability to distinguish between the three forms of organisational structure and three different methods of financing public services. Currently, public services in the municipality may be implemented within the framework of: budgetary unit (the form most closely related to the budget of the commune (the form indirectly related to the municipal budget) and the municipal corporation (the form assuming full commercialization of public services). The consequence of such choice is either leaving the implementation of the specific public tasks of the municipality in close relation with its budget or implementing their execution and financing in fact outside the public finance sector. In the latter case, it is often not full commercialization of public services, as its implementation may be financed from the municipal budget through granted donation or subsidies, or supported otherwise, e.g. by means of specific preference in taxation with public levies.

The method based on legal theory (the dominant method) has been used in the paper, complemented with the empirical–analytical method (specifically in relation to the decisions by courts and the regional chambers of audit), as well as the comparative method regarding the evolutionary changes to the legislation made in the reviewed period.

Article 15 PFA expresses the essence of a local government budgetary establishment, concluding that it is an organisational unit of the public finance sector, executing the distinguished tasks and covering the costs of its operation from the revenues. Obtaining the revenues by the local government budgetary establishment means that the surplus of revenues over expenditure may occur. However, such situation does not mean the budgetary establishment carries out only the profit-making economic activities and not the operations in the field of public utility.[2]

2. The Scope of Tasks of the Municipalities Specified in Article 7 of the Local Government Act and the Entitlement to Create Municipal Budgetary Establishments

The objective criterion, providing the normative shape to the authority of the municipality to create municipal budgetary establishments, consists in the own tasks of the municipality. Specifying the limits of the authority of the municipality to create (join or transform) a municipal budgetary establishment requires the analysis of the catalogue of own funds of the municipality under Article 7 of the Local Government Act of March 8, 1990[3] and confronting it with the catalogue of the LGU's own funds under Article 14 of the PFA, defining the scope of operation of a local budgetary establishment. Each of these catalogues is of different nature. The catalogue specified in Article 7 of the LGA is of open nature – as the enumeration of own tasks of the municipality was preceded with the phrase "in particular"[4] – whereas the catalogue of own tasks of the LGU adopted in Article 14 of the PFA (reference to municipality included) is extensive (closed). Specifying the open catalogue of own tasks of the municipality in Article 7 of the LGA is not a coincidence. It is a consequence of the regulation contained in Article 6 section 1 and 2 of the LGA, from which the presumption of the competence of the municipality in the field of satisfying collective needs of the local community results. This provision states that all public issues of local significance, not reserved by law to other entities, belong to the scope of the own tasks of the municipality. Unless the law provides otherwise, such matters shall be decided upon by the municipality. This presumption is supplemented by the catalogue of issues belonging to the own tasks of the municipality contained in Article 7 section 1 of the LGA.[5]

The views of the legal scholars and the case law assign different functions to the provisions of Article 6 and 7 of the LGA. The assumption of the competence of the municipality is an important constructional element of the principle of the independence of municipality guaranteed by the Constitution.[6] The institution of presumption of the competence of the municipality in the public matters of local importance and from the further provisions of the Act on the local government proves that the general and abstract determination falls within the competence of the municipal council, whereas in an individual and specific manner it belongs to the competence of the commune head (mayor, city president, etc.).[7] It should be explicitly stated, however, that assuming the competence of the municipality in all public matters does not constitute independent grounds for taking any action, neither it authorises the municipality to independently create any public issue of local

importance, as pursuant to the principle of the rule of law formulated in Article 7 of the Constitution of the Republic of Poland, public authority bodies operate on the grounds and within the limits of the law.[8] Both Article 6 and the supplementary Article 7 of the LGA are the norms oriented solely on the tasks, and not competence, thus cannot constitute the grounds for any sovereign act of the municipal body.[9] Such actions may be taken pursuant to a specific provision of a separate law. The views of the legal scholars also specify a different view that Article 6 and Article 7 of the LGA may be, and – in many cases – are the independent and sufficient grounds for resolving public issues of local importance. Different assessment of these provisions would mean depriving them of legally significant consequences and, as a result, result in their loss of meaning.[10] Pursuant to the other, more moderate view, the provision of Article 7 section 1 of the LGA, due to its general meaning (task-oriented general clause) constitutes the legal guarantee of the organisational freedom of the local government in arranging public services.[11]

The own tasks of a municipality have been divided into two categories, i.e. obligatory and optional. Pursuant to Article 7 section 2 of the LGA, the separate Acts specify which tasks of the municipality are mandatory. The legislator imposing an obligation on the municipality to perform a specific public task means that the municipality cannot evade this obligation.[12] The legal scholars, however, hold the view that the municipality should perform the operations obligatory in their scope of financing using all legally available funds.[13] The other tasks of the municipality, which the municipality is not obliged to perform, are of optional nature. However, these tasks cannot be freely created by the municipality. The optional tasks should be objective, i.e. have a legal basis, whereas in the absence of an entity clearly indicated in the Act, the municipality may undertake their performance on the basis of a general presumption of its competence.

The catalogue formulated in Article 7 section 1 covers 22 types of own tasks of the municipality, covering the following:

- spatial order, real estate management, environmental and nature protection and water management
- municipal roads, streets, bridges, squares and road traffic organisation
- water supply and pipes, sewage system, urban waste water disposal and treatment, maintenance of cleanliness and order and sanitary facilities, landfills and municipal waste disposal, supply of electricity, heat and gas
- telecommunications activities
- local public transport
- health protection
- social assistance, including care centres and institutions
- support for family and foster care systems
- municipal housing construction
- public education
- culture, including municipal libraries and other cultural institutions, as well as the protection and care of monuments
- physical culture and tourism, including recreational areas and sports facilities
- market places and market halls
- municipal greenery and trees

- municipal cemeteries
- public order and public safety, as well as fire and flood protection, including the equipment and maintenance of the municipal flood-control storage facility
- maintenance of the municipal public and administrative utilities and facilities
- pro-family policy, including the provision of social, medical and legal care for pregnant women
- supporting and disseminating the concept of local government, including creating conditions for the operation and development of auxiliary units and implementing programmes to stimulate civic participation
- promotion of the municipality
- cooperation and activities to the benefit of the non-governmental organisations and other public benefit entities[14] (church organisational units of the religious associations having regulated relations with the state, LGU associations, social cooperatives, companies operating pursuant to the Act on Sports of June 25, 2010,[15] not aimed at making profit)
- cooperation with local and regional communities of other countries

The aforementioned catalogue of the own tasks of the municipality may not be considered equal to the admissible scope of operations of the municipal budgetary establishment. Neither the concept of assuming the competence of the municipality constituting a structure of the provision of Article 6 of the LGA, nor the open catalogue of the tasks of the municipality formulated as the municipal budgetary establishments may not lead to the conclusion that the decision-making bodies of a municipality exercise full freedom at instituting organisational units in the form of municipal budgetary establishments. Article 14 of the PFA, establishing the subjective limits of the operation of the municipal budgetary establishment constitutes an obstacle for such a conclusion.

3. The Scope of Tasks of the Municipality Specified in Article 14 of the LGA and the Entitlement to Create Municipal Budgetary Establishments

Article 14 of the PFA adopts the catalogue of own tasks of the LGUs, including municipalities, which may be implemented within the framework of a municipal budgetary establishment. Neither the Public Finance Act of November 26, 1998,[16] nor the Public Finance Act of June 30, 2005 contained such a provision.[17] This means that until December 31, 2009, municipalities had been free to establish budgetary establishments in order to execute public tasks, the point of reference being a catalogue of own tasks of the municipality formulated in Article 7 section 1 of the LGA and other own tasks of the municipality to be implemented pursuant to the assumption of competence under Article 6 of the LGA.

The legal status in this regard has changed significantly since the current Public Finance Act entered into force, i.e. since 1 January 2010, as Article 14 of the PFA has been in force with regard to the provisions of Article 7 section 1 of the LGA and Article 6 of the LGA has introduced restrictions on conducting activities of the municipality using

the organizational and legal form of the municipal budgetary institution. A wide scope of the public tasks of the commune, shaped by the systemic, economic and political factors throughout the previous periods,[18] has been significantly limited compared with the possibility to execute them using the municipal budgetary establishment. Such actions have been taken as it was necessary to consolidate public finance and increase the transparency of the public finance sector, as well as limit the so-called non-budgetary organisational forms.

The provision of Article 14 of the PFA of 2009 has no equivalent in the previous PFA of 2005 and PFA of 1998. This is due to the adoption of a different concept concerning the creation of the budgetary establishments as the organisational and legal form of activity in the public finance sector in the current PFA. The possibility to create budgetary establishments only in the area of certain activity by the local government units has been limited. The provision of Article 14 of the PFA should be considered a specific provision in relation to Article 7 section 1 and Article 6 of the LGA, however only in the scope of the authority to create municipal budgetary establishments. If applying the conflict of laws rule *lex specialis derogat legi generali* (namely "the specific norm repeals the general norm"), the authority of the municipality to create municipal budgetary establishments should be analysed taking into consideration the provisions of Article 14 of the PFA. This provision has extensively enumerated the own tasks of the LGU, thus formulating a closed catalogue of such tasks. It is not possible to apply the assumption of the competence of the municipality in creating the municipal budgetary establishments in order to implement own tasks not directly listed in Article 14 of the PFA. It should also be emphasised that the term "own tasks" has been used in Article 14 of the PFA in a very general manner, i.e. without distinguishing them into mandatory and optional tasks. It is allowed to create the municipal budgetary establishments to implement own tasks of the municipality, both the mandatory and optional ones.

The following scope of own tasks of the municipality may be performed within the municipal budgetary establishments:

- housing management and the management of commercial premises
- municipal roads, streets, bridges, squares and road traffic organisation
- water supply and pipes, sewage system, urban waste water disposal and treatment, maintenance of cleanliness and order and sanitary facilities, landfills and municipal waste disposal, supply of electricity, heat and gas
- local public transport
- market places and market halls
- municipal greenery and trees
- physical culture and tourism, including maintenance of recreational areas and sports facilities
- social assistance, vocational and social reintegration, as well as vocational and social rehabilitation of disabled persons
- keeping various species of exotic and domestic animals, including, in particular, the animals in danger of extinction, in order to protect them outside their natural habitats
- cemeteries

The comparison of the catalogues of the own tasks of the municipality specified in Article 7 section 1 of the LGA and Article 14 of the PFA proves that the catalogue contained in Article 14 of the PFA is more narrow. This means that although certain own tasks of the municipality have been indicated in Article 7 section 1 of the LGA, they may not be executed by the municipal budgetary establishment. This issue concerns tasks in the field of telecommunications, public education, culture or fire and flood protection. Article 14 of the PFA sets the limits for the activities that can be executed within the municipal budgetary establishment; however, it does not ultimately define the area of activity of the municipal council with regard to the creation (transformation or merging) such budgetary establishments. It is necessary to analyse this provision along with the provisions of Article 7 of the Act on Municipal Economy of December 20, 1996,[19] stating that the activity extending the scope of public utility tasks may not be executed in the form of a municipal budgetary establishment. Only the commercial companies are allowed to render commercial services. The sole representation that a particular service has the nature of a public utility constitutes an indispensable condition for such service to be rendered by a municipal budgetary establishment; however, it is not a sufficient condition. The objective limitations imposed by the legislator in Article 14 of the PFA should also be taken into consideration.[20]

In that context, the presentation of the concept of "public utility" is of primary importance. This concept has been used, i.a. in Article 9 section 4 of the LGA. The public utility tasks are the own tasks of the municipality, specified in Article 7 section 1 of the LGA, whose aim is to meet the collective needs of the population on an ongoing and uninterrupted basis by providing universal services. This is assumed to be a legal (statutory) definition of "public utility".[21] The term "public utility" has also been used in Article 1 section 2 of the MEA. Pursuant to this provision, municipal economy comprises in particular the public utility tasks whose aim is to meet the collective needs of the population on an ongoing and uninterrupted basis by providing universal services. The essence of the concept of "public utility" has been expressed in the same way as in the Article 9 section 4 of the LGA. There is no universal catalogue of the public utility tasks. It is open and subject to amendments, determined by the life cycle of the inhabitants, external conditions and the general social and economic situation which requires adaptation of the provision of services to these changes. In the circumstances of a particular case, a determination as to whether a specific service provided fulfils the conditions of public utility should be made by reference to the distinctive features of that service, which indicate its importance to the municipal community.[22]

The analysis of the provisions of Article 14 of the PFA and Article 7 of the MEA indicates that the municipal budgetary establishment may only render services which jointly fulfil two criteria: constituting public utility services and fitting the catalogue of tasks specified in Article 14 of the PFA.[23] However, the existence of these premises does not mean that the municipality is obliged to create a municipal budgetary establishment in order to perform its own specific tasks. The legislator leaves the municipality with a relatively wide choice of organizational and legal forms for implementation of its own tasks. A municipality may perform public utility tasks through organizational units the municipality has established for this purpose, in particular through the municipal budgetary

establishments or commercial law companies or through other entities not related to the municipality, natural persons, legal persons or organizational units without legal personality, which are organizationally not related to the commune – pursuant to the contracts for performance of tasks concluded with them.[24] The use of budgetary facilities by the municipalities is justified especially in those areas where the revenues from their activities cover to a large extent the costs of such activities, although at the same time they cannot be maximised due to social reasons and must be supplemented with subsidies from the municipal budget. Apart from the sphere of public utility, the choice of the organisational and legal form for the performance of own tasks of the municipality is significantly limited, as the possibility of creating a municipal budgetary establishment to perform tasks beyond the sphere of public utility has been excluded.[25]

General specification of the own tasks of the municipality may be the source of various doubts as to its interpretation, in particular whether the specified task of the municipality lies within the scope of public utility or exceeds it. This raises the question of whether its implementation may be delegated to the municipal budgetary establishment or should be executed by a municipal company or other entity. The example of such doubt has been setting the boundaries of the own task of the municipality consisting in maintaining housing management and managing commercial premises by the municipal budgetary establishment. It has been assumed that the task of maintaining housing associations by a municipal budgetary establishment, even when the commune owns a part of the premises in a given housing association, goes beyond the scope of public utility. The volume of the share of municipal ownership in the whole housing community remains irrelevant.[26] Delegated administration, including the complex handling of the housing associations, may not be the subject of activity of the municipal establishment as it does not constitute public utility. Rendering the services of property administration delegated by other entities (property owners' or tenants' associations) is not a public utility and does not meet the collective needs of the population on an ongoing and uninterrupted basis by providing universal services. It only meets the needs of the owners of other properties or the owners of properties constituting a given housing association, who ordered the execution of a commercial service. Such activity does not serve the purpose of executing own tasks by the municipality. The scope of these tasks does not include handling the real property belonging to other people, including the provision of management or administration services to separate entities, such as – pursuant to the provisions of law – housing associations, regardless whether the municipality is one of the members of the housing community.[27]

4. Execution of Public Tasks by the Municipal Budgetary Establishment Pursuant to the Provisions of Separate Acts

The provisions of Article 14 of the PFA and Article 7 of the MEA do not comprehensively specify the powers of the municipality to perform specific public tasks with the use of an organisational and legal form of a municipal budgetary establishment. This does not mean, however, that the separate acts broaden the closed catalogue of the own tasks of

a municipality, formulated in Article 14 of the PFA, which may be executed within the framework of a municipal budgetary establishment. The provisions of separate acts are of a precise and defining nature in relation to the general and framework regulations contained in Article 14 of the PFA. This request may be justified on the basis of the selected examples of such separate rules.

Pursuant to Article 19 section 2 of the Act on public collective transport of December 16, 2010[28] the municipality, as the organiser of public collective transport (i.e. the entity providing the functioning of the public collective transport in the given area), may carry out transportation within the framework of the public collective transport in the form of a municipal budgetary establishment. The essence of the public collective transport is the public carriage of passengers by regular services, operated at specified intervals and along specified routes, communication lines or networks. Pursuant to this provision, the organiser may independently carry out transportation within the framework of the public collective transport only in the form of a municipal budgetary establishment.[29] In such case, the municipal budgetary establishment is the operator of the public collective transport, i.e. the entity authorised to operate business activity consisting in the carriage of passengers on certain transport lines, pursuant to an internal act laying down the conditions governing the performance of these services. The municipality, as the organiser of the public collective transport, is obliged to present information, by January 31 each year, to the competent marshal of the voivodeship regarding the public collective transport, specifically the number of transport lines on which the public collective transport is executed by the operator being a municipal budgetary establishment.

Pursuant to Article 3, section 2, point 1 of the Act of June 13 2003 on social employment,[30] the centre of social integration may be created by the LGUs, including a municipality, in the form of a municipal budgetary unit or a municipal budgetary establishment. The centre of social integration provides professional and social reintegration through the following services:

- training the skills that enable people to fulfil social roles and achieve social positions accessible to those who are not socially excluded
- acquisition of professional skills and apprenticeship, retraining or upgrading professional qualifications
- learning to plan life and meet needs through own efforts, in particular by being able to earn own income through employment or business activity
- learning the skills of rational management of the cash held

Public tasks specified in the act on the public collective transport and the act on social employment which may be carried out by the municipality within the framework of a municipal budgetary establishment are not other tasks compared with the tasks specified in Article 14 of the PFA. Public collective transport is included in the task specified as "local public transport" in Article 14 point 4 of the PFA, while running a social integration centre is included in the task indicated in Article 14 point 7a of the PFA as professional and social reintegration.

5. Final Conclusions

When the Public Finance Act of August 27, 2009 came into force in Poland, there have been ca. 2,900 local budgetary establishments (mostly municipal budgetary establishments) which employed ca. 82,000 people.[31] As of December 31, 2012, only 796 local budgetary establishments were operating,[32] while there were 779 local budgetary establishments on December 31 2015[33] (mostly municipal budgetary establishments). The obligation to present such information was repealed on January 1, 2017, due to repealing Article 69 of the Act of 30 August 1996 on Commercialisation and Certain Authorisations of Employees,[34] which obliged the head of the commune (the mayor or the president of a city), the starost, the voivodeship marshal and the executive body of the union of LGUs to submit to the minister competent for the Treasury the information concerning the transformation and privatisation of municipal property, including the list of organisational units.

Various own tasks of the municipalities listed in Article 14 of the PFA are executed within the framework of the municipal budgetary establishment. Currently, the following establishments are created: social inclusion centres, urban sports and recreation centres, tourism and sports and recreation centres, municipal economy centres, municipal utilities, waste management centres, urban markets, urban cleaning centres, housing management centres, municipal building administrations, road and green maintenance centres, municipal equipment operation centres, water and waste water plants. This means that the municipalities use the form of municipal budgetary establishment to execute the public tasks related to satisfying the basic needs of the community.

Selecting the organisational-legal form of municipal budgetary establishment, pursuant to Article 4 of the MEA, falls within the exclusive competence of the municipal council. It has been proven that this choice is not free, since certain forms of regulation in this scope have been introduced by Article 14 of the PFA and Article 7 of the MEA. The consequence of choosing the form of a municipal budgetary establishment is the possibility for the municipal council to set prices and fees or the method of setting prices and fees for municipal services of public utility nature and for the use of the municipal public utility facilities and equipment. Under the aforementioned statutory provision, the municipal council may grant this entitlement to the executive body of the municipality (commune head, mayor, city president). The prices established (directly or by indicating the manner of setting these prices) in the resolutions, are binding for both the entities rendering municipal services of public utilities, as well as for the recipients of these services, thus they are universally binding. Similarly, the fees for the use of the municipal public facilities and equipment are universally binding – they are binding on the entities which make the facilities and equipment available, as well as on all the users of administrative units.[35]

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Designated Income Accounts in Budgetary Units of Municipalities as a Form of Partially Decentralised Redistribution of Public Finance Resources Allocated to Educational Services in Poland

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Abstract: The Act of 27 August 2009 on public finance, which has been in effect in Poland since the beginning of 2010, has changed the rules regarding the keeping of designated income accounts by a commune's budgetary units. The Act limited the possibility to create designated income accounts within a commune budgetary units. The right to create such accounts is restricted only to budgetary units which perform educational tasks and is an exception from the principle of full budgeting, a principle meaning that a commune's budgetary units have to transfer all their income to the commune's budget, and all expenses of budgetary units are covered from the commune's budgets. In case of educational services, these public tasks are performed by the commune's budgetary units as organizational units that are most closely linked with the commune's budget. An exception here, which is an option at the discretion of the Commune's Council, is to create a designated income account within the commune's budgetary unit.

The aim of the paper is to analyse and evaluate relevant legislation, judicial practice of courts and regional accounting chambers, as well as the doctrine of administrative law, in particular, educational law and public finance law regarding the scope of applicability of designated income accounts for a commune's budgetary units that perform educational tasks. The hypothesis that the financing of such expenses through a designated income account is a special form of redistribution of public financial resources in a commune was proven correct. The implementation of this form of funding is justified by the nature of public educational services and allows for more efficient management of this part of public finance. The leading method applied in the paper was the dogmatic and legal method, supported by the empirical and analytical method (in particular with regard to the judicial practice of courts and regional accounting chambers).

Keywords: commune; education; budgetary unit; public educational services; designated income account

1. Introduction

In the Polish public finance sector, there are various methods of settling the accounts of this sector's organisational units with the respective budget. In accordance with the

criterion of the manner of settlement, the individual organisational and legal forms, regulated in the Public Finance Act of 27.08.2009,[1] may be divided into two groups.[2] The first one is created by budgetary units settling with the so called gross method, i.e. covering their spending directly from the budget and transferring the income obtained into the account of the state budget or the budget of a local government unit. The second group includes organisational units settling with the budget with the so called net method (e.g. local government budgetary establishments), i.e. through payment of a part of the surplus current assets.

In the catalogue of the organisational and legal forms of the public finance sector, there are also such that are devoid of the value of organisational separation. Their feature is separation of a planning and financial nature, but they are used within a specific organisational structure. They are forms of a mixed or even hybrid nature. This category may include a designated income account, which may be created in a budgetary unit.

The aim of this paper is the analysis and evaluation of the normative material, decisions of courts and regional accounting chambers, the achievements of the administrative law doctrine, including the public finance law concerning the permissible scope of using the designated income account in budgetary units as a method of gathering public financial resources from specific sources and financing of expenses in a municipal budgetary unit (performing educational tasks) with partial omission of the municipal budget. The paper verifies the hypothesis that the possibility of financing specific expenses from a designated income account is a special form of redistribution of public financial resources in a municipality. The introduction of this form is justified with the specificity of public services performed in the sphere of education and enables more effective management of a part of public financial resources. The municipal council decides about the possibility of using this form relatively freely. The paper uses the dogmatic and legal method as the dominant one as well as, additionally, the empirical and analytic one (in particular with regard to the decisions of courts and regional accounting chambers).

2. The Genesis of Designated Income Accounts – The Outline of the Problem

Pursuant to Article 223 of the PFA, designated income accounts may be established in local government (i.e. municipality, powiat and voivodeship) budgetary units. The financial management of budgetary units is strictly connected with the respective budget because a budgetary unit, as an organisational unit of the public finance sector without legal identity, pursuant to the provisions of Article 11 of the PFA, covers its expenses directly from the budget, whereas its obtained income is transferred to the respective budget. It is an important concept of the so called gross budgeting, which has both its advantages and disadvantages. The advantage is, first of all, more transparency and completeness of managing public resources facilitating consolidation of these resources within a specific budget. The disadvantage is lack of relations between the financial result of the activity conducted in the budgetary unit and the system of motivating its employees to more effective management of public financial resources.[3]

It is necessary to introduce specific solutions which will provide a budgetary unit with a share in some of the obtained incomes through a possibility of financing selected types of expenses. Various solutions have been sought in Poland within this scope for many years. In the period when the Public Finance Act of 30.06.2005 was in force,[4] motivation funds were established in state budgetary units intended for gathering of some of the incomes obtained from forfeiture of objects or financial benefits resulting from revealing of crimes and offences against property or tax crimes and offences. Motivation funds were intended for rewards for employees, soldiers and officers who directly contributed to obtaining of the state budget incomes for the above mentioned reasons. Moreover, budgetary units could keep some of the incomes obtained from specific sources (e.g. fees for access to tender documentation, compensations for lost or damaged property) with a view to financing of certain expenses indicated in the act (e.g. for renovation or recreation of property). To this end, designated own income accounts were created in budgetary units. In this manner, the gross budgeting method was partially abandoned and elements of net budgeting were introduced into the budgetary unit.[5]

Currently, designated income accounts used in Poland are a continuation of the concept referring to special resources of budgetary units (a budgetary unit retained a part of the incomes for its own needs and could spend them on the purposes listed in the act), introduced in 1958 and abandoned in 2004, and, then, the above mentioned motivation funds as well as designated own income accounts. It must be emphasised that modern solutions involving the use of designated income accounts are limited within the objective scope. They may be used in state and local government budgetary units, but only such that conduct the activity in the field of education. Further deliberations in this paper shall focus on the problem matter of creation and functioning of these accounts in municipal budgetary units.

3. Statutory Criteria Concerning the Establishment of Designated Income Accounts

The provisions of Article 223 of the PFA explicitly indicate that a designated income account may be created in an already existing budgetary unit. This means that the order of legal events should be as follows: establishment of a budgetary unit and, then, creation of a designated income account within the unit. It is possible to establish a budgetary unit and create a designated income account within it in a single legal act because, in each of these cases, the same authority has the legislative competences. As regards a municipality, this is its decision making and regulatory body, i.e. the municipal council.

Designated income accounts may be created not only in municipal budgetary units which conduct the activity specified in the Act of 14.12.2016 – School Education Law.[6] Pursuant to Article 11(2) of the Act, the provision of education, upbringing and care, including special education and social prophylaxis, is an educational task of a municipality in pre-schools and other forms of pre-school education as well as primary schools. These are the municipality's own tasks of an obligatory nature. Pre-schools and primary schools are organised in the form of municipal budgetary units.[7] This is the only permissible

organisational and legal form, which is directly stipulated in Article 4(1) of the Act of 27.10.2017 on Financing of Educational Tasks.[8] Pursuant to this provision, pre-schools and schools established and operated by local government units are budgetary units.

The creation of designated income accounts in such budgetary units performing educational tasks is not obligatory. The solution in this case depends on the scope of competence of the municipal council. The scope of the municipality's freedom of decision is relatively wide because Article 223(1) of the PFA mentions only example types of incomes which may be paid into a designated account created in a municipal budgetary unit conducting educational activity. The open catalogue of these incomes is determined by the phrase "in particular" used in the content of the provision. The legislator indicated the following types of incomes: inheritances, legacies and donations in the form of money for the benefit of the budgetary unit; compensations and payments for lost and damaged property managed or used by the budgetary unit. Based on the above quoted provision of the Act, the municipal council determines, by means of a resolution, the sources from which the incomes are gathered in a designated income account. The details and the closed catalogue of the sources of incomes which may be gathered in such accounts, as well as their intended purposes should be specified in a resolution of the municipal council.[9]

The catalogue of issues which the municipal council should regulate in the resolution on creation of a designated income account is also closed. The list of these issues is preceded by the phrase "in particular". This means that, except for the issues mentioned directly in Article 223(2) of the PFA, the municipal council may also include other provisions. It may be concluded that the issues mentioned in the Act are of basic nature and are directly related to the legislator's concept referring to the designated income account. Therefore, the municipal council should primarily specify the following in the resolution concerning the designated income account:

a) the municipal budgetary units which gather the incomes
b) the sources from which the incomes are gathered in the designated income account
c) the intended purposes of the incomes; however, the incomes together with interest shall not be allocated to financing of personal remunerations
d) the manner and procedure of preparing the financial plan of the incomes and expenses financed with them, the introduction of changes in the plan and their approval

The wording of Article 223 of the PFA clearly indicates that it is only the resolution of the municipal council that should indicate e.g. the municipal budgetary units, i.e. individualise the entities which will gather incomes in the designated income account, as well as determine the specific sources of these incomes. It is not possible to be limited only to a general reference to the Public Finance Act or a repetition of the provision of the Act the more so that the legislator, while mentioning the sources of incomes in Article 223(1) of the PFA, used the phrase "in particular" and, thus, only indicated some example sources of incomes.[10] Nevertheless, it cannot be pretended that each type of income may be gathered in a designated income account. This does not mean that such incomes should be qualified from the point of view of the sources mentioned in Article 223(1) of the PFA, taking into consideration their one-off or exceptional nature. The criteria should not be referred to the

nature of the sources within the meaning of their singularity or uniqueness, but to the legal possibility of obtaining them by the municipal budgetary unit with additional inclusion of the nature of its activity in the educational sphere.[11]

The analysis of the content of selected municipal council resolutions indicates a relatively extensive catalogue of income sources, which may be gathered in designated income accounts of municipal budgetary units conducting educational activity. The following sources of income are mentioned: cash inflows from inheritances, legacies and donations in the form of money for the benefit of a budgetary unit; contributions from compensations and payments for lost or damaged property managed or used by a budgetary unit; incomes obtained from rental of spaces and devices; interest on the resources gathered in the bank account; payments for using of the gym, sports field and sports equipment; payments for using of computers, other devices and equipment; payments for organisation of leisure activities for children and youth during winter and summer holidays; cash inflows from other services;[12] payments for meals; payments for children staying in a pre-school;[13] cash inflows from the sale of tangible assets;[14] extra-budgetary resources obtained from foundations, associations and other institutions for implementation of programmes. The sources of income shall be specified in a specific manner in the resolution. It is not permissible to indicate, in a resolution of the municipal council, any source of incomes of the designated account as "other contributions". The use of such a manner of regulation means that no source has been specified for incomes which may be gathered in the account and results in the head of the budgetary unit being able to decide about the incomes which will credit the designated income account, whereas Article 223 of the PFA leaves the specification of the sources of incomes to the competences of the municipality.[15]

The municipal council resolution should also determine the intended purpose of the incomes gathered in a designated account. The legislator, nevertheless, excludes the possibility of allocating these incomes together with interest to financing of personal remunerations. The above quoted resolutions of municipal councils determine various types of expenses which may be financed from designated income accounts, e.g.: the purposes indicated by the donor; renovations of buildings administered by the municipal budgetary unit; investment expenses; expenses related to recreation of damaged or lost property; purchases of cleaning agents; purchases of food; purchases of equipment for kitchens and canteens; statutory tasks of the budgetary unit; expenses related to the bank operation of the designated income account; other purposes directly related to the activity of the budgetary unit.

The intended purpose of the resources from the designated income account should be specified in a resolution of the municipal council in a precise and exhaustive manner so that there are no doubts as to which expenses the head of a budgetary unit may allocate the incomes gathered in the account. These conditions are not fulfilled by the phrase used in a resolution pursuant to which "current expenses" may be financed from the designated income account, because one of such expenses is personal remunerations which shall not be financed from this account as it has been stipulated by the legislator in Article 223(2)(3) of the PFA.[16] For the same reasons, it is not permissible to include, in a municipal council resolution, phrases about a possibility of financing "other purposes directly related to the activity of the budgetary unit" or "statutory tasks of the budgetary unit" from the

designated income account. Neither is it appropriate to include, in a resolution, any phrase saying that expenses of a budgetary unit which are not covered by the financial plan of the unit would be financed for the designated income account. This would lead to the violation of the essence of a budgetary unit determined in Article 11(1) of the PFA and Article 52(1) (2) of the PFA, which stipulates that the costs included in the annual financial plan of a budgetary unit may be increased if incomes higher than the ones forecast have been obtained and increasing of the costs shall not result in increased subsidies from the budget or an increase in the planned state of liabilities. This would result in the violation of Article 261 of the PFA stipulating that the head of a budgetary unit may, with a view to performance of the tasks, incur financial obligations up to the amount of the expenses determined in the approved financial plan of the unit. Hence, the level of expenses incurred by a budgetary unit does not depend on the amount of incomes obtained (gross budgeting). All expenses of a budgetary unit are budgetary expenses and the incomes obtained by it (as a rule) are budgetary incomes. An exception from this rule, in the form of the designated income account, is introduced by Article 223 of the PFA. Introduction, by a municipal council, of the arrangements as to this type of incomes and their intended purpose shall, nevertheless, not lead to any change in the form of financing of the municipal budgetary unit through creation of the second independent source of financing of its financial plan (remaining outside the municipal budget).[17]

Pursuant to Article 223(3), expenses from the designated income account may be incurred up to the amount of the gathered incomes within the financial plan. This means that the account shall not be credited from other sources which have not been mentioned in the resolution of the municipal council. The statutory phrase "up to the amount of the gathered incomes" does not create any obligation of using all the financial resources gathered in the account. Nevertheless, it should not be interpreted towards arbitrary spending of these resources because each of the expenses should have its basis in the form of being included in the financial plan of the designated income account. An order has been formulated in Article 223(4) of the PFA to transfer the financial resources remaining in the designated income account on 31 December of the financial year to the budget of the municipality. The resources should be transferred not later than by 5 January of the following year. This means that the resources from the designated income account unused in a given year shall not be used further by the specific municipal budgetary unit, even in a situation when they were included in the financial plan of the account but were not used by the end of the financial year. This is a mandatory rule and shall not be modified in any manner through municipal council resolutions.

The obligation to transfer incomes gathered in the designated account to the municipal budget is qualified as an expense from the designated account (payment to the municipal budget). In accordance with the budgetary classification, transferring of the resources remaining in the designated account to the budget is effected pursuant to "paragraph 240 – transfers of the remaining financial resources gathered in a designated account of a budgetary unit into the budget". A payment into the municipal budget constitutes an expense from the designated account and an income within the scope of the municipal budget of the following year. Such payments are not included as current expenses of the municipal budget.[18] The essential feature of functioning of the designated income

account is that the unused financial resources remaining at the end of the financial year must be transferred to the municipal budget. The reverse direction of the financial stream, i.e. crediting of the designated income account from the municipal budget is not permitted by the law. To conclude, only complete use of the resources gathered in the designated income account in compliance with the plan results in no obligation to transfer them to the municipal budget.

4. Legal Status of the Financial Plan of a Designated Income Account

Pursuant to Article 223(2) (4) of the PFA, a municipal council shall determine, by means of a resolution, the manner and procedure of preparing the financial plan of the designated income account, which shall include the sources of incomes and the expenses financed with them. Pursuant to the same procedure, the municipal council shall determine the manner of introducing changes in the plan and the manner of their approval. It is exclusively the municipal council determining the procedure of introducing changes in the financial plan of the incomes gathered in the designated account and the expenses financed with them that is authorised to indicate the entities entitled to introduce the changes and approve them. The municipal council is, nevertheless, not authorised to transfer the rights to the executive body.[19] The analysis of the provisions of the selected municipal council resolutions shows that standard solutions are adopted within this scope. Heads of municipal budgetary units, together with projects of financial plans of these units, develop the projects of financial plans of incomes gathered in a designated account and the expenses financed with them. The projects of financial plans are filed with the executive body of the municipality within the time limit enabling their inclusion in the project of the municipal budget resolution. A project of the financial plan approved by the head of the municipal budgetary unit constitutes the basis of financial management within the designated income account in the period from 1 January of the financial year until the date of adopting the budget resolution by the municipal council. Similarly as in the municipal budget, also in the financial plan of the designated income account, the planned incomes constitute a forecast, whereas the planned expenses are the limit. This means that the primarily forecast incomes may be obtained in higher amounts, whereas the planned expenses shall not be incurred in higher amounts unless they are financed from additional incomes and a respective change is introduced within this scope in the financial plan of the designated income account. During the financial year, the financial plans of designated income accounts may be changed by heads of municipal budgetary units.

In order to ensure the planning discipline, municipal council resolutions also specify the dates of preparing the projects of financial plans of designated income accounts and the dates of submitting the information and the reports concerning the implementation of the plans. Determination of such dates enables synchronisation of the mode of project works on financial plans of designated income accounts with the procedure concerning other financial plans in the municipality, including in particular the municipal budget and the financial plans of municipal budgetary units. Therefore, heads of municipal budgetary

units are obliged to check annually, by 20 October, the financial plan of the designated income account for the following year. Heads of municipal budgetary units are obliged to present the municipal executive body with information on the course of implementation of the plan for the first half of the year by 10 July, whereas, by 31 January of the year following the financial year – an annual report on the accomplishment of the financial plan.

The use by the legislator of the phrase "designated income account" simultaneously indicates its separation from the conventionally understood municipal budget. The phrase "designated income account" means separation of the account from the accounts kept with a view to bank operation of the municipal budget. It is not only a separate financial resource being at the disposal of the head of a municipal budgetary unit, but also a stream of incomes and expenses separated from the municipal budget as regards planning. The financial plan of the designated income account is a planning document separated from the financial plan of the municipal budgetary unit where such an account was created. It should be prepared with the use of all sections of the budgetary classification, i.e. in particular: division, chapter, paragraph in the budgetary classification. Pursuant to the provisions of Article 211(5) of the PFA (specifying the structure of a budget resolution which includes the municipal budget and appendices), as well as Article 212 of the PFA (specifying the so called subject matter of a budget resolution) and Article 214 of the PFA (specifying the content of the appendices to the budget resolution also stipulating that the plan of incomes of a separated income account of municipal budgetary units conducting the activity determined in the School Education Law and the expenses financed with them are included in a separate appendix), it must be explicitly concluded that the financial plan of a designated account of incomes and expenses of a municipal budgetary unit is a planning document separated from the municipal budget, being a municipality planning document, as well as from the financial plan of the municipal budgetary unit. The above mentioned financial plans are only included in the same normative act, which is the municipal budget resolution.

The arrangements adopted in the financial plan of the designated income account of a municipal budgetary unit are arrangements separated from incomes and expenses approved in the municipal budget and the financial plan of a municipal budgetary unit. These are separate categories of incomes and expenses and shall not be treated as synonymous, or interchangeable or aggregated for other purposes determined in separate acts. The above assessment is confirmed in the doctrine of the public finance law.[20] It is emphasised that the financial plan of the designated income account of a municipal local government budgetary unit reveals significant information not included in the municipal budget concerning non-budgetary management of public resources in a municipality.[21]

Separation of the financial plan of a designated income account from other financial plans adopted in a municipality is also confirmed by the provisions of the PFA concerning budget reporting. Based on the delegation of legislative powers formulated in Article 41(2) of the PFA, the Minister of Finance determined – by means of a regulation[22] – the types, forms, dates and methods of preparing the reports. The provisions of the regulation explicitly indicate that separate reports are prepared on accomplishment of municipal budgets (reference no. Rb-27S and Rb-28S), as well as on the incomes and expenses in designated accounts of municipal budgetary units (reference no. Rb-34S). Furthermore,

Article 267 of the PFA indicates that the executive body of a municipality presents to the municipal council, by 31 March of the year following the financial year, an annual report on the accomplishment of the municipal budget containing a statement of incomes and expenses resulting from closing of municipal budget accounts, in the detail not lesser than in the municipal budget resolution. The statement of incomes and expenses should include the data resulting from the closing of municipal budget accounts, as well as the list of budgetary units where designated income accounts have been created (only a list of such municipal budgetary units is mentioned and not the amounts gathered and spent from the designated income accounts). This is another argument justifying the thesis on separation of the municipal budget and the designated income account of a municipal budgetary unit, as well as the financial plan connected with this account.

5. Final Conclusions

The applicable legal regulations indicate that the legislator regulates, within the subjective and objective scope, the creation and functioning of designated income accounts. It is permissible to create such designated accounts only in budgetary units conducting a specific type of activity, i.e. performing educational tasks. The principle is performance of public services in the sphere of education with the use of the form of a municipal budgetary unit as the organisational unit most closely connected with the municipal budget. A designated income account shall be treated as an exception from the principle of gross budgeting[23] (involving transfer of all incomes obtained by a budgetary unit to the municipal budget and covering of all expenses of the budgetary unit from this budget). Although the resources gathered in designated income accounts are included in the general, i.e. municipal budget records and reports, they are at the disposal of the head of a municipal budgetary unit rather than the executive body of the municipality responsible for implementation of the municipal budget. The amount of expenses from the designated income account is limited by the amount of incomes obtained from the sources indicated in the municipal council resolution.

Creation of designated income accounts de facto leads to decentralisation of the competences in the process of gathering and spending of a part of the municipality's financial resources. Municipal budgetary units gather financial resources and finance some specific expenses independently with them, yet within the limits set by the municipal council by means of a resolution. The cash inflows obtained by them owing to their activity are used within their own scope.[24] It is possible to conclude that the manner of functioning of designated income accounts may have a positive influence on the activity of municipal budgetary units. First of all, it may motivate the managements of these units to obtain additional incomes from sources not related to the main object of activity of the municipal budgetary unit. The additional financial resources obtained in this manner constitute the source of financing the expenses without an excessive burden to the municipal budget. As a result, designated income accounts may lead to improvement of the level of flexibility in conducting of the financial management in a budgetary unit.[25]

While adopting the Public Finance Act in 2009, a concept of consolidation of public finances was promoted, as well as the need of maximum limitation of various forms of non-budgetary and semi-budgetary management (e.g. state budgetary establishments and motivation funds were abolished). The possibility of creating own income accounts in (state and local government) budgetary units was significantly limited, the essence of functioning of which was very close to the currently created designated income accounts. In the latter case, this form of conducting the non-budgetary management was, nevertheless, not completely abolished, but rather reorganised through its use only in budgetary units performing educational tasks.[26]

The hypothesis formulated in the introduction, according to which financing of specific expenses from a designated income account constitutes a specific form of redistribution of public financial resources in a municipality has been verified positively. The introduction of this form of non-budgetary management is justified with the specificity of public services performed in the sphere of education and enables more effective management of a part of the public financial resources. In particular, the assets transferred by the municipality into the management of a budgetary unit may be used more effectively and constitute an additional source of incomes in the form of fees collected for leasing of premises, land or sport infrastructure facilities (e.g. gyms, swimming pools and school sports fields, common rooms). This may only happen, nevertheless, after the performance of public educational services. Additional financial resources may be used in order to better meet the needs of the local community in the sphere of education including the obligatory tasks of the municipality.

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The Legal Aspects of Reducing the Bureaucracy of the Court Administration

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Abstract: The article deals with questions of the bureaucratic organisation of courts, or in other words, how the court administration can affect, or is able to affect judicial autonomy, professionalism, the court's decision making and overall the effectiveness of court functioning. The purpose of this paper is to analyse legal means of reducing the court's bureaucracy.

Keywords: court administration; administrative supervision; judicial autonomy; administrative law

1. Introduction

Nowadays we expect from public administration a high level of efficiency and professionalism.[1] The right to a fair and objective hearing is an element of the guarantee which creates a standard of "good administration".[2] Public authority should determine a dispute not from a domineering position towards private entities, but above all using conciliation methods. An administrative authority should be a partner for a private entity and not an opponent. An acceptable model of bureaucracy is based on a dialogue between parties of a dispute and finding a possible solution for all of them. Therefore, a significant attention is paid to explanations of administrative decisions, which should be not only understandable, but also convincing for individuals.

The above-mentioned expectations are addressed also to court authorities and their administration. Opinions about courts and their activities are formulated not only on the basis of issued judgments but also on personal contacts with the court staff. Though the lack of the court's action or an excessive length of proceedings is frequently caused by parties of a dispute,[3] expectations towards quick settlement of a case are currently becoming more intensive. A significant role is played by general rules in which courts are in contact with society.[4] This tendency is clearly seen from the court perspective, where time limits in proceedings are under strict control and explorations in various statistics.[5] Contemporary judges are evaluated not only from a content-related perspective, lawfully issued judgments, but also from effectively undertaken procedural activities.

The purpose of this paper is to analyse legal means of reducing the court's bureaucracy, understood from a negative side, as a phenomenon which limits the court's efficiency and professionalism.[6] The term "bureaucracy" is derived from the French language and means a centralised organisation system in which the authority is associated with the office.[7] In some explanations it is understood as a separate entity from the citizens state power, or

even as officials making harmful decisions for society[8] or even soulless adherence to regulations in dealing with official matters.[9] The reasons for such understanding of "bureaucracy" have both a structural and procedural nature. Creating a proper shape of these two regulation spheres can lead to the reduction of the negatively perceived bureaucracy.

However, exercising of these tools must respect the nature of court administration which is linked with structural courts independence and judicial autonomy. Striving to achieve a high level of efficiency in the administration of justice cannot violate those requirements. Therefore, in the first part of this paper a special attention will be paid to the nature of court administration. These reflections make it possible to analyse legitimate ways of reducing bureaucracy in court administration in the second and third part of this paper.

2. The Nature of Court Administration

Taking into consideration the nature of court administration, it is necessary to point out the subject "administration", which has a central meaning for the science of administrative law. Following the achievements of the German science, administration is defined as a state activity that is neither legislation nor the justice system.[10] In addition to the negative definition, which is the starting point for consideration of differences between three state authorities, numerous positive definitions of administration are formulated, which emphasise the characteristic position and structure of the administering entities,[11] the participation of the human factor[12] and the objectives of the administration's activities.[13] Public administration is defined as all organisational and executive activities aimed at realising the common good by various entities, including not necessarily state-owned ones, related to the basis and form of activity under the statue, remaining under social control.[14]

Court administration on the one hand should be treated as a part of a whole public administration, which creates a huge organism necessary to perform obligations by all kinds of public power, legislative, executive and judicial. Administration in courts performs service functions for effective functioning of these public institutions. The duties of court administration include all tasks to ensure the proper functioning of the courts, both from the personal and material side. These duties are: matters of employment of judges and court clerks, all employee and training matters, maintenance of court buildings and providing substantive support in adjudicating.[15] Court administration is financed by the whole state. Therefore, two other branches of state power have the right to know where are the positive and negative sides of their activity in order to solve problems and avoid negative tendencies in the future.

The above-mentioned activities of the court administration play a significant role also for providing legal protection for the citizens, who turn to court clerks with requests for information about pending cases or even advices on how to solve their problems and technical issues connected with the court's functioning. Personal contact with court employees could have a crucial importance in making opinions about the level of court professionalism. An engagement in the work of court clerks, their knowledge and experience, may deeply affect the efficiency of court activity.

On the other hand, this administration is created to perform special obligations joined with tasks of a judicial power. The court administration also plays a crucial role in the service for judges and their judicial function. Court administrations and judges create a separate judicial power which is responsible for solving disputes between individuals. A lack of one of these spheres, also judicial and administrative, will make court activity impossible.

Courts are appointed to solve disputes between private entities or state on the basis of facts and binding legal regulation.[16] Court administration is not a part of public administration which belongs to the executive power. Though court administration is not directly engaged in solving those disputes, its activity is linked to adjudication functions because it helps judges to be more efficient and professional. The boundary between judicial and administrative activities is difficult to stress. The whole activity of this administration is focused on solving disputes and exercising justice. Without performing this function, the existence of court administration would be unnecessary. Inefficiency of court administration can, in a straight way, lead to inefficiency of the whole court, and above all the judicial functions.

Therefore, the nature of court administration is twofold. On the one hand, it is an administrative organism, designed for special tasks. The administrative organism must be guided by professionals who ensure a high level of efficiency and professionalism of this administration. In some cases it is necessary to engage judges in performing administrative functions because this group of well-educated and experienced clerks is the most appropriate group to perform these duties towards other judges. It is questionable to what extend the responsibility for functioning of this administration should derive from court or the executive power? This question is connected with the second nature of court administration, namely the special tasks performed by this branch of the public power.

The other and more general question, which may be formulated now, is connected with a group of competences, above all the supervision nature, which these two branches of power, especially the executive power, should be equipped with in order to make an activity of court administration effective and professional. The preliminary answer to this question is: the executive power should affect the judiciary only in exceptional cases, also in the area of court administration, when the judiciary fails to cope with maintaining the high level of effectiveness of judicial protection. Any interference by the executive with the operation of the judiciary threatens the independence of judges and separateness of the court system from other authorities.

3. Two Different Models of Supervision over Court Administration

In Poland there are two ways of performing supervision over the court administration. The first pattern is typical for ordinary courts, where a significant influence over the court administration is assigned to the Minister of Justice. In this pattern the responsibility for functioning this administration is taken over by an authority which is a part of the executive power. The second model is typical for administrative courts which create

a separate judicial branch from ordinary courts. The supervision competences are entrusted to the President of the Supreme Administrative Court (hereinafter SAC).

Focusing on the first model, according to Article 9 of the law on the system of common courts,[17] the Minister of Justice supervises the common courts in order to ensure appropriate technical, organisational and financial conditions (external supervision). Besides the Minister, each President of the common court also fulfils internal supervision over courts, ensuring the proper functioning of the internal office of the court (internal supervision).[18] Presidents of common courts – district, regional and appeal are appointed by the Minister of Justice.[19] Because of this competence, the Minister of Justice has a crucial influence not only on external, but also on internal supervision. Additionally, in regional and in appellate courts, there are appointed managers[20] of the courts who have competences in the court's finances. Their position is independent from the competences of the courts' presidents and they are subordinated directly to the Ministry of Justice.

The President of district, regional and appellate court may be dismissed by the Minister of Justice not only in case of neglecting his or her obligations but also when effectiveness of his or her activities in the field of administrative supervision or organisation of work in court is in opinion of the Minister unsatisfactory.[21] The Minister of Justice has crucial competences in the area of supervision over common courts. He assesses the efficiency of court administration and can change the president of the court if he estimates that the court could work more effectively. The other court institutions such as general assembly of judges of each court or the board of the courts can only formulate opinions to the Minister, which are not binding for him in the process of appointing the president of the court.

The second pattern of the supervision is typical for administrative courts, which create a separate branch of systems of judiciary in Poland. All competences over court administration in this system are submitted to the President of the Supreme Administrative Court, who exercises the hierarchical supervision over the administrative activity in this branch of courts.[22] The reason for adopting this solution is a basic function of administrative courts, which perform control over the public administration. Therefore, the executive power should not have any influence on a public body that controls his or her activity.[23] In this solution a responsibility for functioning of the court administration is focused only on the judicial power. The Minister of Justice has no competence to issue some of the orders and to create the structure of the administrative court's administration. The President of the SAC has also the power of minister competent for matters of public finance in relation to the implementation of the budget of administrative courts.[24] This branch of courts has guaranteed a financial independence from the executive power. That guarantee has a crucial importance in assessing the level of court and judge independence from other state authorities.

In the second model, the President of the SAC performs administrative tasks towards the whole administrative judiciary. These obligations are fulfilled by special agencies inside the Supreme Administrative Court (the Chancellery of the President of the SAC and the Judicial Decisions Bureau) and by the Presidents of voivodeship administrative courts who in administrative competences are subordinated to the President of the SAC. The President of the SAC exercises hierarchical supervision over the administrative activity of the admin-

istrative courts.[25] He establishes the principles of clerical work in administrative courts.[26] The president of the voivodeship administrative court manages the court, represents it in external relations and performs activities of judicial administration.[27] The president and vice-president in the voivodeship administrative court may be removed from the office during the term of office in the event of gross dereliction of official duty.[28] This condition is more strictly regulated than the similar, above-mentioned competence of the Minister of Justice. The President of the SAC cannot remove the President of the voivodeship administrative court in case of inefficiency of the court administration. Gross dereliction of the official duty must be connected with a strong negative effect of the president's duties. As a result, a judicial activity of the court must be seriously neglected.

The second model should be treated as a proof, that it is possible to create a special administrative mechanism inside the judiciary. Although it is not free from the disadvantages associated with a strong position of the President of the SAC,[29] court administration to be effective, does not need special supervision measures performed by members of other branches of state power. The effectiveness of the court administration is not strictly connected with an entity which fulfils supervisory functions, but with the engagement of court clerks and real supervision measures which make the court activity more effective. If the main supervisory competencies are located in a member of the judicial power, it is possible to equip this entity with a stronger power, and with less threat that it is incompatible with the principle of judge independence.

For this reason, the solution, which is present in the administrative court system, does not threaten the effectiveness of the administrative judiciary. It guarantees more stability and independence from other branches of state power, above all the executive power. The system of administrative courts is less addicted to political changes. The President of the SAC is appointed by the President of the Republic of Poland from among two candidates presented by the General Assembly of Judges of the SAC for the term of six years.[30] Over the past six years in Poland there have been five Ministers of Justice. Therefore, in literature the model of supervision over administrative courts is treated as a modelled regulation in the competence sphere between the executive and judicial powers.

4. Ways to Reduce the Court's Bureaucracy

4.1. Supervision over the court's administration

The first mechanism, which could be feasible to reduce bureaucracy of court administration, is connected with supervision measures. The concept of supervision is widely recognisable in administrative law and not that well known in the judiciary. While adopting supervision measures, a supervisor cannot only control the supervised entity but also apply measures which aim to achieve a concrete goal.[31] A characteristic feature of the term "supervision" is an interference with a supervised entity, which has no choice to reject orders issued by the supervising entity. Because of existing relations between these two entities, the second of them takes responsibility for functioning of the first one.

The question, which should be stated at this moment, is connected with the possibility of using supervision measures developed in the science of administrative law into exploration of the judicial power. There is no doubt that supervision measures cannot interfere with the judicial independence. Where is located the source of the court's activity which must be free from internal and external influences? Where are the boundaries of the supervision over court administration? The Polish Constitutional Court approving supervision competences of the Minister of Justice over courts has stated that supervision over the administrative activities of courts should not include organising proceedings in concrete cases, such as appointing terms for concrete procedural activities, summoning witnesses and experts.[32] This statement does not give a concrete answer about the activity which is linked with jurisprudence and cannot be embraced by the administrative supervision. It is rather a proof, that determination of the border between judicial and administrative functions of courts is not entirely possible.

Apart from the doubts connected with establishing the limits of admissibility of administrative supervision, these measures cannot interfere with the process of adjudicating. A judge must be free from pressure in solving court disputes. This requirement can be understood in a narrow and wider sense. Focusing on court administration, the proper functioning of it could strengthen the level of the judge independence and make fulfilling of the jurisdictional duties easier. A judge equipped with the assistance of a secretary clerk and assistant who can help him/or her in searching jurisprudence, can solve more cases, perhaps in a more content-related way. It does not mean, that all the judge's connections with court administration have an impact on the judge's independence. They are connected with the judge's obligations and therefore, each kind of interference in this area of activity must find serious reasons. Competence to perform surveillance measures should have their basis in the law.

Coming back to the surveillance measures over court administration, within the scope of measures over administrative activities of voivodeship administrative courts, the President of the SAC may order an inspection or general inspections in the court.[33] A general inspection embraces all forms of the court activities, such as the burden of judges in relation to the influence and number of settled cases and the state of arrears, efficiency of court proceedings, including preparation of meetings, performance of proceedings, including timely preparation of justifications and performance after the decision has become final, and the level of uniformity of judgments in the court visited against the background of the case law of other administrative courts. The inspection is aimed at examining a specific problem in the field of the functioning of a voivodeship administrative court or its specific organisational unit, as well as examining the supervisory activities of the president, vice president and chairman of the department, as well as assessing the efficiency and timeliness of business activities performed by particular judges.

Among many surveillance measures over court administration in ordinary judiciary, the Minister of Justice performs external administrative supervision: assesses annual information on the activities of courts, determines general directions of internal administrative supervision performed by presidents of appellate courts, controls the performance of supervisory duties by the presidents of appellate courts and issues relevant regulations.

The Minister of Justice may turn to the President of the Court of Appeal in writing if he finds any deficiencies in the field of court administration, internal administrative supervision or other administrative activities and demand the removal of its consequences.[34] The President of the Court of Appeal, to whom the attention is addressed, may submit a written objection to the Minister of Justice within fourteen days from the day of returning the attention. As a result of this objection, a dispute is passed to the National Council for the Judiciary.[35] Attention can be combined with a reduction of the functional additive to the extent corresponding to the seriousness of the infringement, ranging from 15% to 50% of the allowance, for a period from one month to six months. If the remark is set aside, the supplement is adjusted to the previous height.[36]

The manager of a court directs the court's administrative activity to ensure appropriate technical, organisational and property conditions for the functioning of the court. The competences of this subject in the area of court administration are more developed in comparison with the competences of the president of the court, because they are focused on all the matters which are connected with financing. The manager of the court, who is appointed by the Minister of Justice[37] performs all conditions which are important for the technical functioning of the court, from financial conditions for court administration employees, to the organisational aspects of their work.[38]

4.2. Procedural ways

Besides the structural measures, procedural solutions could also make the functioning of court administration more effective and bureaucracy less burdensome. One of the solutions is to improve electronic communication with parties of the proceeding during a court process. Serving letters by using electronic means of communication[39] makes this process between the court administration and a party of proceeding less time consuming and bureaucratic. This method of serving official documents is much cheaper and therefore more convenient for the budget of court administration. Hopefully this form of communication will become more popular in the nearest future and embrace not only serving documents, but the whole access to the courts documents during proceedings in each case.

The process of serving documents during a court procedure could be burdensome for the court administration because of the large amount of parties in a certain proceeding. The legislator should take this inconvenience into consideration and substitute the traditional model of serving documents. Besides new electronic forms, there are also other possibilities, such as general announcement. This form is known for the Polish legislator in special areas of administrative law.[40] If this special provision was adopted in specific cases and a person who participated in an administrative proceeding has not lodged a complaint, and the outcome of the court proceeding concerns his or her legal interests, shall be a participant in that proceeding if the person files a request to join the proceeding before the commencement of the hearing.[41] This regulation is another example of how a legislator can create regulations regarding the serving of the documents taking into consideration an

engagement of a court clerk and the necessity to inform the people who are really interested in taking part in certain proceedings.

Another regulation, which makes an activity of court administration more effective, are time limits regulated in law. They are addressed not only to the parties of a dispute, but some of them are binding for judges and court administration. Though their expiry does not make court activities invalid, these terms have a disciplinary significance. Judges as state clerks should not violate deadlines which are addressed to them. These limits oblige judges and court clerks to more intensive and effective activity, especially when in the contact with parties of the proceeding. Individuals, who know these terms, can expect an active behaviour from the court's side and plan their own activity in the future.

An example of this kind of terms is connected with the obligation of a judge to prepare a written explanation of an issued judgment. According to the regulation of proceedings before administrative courts,[42] the judge is obliged to prepare written reasons of the issued judgment within fourteen days from the day of filing the request. In a complicated case, the president of the court may extend the time limit for a fixed period of time but not longer than thirty days.[43] Though this term has only a disciplinary nature, in practice it is treated seriously, because of the negative consequences for the judge and court administration connected with supervision measures performed by the President of the SAC. These are also restrictive for the judge during applying for a better position in a higher court. Violation of the deadline may also lead to disciplinary proceedings.

Another tool, which is convenient for reducing bureaucracy, is connected with the organisation of public trials. A general rule in this area is that a court may adjourn the proceedings before administrative courts only for a good clause, regardless of a concurrent motion of the parties.[44] The trial shall be adjourned only in two cases. Firstly, if the court has found impropriety in notification of either party or if absence of the party or its agent has been caused by extraordinary circumstances or other impediments known to the court which may not be overcome, unless the other party or its agent seeks the hearing of the case in their absence.[45] Secondly, if the court has decided to notify of the pending court proceedings those persons which have not yet participated in the case in the capacity of a party.[46] Besides these circumstances, the Law on proceedings before administrative courts regulates premises when the proceedings shall be suspended.[47] Upon a concurrent motion of the parties the court may, but not shall suspend the proceedings. One of the basic principles of the proceeding before administrative courts is the principle of the speed in the proceeding. It means that an administrative court should undertake actions aimed at quick settlement of the case and should try to decide it at the first meeting.[48] A well-organised conduct of the proceeding is conductive to limitation of the bureaucracy of the proceeding and evolution of a positive image of the system of administrative justice.

5. Conclusions

Court administration from a subjective point of view is a part of the whole public administration. It should be organised in a way, which will correspond with current expectations formulated in modern societies. Administration should be in a dialogue with

private entities, explaining reasons for an undertaken activity, which should be foreseeable and legal. Only in that way the activity of courts has a chance to be understandable for society and can create a high level of trust in courts.

Special tasks of court administration do not mean that the measures, which will lead to ensuring more efficiency in its activity, could not be undertaken by the executive power. This does not mean that the executive power in exercising competencies in supervision over court administration can interfere with the judicial independence. Fulfilling tasks of court administration by the court's presidents is free from this threat and in reality is not less effective. Focusing on supervision competencies in court institutions could also be an answer to a problematic distinction between judicial and non-judicial activities performed by the court administration.

The sphere of judicial independence should be evaluated in a broader sense. An effective functioning of court administration can positively affect this independence. Therefore, each interference in an administrative activity of courts should find serious reasons and statutory basis. Supervision over court administration could also be performed by the court authorities. This solution is less controversial, especially in states with a shorter tradition of democracy and a lower level of law culture.

In the process of reducing unnecessary court bureaucracy a significant role is awarded to procedural measures. Court procedure can make their activity less burdensome, when high procedural instruments would be created only in the circumstances, where it is really necessary to issue a fair judgment. Regulations connected with delivery of court letters and special terminations in court proceedings could reduce this bureaucracy in a significant way.

6. Summary

The analysis in this paper is focused on measures which can help to reduce bureaucracy in court administration. Courts are organisms of the third power of a state. They have their own administration which helps them fulfil their obligations. Bureaucracy, perceived negative as a creature who limits a court's efficiency and professionalism could be liquidated in two ways. The first one is linked with supervision measures and the second one with procedural measures. The analysed functions play complementary rules in making court activity more effective.

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2 According to Article 41 paragraph 2 of the Charter of Fundamental Rights of the European Union (*Official Journal of the EU,* 2012 C 326/391), a right to good administration includes three components: firstly, the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, secondly, 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 and thirdly, the obligation of the administration to give reasons for its decisions.

3 One of the reasons is abusing of procedural rights by individuals who take part in court proceedings. Some of the parties are interested not in finishing a procedure, but in a continuation. Adopting this strategy, they will avoid connected negative consequences which can be created by a final judgment. See Wojciech Piątek, Rozpoznanie sprawy przez sąd administracyjny bez nieuzasadnionej zwłoki, 53, in *RPEiS,* vol. 79, no. 2 (2017). https://doi.org/10.14746/rpeis.2017.79.2.5

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13 Particularly Zbigniew Leoński pointed out that each administration affects people and social relations. See Zbigniew Leoński, *Zarys prawa administracyjnego,* 23 (Warszawa, Wydawnictwo Naukowe PWN, 2004). The purposeful nature of the administration's activities, including the manifestation of its own initiative and imaginations, is strongly emphasised by Ochendowski, Izdebski, Kulesza and Wyrzykowski. See Eugeniusz Ochendowski, *Prawo administracyjne. Część ogólna,* 23–24 (Toruń, Comer, 2001); Hubert Izdebski, Michał Kulesza, *Administracja publiczna. Zagadnienia ogólne,* 79 (Warszawa, Liber, 1999).

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34 Article 37ga paragraph 1 LSC.
35 Article 37ga paragraph 2–3 LSC.
36 Article 37ga paragraph 4 LSC.
37 Article 32 paragraph 1 LSC.
38 Article 31a paragraph 1 LSC.
39 See Article 74a § 1 the Act of 30 August 2002, Law on proceedings before administrative courts, *Journal of Law,* no. 1302 (2018) as amended, hereinafter LPAC.
40 In case of real estate with an unsettled legal status, if within 2 months there are no persons who prove that they are entitled to property rights to the real estate, the decision on expropriation is subject to a public announcement. See Article 118a § 2 of the Act on real estate management.
41 Article 33 § 1a the Act of 30 August 2002 LPAC.
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The Constitution and Public Administration

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Abstract: The article is devoted to the analysis of the ratio of public administration and the Constitution. At the same time, under public administration, the author understands the activities of state bodies and their officials to transform social relations for the benefit of society and the state. And under the Constitution – the Basic Law (or the sources of law) of the state and society, containing the system of constitutional principles and norms and ensuring the achievement and preservation of constitutional values.

The main task of the author is to confirm that the Constitution is the basis and at the same time the framework of public administration, and the constitutional values are the purpose of its implementation.

To reveal the question, such general scientific methods of cognition were used as analysis, synthesis and generalisation. Comparative legal, concrete sociological research methods, interdisciplinary and complex approaches attracted the attention of the researcher in the study of the problem.

Keywords: public administration; Constitution; constitutional principles and norms

1. Introduction

The main purpose of the author is to confirm that the Constitution, i.e. constitutional principles and constitutional norms, are the basis and at the same time the framework of public administration. The essence of public administration is to ensure constitutional values.

To reveal the question, such general scientific methods of cognition were used as analysis, synthesis and generalisation. Comparative legal, concrete sociological research methods, interdisciplinary complex approaches attracted the attention of the researcher in the study of the problem.

The author relied on the works of such researchers in the field of public administration as Tikhomirov Yu. A.,[1] Vasilenko I. A.,[2]

Litvak B.[3] and specialists in the sphere of constitutional law – Avakyan S. A.,[4] Bondar N. S.,[5] I. Kravets I. A.,[6] Crosse V. I.[7] and Liverovskii A. A.[8]

2. Constitutional Values and Public Administration

Public administration is part of people's daily lives. Neither the state nor society can be imagined without governance. Public administration is a way of influencing public relations. Yu. A. Tikhomirov defines public administration as an organised process of management, regulation and control of state bodies over the development of economic and cultural spheres and other spheres of public life.[9] This is the so-called broad approach to the definition of public administration. In the narrow sense of the word, public administration is a state-power activity of the executive authorities of the state to carry out their functions.

Public administration, in both the broad and narrow sense of the word, is based on the Constitution.[10] Public administration is a kind of public-power activity. It is characterised by certain features. First, it is an activity that is managerial in nature. Secondly, it is carried out constantly and continuously. Third, it is a planned activity. Public administration is based on the principle of legality, i.e. it is carried out by the authorised state bodies established in the manner prescribed by law, using the methods provided by the law, within the limits defined by the law. Another important feature of public administration is the following. It is the management activity existing in the modern state and society, aimed at the achievement of generally significant results.

The role and importance of public administration is determined by the constitutional framework. Modern constitutions consider the idea of democracy as one of the basic principles of the organisation and functioning of the state and society. The people are the source of power in the state. Democracy means the sovereignty of the people. The people exercise their power either directly or through the state bodies they form. The direct forms of popular democracy are elections and referendum. The people or the body they have chosen to represent them determine the scope of powers of the subjects of public administration, the methods and limits of their implementation, as well as the range of issues that can be considered in a referendum. The constitutional character also has the definition of the sphere of activity of the self-government of the people. Self-government is implemented through a system of local self-government bodies, the composition of which may be different. The researchers identify today three main models of local government.[11] The Anglo–Saxon model is characterised by a high degree of autonomy of local governments and the absence of special local government bodies. Local governments in the United Kingdom operate within the limits of the law, custom, established practice, judicial precedent, i.e. the unwritten Constitution, independently and under their own responsibility. The second model is the continental model, the classic example of which is France. One section of the French Constitution of 1958,[12] consisting of only one article – Article 72, is devoted to the issue of local self-government according to which "local communities of the Republic are communes, departments, overseas territories. All other local groups are formed by law". Collectives are freely managed by elected councils, but under conditions defined by the law. National interests, administrative control and law enforcement are the area of activity of government representatives in departments and territories. The same dual nature of the organisation of local government and self-government distinguishes the Republic of Belarus. Local administration and self-government in Belarus is exercised by

citizens through local councils of deputies, executive and administrative bodies, and bodies of territorial public self-government (Article 117 of the Constitution).[13] The combined model of organisation of local self-government is characteristic for Germany. In the Federal Republic of Germany, under Article 28 of the Basic Law, "communities shall be entitled to regulate all the affairs of the local community within the law under their own responsibility".[14] Accordingly, the public administration in Germany is composed of areas with several communities that are community associations. The commune is the basic element of the whole mechanism of self-government.[15] Public administration is a type of management system. This is a complex phenomenon, which includes the subjects, objects, goals, functions, legal and information support, the procedure for decision-making and execution. All components of public administration are determined by the Constitution, i.e. are set by the constitutional principles and norms. First, the subjects of public administration. The subjects of public administration in the broad sense of the word are individuals, public organisations, state bodies. If we consider public administration the implementation of its powers by state bodies, i.e. public administration in the narrow sense of the word, its subjects are the bodies of state power, empowered to exercise power and direct control of social processes. The state apparatus is numerous. Accordingly, the subjects of public administration may be classified on various grounds, many of which are constitutional in nature. The subjects of public administration are divided into legislative, executive and judicial branches of government. This basis of classification of state bodies is determined by Articles I, II and III of the Constitution of the United States,[16] Article 10 of the Constitution of the Russian Federation,[17] Article 6 of the Constitution of the Republic of Belarus.[18] Public administration is divided into three parts: national, regional and local. The 3-element structure of the state apparatus is typical for federations, and 2-element structure – for unitary states. The forms of political–territorial organisations are defined by the Constitution of the state. The competence of state bodies is also established by constitutional norms. The above allows them to subdivide depending on the object of influence in leadership, administrative and economic field, etc. Fixed by the Constitution, the principle of decision-making entities of public administration is the basis of dividing them into single (individual) and collegial decision making.

The objects of public administration are the elements of the social environment and their relations, changing as a result of interaction with the subject of public administration. The specificity of various objects of public administration is determined by the fact that they all contain a "human factor". The objects of public administration are capable of self-movement, purposeful, adaptive, capable of self-government and dependent on the conditions of social life. These properties determine the methods, intensity and measure of influence on them of the subjects of public administration. The more developed the managed objects, the softer the public administration can be. In addition, according to the content determined by the social functions of objects, it is possible to distinguish objects management, distributed across the spheres of society. These are objects of economic, social, spiritual, political systems. Constitutions determine the foundations of the state and society, i.e. the constitutional system (otherwise, the state and social system). The structure of the constitutional system is characterised by economic, political, social,

spiritual and ideological subsystems. Constitutional principles and norms determine the basis of each of the subsystems, direction, measure and limits of its regulation.

The purpose of public administration coincides with the purpose of the modern state and society. As such, it is expressly determined by part 1 of Article 2 of the Constitution of the Republic of Belarus,[19] which states: "The person, his rights, freedoms and guarantees of their realization are the highest value and the goal of society and the state"; part 1 of Article 2 of the Constitution of the Russian Federation,[20] according to which the person, his rights and freedoms are the highest value, and recognition, observance and protection of human and civil rights and freedoms – the duty of the state; Article 2 of the Constitution of Italy,[21] according to which the Republic recognises and guarantees the inalienable rights of the human person as a private person and as a member of a public association in which his personality manifests itself, and requires the fulfilment of the immutable obligations arising from political, economic and social solidarity. According to the researchers, the legal aims of public administration should be distinguished.[22] In socio–economic terms, the purpose of the activities of state bodies is the satisfaction of public interest and the economic well-being of the state and society. Public interest in this case is associated with the construction and maintenance of a certain system of economic relations. From a political point of view, it is the creation and functioning of a political system that would ensure the participation of all political forces of the state and society in the management of their affairs, that would contribute to human development. The security purpose of public administration is associated with ensuring public order and public security. The organisational and legal purpose – with the formation of a legal system that promotes the implementation of all functions of the state and society. It seems that all of these goals of public administration are the edge of one expected result, which state and society seeks – to ensure the rights and freedoms of the citizens. This constitutional goal, both the constitutional principle and the constitutional value, is embodied in many modern Constitutions, but more importantly, it is becoming both a basic and political value of society. Moreover – regardless of the state legal system. In modern realities, there is an increasing trend towards the international understanding of the values of the state and society.

The objectives of public administration are realised through its functions. Functions of public administration – the main activities of its subjects aimed at achieving the goals. The functions of the subjects of public administration reveal its essence. From the point of view of society and the state, the subjects of public administration implement such functions as setting goals and objectives, forecasting, planning, organising function, motivation function, regulation and control. As mentioned above, the objectives of public administration are directly determined by the Constitution. The same applies to the tasks of public administration. Among them – ensuring the internal and external security of the state, creating conditions for the development of democratic institutions of society, guaranteed protection of the rights and freedoms of citizens, the creation of equal legal conditions for the development of all forms of property, the formation of market mechanisms, ensuring mutually beneficial cooperation of central and local authorities.

The function of planning in public administration is expressed in setting goals, determining the necessary resources for their achievement, methods and terms, as well as forms

and methods of step-by-step control over the activities of the control object, by which the implementation of the planned task is achieved.

The forecasting function in public administration is the development of a reasonable judgment about the future development of the company or its options, ways and terms of its achievement. The forecast is a reliable tool for making strategic management decisions.

The organisation as a function of public administration is to determine the organisational provisions establishing the order of management and procedural regulation: regulations, standards, instructions, requirements, responsibility, etc.

Motivation as a managerial function is usually considered in relation to limited, local systems. The motivation is not so much to form the motives of people's activities as to know, catch and form actions to guide the system in accordance with them. In case of public administration, the function of motivation is essentially the same, but differs in scale and content. Motivation at the national level takes the form of a national idea.

Regulation is an important function of modern public administration. It can be seen in a broad and narrow sense. The state, through the issuance of laws, regulations and judicial acts, establishes certain general rules of conduct for participants in public relations, i.e. regulates them.

The control function in public administration is designed to ensure discipline, legality, compliance with the regime of activity and the effectiveness of subjects and objects of public administration. In this regard, the control functions are connected with the state regulation to increase its efficiency.

The specific functions of public administration are embodied in the concrete manifestations of the whole variety of situations arising in practice, where it is necessary to act only on behalf of the state, realising its competence. These include the law enforcement function of judicial institutions, election and referendum commissions, state statistics (population census), licensing of activities, regulation of special legal regimes (state of emergency, free economic zones) and a number of others. These functions are based on the Constitution and must be subordinated to it.

The performance of functions by public administration actors is inextricably linked to the fundamental basic ideas underlying them and determining them. Constitutional legal principles – democracy, legality, separation of powers, unitarism (or federalism), etc. – are the basis of management activities, reveal its essence and act as a criterion for assessing their effectiveness. At the same time, not only the social and legal, but also the organisational principles of the subjects of state administration are determined by the Constitution. Sectoral and territorial principles, functional and linear, dual subordination and a combination of unity of command and collegiality all have a constitutional nature. Thus, the Constitution of the Republic of Belarus declares in part 1 of Article 1 that the Belarusian state is a democratic state and a unitary republic.[23] According to Article 7 of the Basic Law, the principle of the rule of law is established in Belarus, one of the most important aspects of which is the action of the state, all its bodies and officials (subjects of state administration) within the framework of the Constitution and the legislative acts adopted in accordance with it.[24] According to Article 1 of the Italian Constitution, democracy is the most important constitutional principle of the organisation and activities of the state, its bodies, officials and all subjects of law.[25] Article 20, paragraph 1, of the Constitution of the Federal

Republic of Germany enshrines both the principle of democracy and the principle of federalism.[26]

The legal basis of public administration is essentially determined by the Constitution. The basic law establishes the sources of law, builds their hierarchy. The normative basis of public administration in the conditions of the Republic of Belarus is the Constitution of the Republic of Belarus, laws adopted by the supreme representative body of the state – the National Assembly of the Republic of Belarus, the Belarusian Parliament, decrees and edicts of the President of the Republic of Belarus, other acts of state bodies issued on the basis and in accordance with the Basic Law of the Republic of Belarus.

In the organisation of public administration, the implementation of the functions of its subjects, the use of certain methods of their implementation, in the decision-making process and decision's execution may occur errors, distortions, deficiencies that have a negative impact on the order of social relations. Since constitutional principles and norms are the basis of this order, these errors should be considered a constitutional legal deformation. According to Nikitina A. V., constitutional deformations (or defects) are the shortcomings of legal regulation, interpretation and application of the law, leading to violation or threat of violation of constitutional principles and constitutional values.[27]

Constitutional deformations can be manifested in different ways and in different spheres of public administration. Therefore, it makes sense to highlight the constitutional deformation in the economic, political and social spheres. They can also be divided into deformations related to the organisation of state power and the legal status of the individual.

A constitutional deformation in the economic sphere, for example, related to the implementation of the most important constitutional principle of equality of state and private property, is the priority given to the protection of state property to the detriment of private property. Or withdrawal of the land plot by virtue of the interests of social necessity of private ownership or other lawful possession of the property of the state. An example of constitutional deformation in the political sphere is, for example, the illegal refusal to register a candidate or the refusal to register a political party that does not comply with the law.

Constitutional deformations are extremely diverse in their manifestations. One of the constitutional deformations, which is clearly manifested in modern States (especially in the territory of the former Soviet Union), is the establishment or reorganisation of state bodies or institutions, the needs of which are objectively absent. The lack of scientific forecasting in terms of the development of the state apparatus can generate a cyclical problem: the increase in the number of civil servants leads to an increase in the cost of their maintenance; from an economic point of view, this creates a need to reduce the number of officials; the reorganisation of the state apparatus leads to the emergence of new state structures and further on. The reform of the bureaucracy in modern states, carried out in line with legal reforms, often raises the question of duplication of powers of various state bodies, unclear definition of their competence, as well as difficulties in its differentiation. Hence – defects in the management system, including the legal regulation of social relations. Often, it is easier for an official not to take active actions than to justify their legitimacy in the future. The lack of initiative of the civil servants, their passivity can be regarded as another manifestation of constitutional deformation.

Constitutional deformations in public administration undermine the authority of the law and threaten public order. Therefore, it seems necessary to determine the directions of their minimisation. The first direction is the optimisation of the functions and powers of bodies exercising public administration. Under the name of optimisation, A. L. Mironov understands the clarification of specific powers, the establishment of the exact responsibility of the controlled bodies for the execution of decisions, the strengthening of the financial and organisational basis of the control bodies.[28] Another direction is training of professional civil servants. Moreover, it should be borne in mind that professionalism is not only deep knowledge and skills of officials, but also a high level of their moral and legal consciousness, based on the understanding and acceptance of human values. The application of sanctions for violations in the administration of public administration also appears to increase the responsibility of public servants for their decisions.

3. Conclusion

Thus, it is possible to draw the following conclusions:

Public administration as an organised process of management, regulation and control of state bodies over the development of economic and cultural spheres, other spheres of public life, and as the power activities of the executive bodies is based on the Constitution, obeys to it and is limited by it.

Subjects, objects, goals, functions, legal and information support, the process of decision-making and execution are determined by constitutional legal principles and norms.

When organising and in the process of functioning of the public administration, violations are possible, which are deviations from the constitutional legal principles and norms, i.e. constitutional legal deformations.

Constitutional legal deformations threaten public order and undermine the authority of the Constitution.

The methods aimed at preventing constitutional legal deformations are optimisation of functions and powers of the subjects of public administration, improvement of personnel work, strengthening control over the sphere of public administration and the use of legal responsibility, if necessary.

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Case study

Tax Inspection – Unlawful Interference

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Abstract: This article focuses on the issue of options, respectively the scope of application of the tax authorities' discretion in the use of available instruments to ensure the objective of tax administration, i.e. the correct identification and determination of the tax and its payment.[1] The article is based on a case study of the decision of the Supreme Administrative Court of the Czech Republic.

Keywords: tax; additional taxation; tax inspection

1. Introduction

The result of the decision of the Supreme Administrative Court of the Czech Republic, which is analysed in this article, is the declaration of the unlawfulness of the tax inspection. As it might seem at first glance, the problem was not, as in many cases before, in the incorrect procedure of the tax administrator at the beginning of the tax inspection, the definition of its scope or its length. Tax inspection has been dealt with in many decisions. For example, the decision of the Constitutional Court of 8 November 2011 (Pl. ÚS 33/11) deals with the possibility of the tax administrator to initiate tax inspection. The Constitutional Court noted that, after previous differences in decision of courts, tax inspection can be initiated by the tax administrator even without specific reasons and suspicions. But in the analysed case, the court deals with the question whether the tax administrator should have used other, less burdensome means before the tax administrator proceeds to tax inspection.

The problem, and therefore the reason for dealing with the above mentioned issue, is, of course, the consequences of the taxpayer's undue process, which in a certain sense may depend on the decision of the tax administrator whether he notifies the taxpayer or initiates the inspection. De facto, it is also the question whether the penalty payment under section 251 of the Tax Code is imposed.

In practice, it will be important whether such a mistake is one-off or repetitive. This is related to another issue, namely the categorisation of tax subjects, which would be the issue of self-employment and the motivation of one or the penalisation of others. It is the same in substance but depends only on the point of view. Hungary has chosen the system of motivation. The question is how this system will develop and whether the responders who

will have no benefits will claim to be sanctioned. Perhaps, in fact, the probability of tax inspection will be higher. In addition, in such a motivation system (of course, it depends on its particular setting), it must necessarily be that all of the taxpayers are initially classified in category 0. If they will fulfil the obligation properly, they will proceed to categories 1, 2, etc. It can be assumed, in such cases when there is a majority of such entities that those who fail to fulfil the obligations will remain in category 0, and de facto, this group corresponds to a group that could be ranked on the basis of another criterion, the opposite one.

2. Legal Regulation

This is the interpretation of Section 143 (3) of Act No. 280/2009 Coll., The Tax Code, as amended (hereinafter the Tax Code). The issues are, whether the tax administrator should use firstly means in accordance to the client's approach and notify the taxpayer (although the taxpayer was already in delay with the tax assessment; the tax entity set the tax, but it was suspected to be incorrect).

The Supreme Administrative Court tried to define a very thin line when the tax administrator has to notify the taxpayer to fulfil his duties additionally, and when he has to choose another procedure, harder, more powerful to get the data himself. In the first case, the tax administrator takes care of the welfare of the individual and alerts the inattentive addressee of the self-enforcement legal norm. This costs a lot of money, and of course it is true that the money is paid by other honest and supervised tax payers. In the decision, the court also refers to the basic objective of tax administration, but in my opinion the payment security is insufficiently accented.

To analyse this case, it is necessary to focus on the following legal rules, respectively individual concepts and institutes, which are interpreted in the decision of the Supreme Administrative Court. This is a situation where the taxpayer filed a proper tax claim, but there was a situation where the tax administrator had doubts about its correctness, and the issue is how the tax administrator should properly react.

It responds to this situation defined in the framework of Section 145 of the Tax Code – Procedure for not submitting a proper or additional tax return.

"(1) In the absence of a proper tax return, the tax administrator prompts the taxpayer to submit it and sets a substitute period. If the taxpayer fails to comply with this notice within the specified time limit, the tax administrator may assess the tax by means of utilities or assume that the taxpayer claimed a tax of CZK 0 in a regular tax return.

(2) Where it can be reasonably assumed that the tax is to be taxed additionally, the tax administrator may prompt the taxable person to submit an additional tax return and set a substitute period. If the taxpayer fails to comply with this notice within the specified time limit, the tax administrator may levy tax on the aid (on his behalf)."

Furthermore, Section 143 (3) and (2) of the Tax Code should be mentioned.

"(1) The tax may be based on an additional tax return or an additional bill, or ex officio. The legal power of the existing tax assessment decisions is not an obstacle to it.

(2) According to the results of the arbitration procedure, the tax administrator shall tax the difference in the amount of the last known tax and the newly established amount, and he shall simultaneously prescribe the calculated tax difference in the tax records; additional tax assessment for direct payment of the taxpayer is also understood as taxation.

(3) Additional tax assessment ex officio may occur only on the basis of the result of the tax inspection. If the tax administrator discovers new facts or evidence except the tax audit, on the basis of which it can be reasonably assumed that the tax is to be additionally assessed, tax administrator proceeds according to Section 145 paragraph 2."

It was clear from the facts of the analysed case that the tax administrator had apparently quite specific information and documents, that he could even assess the tax (of course, he could not be sure what causes the error). Thus, the tax administrator could use the procedure to remove the doubts, and in fact, to point the taxpayer to the error. He did not have to prompt to submit an additional tax return. And, according to the results, if the doubts were not scattered and the taxpayer did not submit the additional tax return, the tax administrator could initiate a tax inspection with the aim of detecting the necessary facts. The procedure is governed by Section 89 of the Tax Code:

"(1) If the tax administrator has specific doubts about the correctness, veracity or completeness of the proper tax return or additional tax return and other documents submitted by the taxpayer or the truthfulness of the data contained therein, the tax administrator prompts the taxpayer to remove doubts.

(2) In a tax administrator's prompt, the tax administrator raises doubts in a way that will allow the taxpayer to comment on it, complete the incomplete information, explain the uncertainties, prove the untrue data, or prove the truthfulness of the data, and provide evidence to eliminate these doubts.

(3) In the prompt, the tax administrator sets a deadline for the elimination of doubts, which shall not be shorter than 15 days, and inform the taxpayer of the consequences associated with the non-removal of doubts or non-observance of the deadline.

(4) Where it is clear from the proper tax return or the additional tax return that the taxpayer is liable to a tax deduction, the tax administrator shall, in case of doubt, issue a prompt for the elimination of doubts within 30 days from the date of such tax return submission but at the earliest from the last day of the deadline set for submitting a proper tax return or an additional tax return."

In this way, the tax administrator would dispel his doubts about the correctness of the tax, perhaps he would have found out, although this is not primarily a key one, and it is irrelevant for determining of the tax, why the tax payer did not give this information to the tax administrator (as an argument in the cassation complaint, it looks somewhat ridiculous).

3. Case Study

In view of the possible unlawful interference in the form of tax inspections initiated by the tax administrator, the Supreme Administrative Court assessed a cassation complaint by the Financial Office against a taxpayer at its meeting on May 6, 2015.[2] The tax administrator

demanded the annulment of the Regional Court's decision finding the illegality of the tax inspection.

Since the tax administrator had doubts about the amount of the submitted tax, in particular, the tax administrator considered that the taxpayer did not include the income relating to the real estate change contract in 2010. The tax administrator therefore initiated the tax inspection and could consequently establish the tax ex officio.

The tax entity, however, opposed the fact that the tax administrator did not proceed properly and took advantage of the tax inspection institute prematurely. Referring to Section 143 (3) of the Tax Code in conjunction with Section 145 (2) of the Tax Code, the taxpayer should first have been prompted to submit an additional tax return if the tax authority had at this time information (obtained expect the tax inspection) on the basis of which he could reasonably assume that the tax will be set additionally.

In this case, it was demonstrably established in the proceedings before the Regional Court that the tax administrator was convinced (by his search) that the value of the exchanged real estate was not included in the personal income tax base. He also had at his disposal a contract of exchange and expert judgment of the land exchange valuation (on the basis of which it is possible to determine the tax). The Tax Administrator stated in his defence that he had begun a tax inspection to dispel doubts, referring to the results of the tax inspection, which should determine whether and in what specific amount the tax would be set additionally. In addition, he also wanted to find out "why" the taxpayer did not provide the information.

The tax administrator, however, defended the conclusions of the Regional Court[3] and argued that it was not possible to reliably assume the reasonableness of the additional tax assessment before the initiation of the tax inspection. He also argued, referring to the ruling of the Supreme Administrative Court,[4] that although it is necessary to choose a procedure which, in the circumstances, best accords with the principle of restraint and proportionality, on the other hand, the tax administrator may proceed to tax inspection immediately if he has good reason to believe, that another approach would not suffice to achieve the purpose of tax administration. In order to decide whether to initiate a tax inspection or to prompt the taxpayers to submit an additional tax return, it is essential to take into account the principle of effective security of the basic tax administration objective. [5]

The Supreme Administrative Court first analyses the explanatory memorandum to the Tax Code in relation to Section 145 (2) of the Tax Code and focuses on the part where the principle of speed is accentuated according to which the tax administrator should proceed in case of various findings so that the tax returns are submitted with respect to the primary way of fulfilling the duties of the taxpayer – the obligation to submit, analogously also in the additional procedure. According to the explanatory memorandum, it is at the discretion of the taxpayer to submit a tax or allow the tax administrator to charge the tax on his behalf.

In addition, the Supreme Administrative Court also notes the differences in the legislative capture of rules under Section 145 of the Tax Code. In the analysed case, although the second paragraph of the provision is essential, but as the tax administrator correctly states, the provision of paragraph 1 states that the tax administrator does not have the

possibility to consider *("the tax administrator prompts"),* but in case of additional tax returns the provision of paragraph 2 provides the possibility (not obligation) of the tax administrator *("the tax administrator may prompt").*

Furthermore, the Supreme Administrative Court expresses in its decision on §143 (3) of the Tax Code and states that the explanatory memorandum shows that: *"the tax administrator will either find out in the framework of the tax inspection and will impose a tax on the result, or the tax administrator obtain by another means evidence that a change in the last known amount of the tax is needed, the tax administrator prompts the taxpayer to submit an additional tax return or an additional bill."*[6]

The Supreme Administrative Court first considered the interpretation of the reasonable assumption by analysing the above-mentioned provisions and also relied on the fundamental principles of tax administration and interpretation in the spirit of the fundamental principles of tax administration. He states that the notion of "reasonable" as "for sure" cannot be understood. It further states that, the condition of a reasonable presumption of additional tax establishment is not only the situation in which the tax administrator would be able to determine the tax in a specific amount on the basis of information obtained apart from the tax inspection. It argues quite logically when it states that this situation is unlikely, but rather common, the situation in which the tax administrator finds out that the tax return does not contain specific tax-related facts and it can already be assumed that the tax will be additionally established. That means that if it is found that the tax return is incomplete, it can generally be assumed that the tax will be established additionally, regardless of its final amount (which is irrelevant, and the law does not even mention a specific amount).

The prompt of the tax administrator is referred by the Supreme Administrative Court as an *"instruction to allow the taxpayer to fulfil its obligation"* and as a reflection of the principle of proportionality and restraint. [7]

I cannot agree with this statement (the "instruction"). The taxpayer has the possibility to submit the additional tax return even without the tax administrator's prompt, in particular time limits.[8] In general, it would be more likely to refer to the tax administrator's prompt (after fulfilling the legal conditions) as a reflection of the principle of client access and, where appropriate, restraint.

The Supreme Administrative Court furthermore deals with the analysis of Section 145 of the Tax Code. It understands it as a prerequisite for effective tax administration, with regard to the number of taxable entities and related tax obligations. I can agree with this statement and further, it is necessary to highlight the close connection with the method used to require tax-related obligations, namely self-enforcement. The Supreme Administrative Court also notes the fact that in practice there is a demand for correct and complete identification and determination of the tax (there is a certain probability of incorrect data) with the factual reliability of tax proceedings with a large number of subjects. Here it is necessary to add more in connection with the inspection part of the tax proceedings, especially when it is not performed on a voluntary basis, properly and on time. Moreover, this widely understood control (and search) activity of the tax administrator is a basic and necessary prerequisite for the functioning of tax administration and self-enforcement, i.e. the result of the prevention principle and a certain motivation to

properly discharge of the duties, thus ensuring efficient administration and the process of tax collection.

Following the mentioned provision which deals with a situation where the taxpayer did not at all submit tax, the Supreme Administrative Court interprets the provision of the second paragraph of that Section, which provides that the tax administrator may prompt when it can be reasonably assumed that the tax will be additionally established. The situation where the tax return is not submitted at all, consumes the provisions of the first paragraph. In such case, the tax administrator must prompt. In addition, in the provision of paragraph 2, the legislator would refer to the assessment of the tax, not the additional assessment.

When the tax return is submitted, but apparently incorrectly and there is a reasonable presumption of additional assessment, the tax administrator can prompt. However, the Supreme Administrative Court interprets this provision in the opposite way, as the possibility of the tax administrator in certain cases "not to prompt" the taxpayer and to initiate tax inspection, i.e. to intervene lawfully in the rights of the taxpayer. At the moment, in the opinion of the court, the interest in the correct assessment of the tax with the efficiency and feasibility of the tax procedure prevails and justifies the fact that the legislature did not necessarily assume the same number of prompts according to the additional establishment of tax as the number of proper tax returns. This can generally be accepted, but I cannot agree with the used justification. The Court therefore interprets paragraph 1 as the general duty of the tax administrator to always prompt, and paragraph two as a specific limitation of that option where the tax controller reasonably assumes. This somewhat denies both the verbal and the systemic interpretation of this paragraph.

4. Conclusion

On the basis of a procedural analysis of the situation, taking into account the system of tax procedure and the fact that paragraph 2 deals with additional taxation, tax inspection can be understood as a certain *ultima ratio* that may occur within the deadline for additional taxation. In general, there is still a prerequisite for self-enforcement, as in the proper assessment process, i.e. the taxpayer itself may detect a mistake in his submission and may change it. It is impossible to rely on the fact that the tax administrator will reveal most of the mistakes. The system works on prevention and voluntarism, and assumption that the tax inspection can be carried out.

In practice, there will be fewer cases where there will be a reasonable presumption of additional taxation. The assumption is always here, as the court said, but it can result from the statistical fact that the legal rules are not always met on a voluntary basis and therefore the coercion exists. This, of course, cannot and I do not want to criminalise every addressee of the legal norm, respectively taxpayer in this case.

It should also be taken into account the fact that a potential prompt is already part of an additional taxation procedure, i.e. the phase, when the taxpayer must assume that the tax administrator will verify his tax liability, whether by random check, suspicion of own

investigation (search activities) or statement of a third person. And the taxpayer had the opportunity and sufficient time to submit turn return properly in the original date.

Therefore, if there is a reasonable expectation and at the same time, there is no risk of non-taxation and avoidance of taxation, the tax administrator should, respectively, must prompt the taxpayer, especially with regard to the principle of economy, client access and the primary method of applying tax law rules – self-enforcement.

Efficiency and feasibility of the tax administration cannot be perceived as opposed to the requirement of correct tax assessment, quite the contrary. In many cases, the need for legal (quick) intervention in the taxpayer's rights will be more effective, especially in the event of a recovery phase. In addition, the possibility of tax inspection must be perceived as a preventive and effective tool for the effective functioning of the voluntary system of self-enforcement.

This situation could also be seen through the eyes of other taxpayers and the principle of equality. They may feel affected that the tax administrator has not also prompted for an additional tax return, taking into account the fact that the tax administrator has not pursued conscientiously his search-control activity and has not found their mistake.[9]

This would *de facto* mean in an extreme case that before initiation of the tax inspection, especially if it is random, the tax administrator should obtain all possible information about the transactions and legal facts of the taxpayer, in particular from the databases and the automated approach, as well as from other public authorities. Only after that he would be able to initiate tax inspection without the risk of any indication of the inspection being illegal.[10]

The tax administrator has the possibility (not the obligation) to prompt also with regard to the principle of economy of tax administration. Although there may be a fact that indicates the incorrect data in the tax return, but this may not automatically imply a presumption of additional taxation.

It may happen that, despite some income is not included, the resulting tax does not change, for example because the taxpayer's discount was not fully consumed. That means that the lack of information does not automatically affect the resulting amount of tax. The opposite situation is Section 141 (1) and (2) of the Tax Code which states that the taxpayer is obliged to file an additional tax return if he finds that he has a higher tax liability and can file it, if the tax is the same or lower. Again, with regard to the principle of economy, the negative difference in the calculated tax (the part will be refunded) may not be automatically economically efficient for the taxpayer because it means to fulfil the tax return again (additional costs).

Therefore, it is not possible to force the taxpayer to submit additional tax return if the tax would have been the same or lower, only to have it "correctly" in the evidence of the tax administrator. It is a manifestation of the principle of the material state which appears in many decisions of the Constitutional Court.

In this particular case, I consider essential the tax administrator's weak argumentation, the lack of explanation of the facts and, in the least, the weak defence of the principles of tax law and the public interest in the form of an obligation to proceed in such a way that the tax is determined and secured. The need to act preventively and motivational, even in the form of a threat of sanctions is also very important. The court itself stated the practical

and factual impossibility of inspection of each entity. This is all the more necessary to ensure a clear interpretation of the norms and to act educationally that the fault will be followed by the consequence (the principle of economy and speed of administration). It is not possible to educate in a constant need to prompt any addressee of any rule.

Tax inspection should also be perceived from a certain point of view as a manifestation of power intervention, the *ultimate ratio* leading to the objective of tax administration specifically according to the tax of a particular taxpayer.

It can be agreed that the tax administrator should be guided by the principle of reticence for its application, for many reasons on the side of the taxpayer, but also with regard to the principle of economy. Inspection itself is not an easy task, and it is very costly for the tax administrator because it also involves many procedural obligations to ensure a fair process.

In addition, the tax administrator should be more lenient, especially in case of "errors in writing and errors in numbers" in tax returns, respectively in situations when the taxpayer communicates the material information, for example in the form of an attachment, but does not fill the right so-called "box". It always depends on a particular tax administrator, but in general it can be said that this approach is applied.

In the analysed case, the tax administrator obviously had a reasonable prerequisite for additional taxation and did not proceed in accordance with the legal regulations. It follows from the facts that the tax authority was required to prompt the taxpayer. The problem could arise in situations when the prompt could endanger the determining of the tax in correct amount, obscuring information about other unapproved revenue or transactions, and this could lead to the tax administration being thwarted. With this, the tax administrator did not completely deal with in his submissions, and this was not proven.

References

1 Section 1 (2) of the Tax Code.
2 Supreme Administrative Court: 2 Afs 209/2014.
3 On the grounds of the judgment under appeal, the Regional Court concluded that before initiating the tax inspection, the tax administrator had sufficient specific information which allows him to choose the procedure proportionally, namely the tax administrator should prompt the taxpayer to submit additional tax return. Referring to the decision-making activity of the Supreme Administrative Court, the Regional Court added that limiting the personal sphere of an individual by the tax administrator's duty to carry out tax inspection must follow a legitimate aim and be appropriate, necessary and proportionate in relation to that objective. Thus, if the conditions for the procedure under Section 145 (2) of the Tax Code were met, the tax administrator could not proceed to the most burdensome procedure – proceed to the tax inspection. The Court thus deduced that the tax inspection was an unlawful interference from the beginning.
4 Constitutional Court: 5 Afs 92/2008-147.
5 Constitutional Court: 5 Afs 92/2008-147.
6 Supreme Administrative Court: 2 Afs 209/2014.
7 See Section 5 (3) of the Tax Code.
8 See Section 141 of the Tax Code.
9 Information from parallel proceedings.
10 Kobík also draws attention to the principle of equality (see Jaroslav Kobík, *Daňový řád s komentářem* [Tax Code with Commentary], 2nd edition, 741–742 (Olomouc, Anag, 2013).

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European Investigation Order and the "Brussels" Bureaucracy

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Abstract: The contribution deals with the insight on the European investigation order, as a tool of mutual judicial assistance in criminal matters. With the purpose to show that the criticised, so called Brussels bureaucracy very often just reacts on the propositions of the member states. A good example of this is given in the presented article. It shows the result of a conducted CEPOL survey and connects it with the short presentation of this tool.

Keywords: European investigation order; mutual cooperation in criminal matters; template; bureaucracy; statistics

1. General Overview

In October 2017, CEPOL approached CNUs in 26 Member States[2] to provide direct contact points in law enforcement agencies (dealing with the subject of the OTNA) of their respective countries; 21 MS responded this initiative. Further on, the questionnaire was sent to these nominated contact points (law enforcement agencies and CEPOL National Units). This resulted in 44 completed answers from different LE agencies from 21 Member States, indicating a *relatively high response rate: 80.76% of Member States representing 42,601 law enforcement officials*[1] *across Europe,* expressed their needs in the field of Counterterrorism.[2]

The *most relevant main topic* for law enforcement officials in this area is related to *foreign terrorist fighters* (85.71% of MSs found it relevant) followed by *financing terrorism, radicalisation and open source intelligence (80.95%)* (Table 1). The least relevant need was about *hostage taking* (47.62%):[3]

Table 1.
The relevance and urgency rates of the individual law enforcement topics

Main topics	Relevance rate	Urgency rate	
Foreign terrorist fighters	85.71%	85.00%	Relevant and urgent
Radicalisation	80.95%	88.00%	Relevant and urgent
Financing terrorism	80.95%	84.00%	Relevant and urgent
Open source intelligence	80.95%	76.00%	Relevant and urgent
Terrorism/Firearms trafficking	71.43%	92.00%	Relevant and urgent
Covert Human Intelligence Sources	66.67%	80.00%	Relevant and urgent
Protection of soft targets	66.67%	72.00%	Relevant and urgent
Critical infrastructure protection	61.90%	68.00%	Relevant and urgent
Encryption technologies used to facilitate terrorism	57.14%	76.00%	Relevant and urgent
Aftermath of attack	57.14%	72.00%	Relevant and urgent
CBRN,CBRNE	57.14%	68.00%	Relevant and urgent
Hostage taking	47.62%	64.21%	Less relevant and urgent
E-evidence	42.86%	61.18%	Less relevant and urgent
De-radicalisation	33.33%	54.48%	Less relevant and urgent

Source: Compilation of the authors based on OPTNA on Counterterrorism, CEPOL, presented on the Management Board meeting in Sofia on 15–16 May 2018. 3.

With the aim of better understanding the needs of LE officials, various *horizontal aspects* were presented for the assessment of respondents under each topic. As the relevance varies from topic to topic, the overall assessment demonstrated *that training should put emphasis on prevention, cross border exchange of information, evidence and criminal* AS intelligence, as well as on cooperation with non-EU countries. At the same time protection of personal data, knowledge of cultural aspects and history, as well as fundamental rights were given less priority. According to the CEPOL's mandate "in its training activities, CEPOL should promote common respect for, and understanding of, fundamental rights in law enforcement"[4] therefore, in spite of its low ranking, fundamental rights should be given priority when designing the training portfolio on Counterterrorism.[5]

Table 2.
The relevance rates of the horizontal aspects of law enforcement

Horizontal aspects	Relevance rate
Prevention	41.46%
Cross border exchange of evidence	40.86%
Cross border exchange of information	40.69%
Cooperation with non-EU countries	39.72%
Cross border exchange of criminal intelligence	37.38%
Better use of EU instruments	36.54%
Information exchange	34.53%
Undercover operations	33.88%
Common definitions	33.65%
Common sanctions	29.96%
Protection of personal data	29.42%
Knowledge of cultural aspects and history	28.26%
Fundamental rights	25.72%

Source: Compilation of the authors based on OPTNA on Counterterrorism, CEPOL, presented on the Management Board meeting in Sofia on 15–16 May 2018. 4.

2. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 Regarding the European Investigation Order in Criminal Matters

The initiative on the adoption of the European Investigation Order came from the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council.[6] The negotiations started in 2010.[7] The Directive was adopted in 2014.[8] Deadline for the transposition was on May 27, 2017.[9]

The main aim of its adoption was to:[10] create a single comprehensive instrument with a large scope; set strict deadlines for gathering the evidence requested; limit the reasons for refusing such requests; reduce paperwork by introducing a single standard for and to protect the fundamental rights of the defence.

Under Article 1 a European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State ("OG the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence in accordance with this Directive. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State. Member States shall execute an EIO on the basis of the principle of

mutual recognition and in accordance with this Directive. The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.

Where the objects, documents, or data concerned are already relevant for other proceedings, the executing authority may, at the explicit request of and after consultations with the issuing authority, temporarily transfer the evidence on the condition that it be returned to the executing State as soon as it is no longer required in the issuing State or at any other time or occasion agreed between the competent authorities.

Member States shall ensure under Article 14 that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.

The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.

Where it would not undermine the need to ensure confidentiality of an investigation the issuing authority and the executing authority shall take the appropriate measures to ensure that information is provided about the possibilities under the national law for seeking the legal remedies when these become applicable and in due time to ensure that they can be exercised effectively.

Member States shall ensure that the time limits for seeking a legal remedy shall be the same as those that are provided for in similar domestic cases and are applied in a way that guarantees the possibility of the effective exercise of these legal remedies for the parties concerned.

The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of an EIO.

A legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases.

The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules, Member States shall ensure that in criminal proceedings in the issuing State, the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.

3. Investigative Measures According to the European Investigation Order

3.1. Temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure

An EIO may be issued under Article 22 for the temporary transfer of a person in custody in the executing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which the presence of that person on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State.

The transferred person shall remain in custody in the territory of the issuing State and, where applicable, in the territory of the Member State of transit, for the acts or convictions for which he has been kept in custody in the executing State, unless the executing State applies for his release.

The period of custody in the territory of the issuing State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing State.

A transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the issuing State for acts committed or convictions handed down before his departure from the territory of the executing State and which are not specified in the EIO.

The immunity shall cease to exist if the transferred person, having had an opportunity to leave for a period of 15 consecutive days from the date when his presence is no longer required by the issuing authorities, has either:

a) nevertheless, remained in the territory; or

b) having left it, has returned.

3.2. Temporary transfer to the executing State of persons held in custody for the purpose of carrying out an investigative measure

An EIO may be issued under Article 23 for the temporary transfer of a person held in custody in the issuing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which his presence on the territory of the executing State is required. Article 22 is applicable mutatis mutandis to the temporary transfer under this Article.

3.3. Hearing by videoconference or other audiovisual transmission

Where a person is in the territory of the executing State and has to be heard as a witness or expert by the competent authorities of the issuing State, the issuing authority may issue an EIO under Article 24 in order to hear the witness or expert by videoconference or other

audiovisual transmission. The issuing authority may also issue an EIO for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission.

The issuing authority and the executing authority shall agree on the practical arrangements. When agreeing on such arrangements, the executing authority shall undertake to:

a) summon the witness or expert concerned, indicating the time and the venue of the hearing;
b) summon the suspected or accused persons to appear for the hearing in accordance with the detailed rules laid down in the law of the executing State and inform such persons about their rights under the law of the issuing State, in such a time as to allow them to exercise their rights of defence effectively;
c) ensure the identity of the person to be heard.

Where a hearing is held by videoconference or other audiovisual transmission, the following rules shall apply:

a) the competent authority of the executing State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identity of the person to be heard and respect for the fundamental principles of the law of the executing State. If the executing authority is of the view that during the hearing the fundamental principles of the law of the executing State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with those principles;
b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the issuing State and the executing State;
c) the hearing shall be conducted directly by, or under the direction of the competent authority of the issuing State in accordance with its own laws;
d) at the request of the issuing State or the person to be heard, the executing State shall ensure that the person to be heard is assisted by an interpreter, if necessary;
e) suspected or accused persons shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, under the law of the executing State and the issuing State. Witnesses and experts may claim the right not to testify which would accrue to them under the law of either the executing or the issuing State and shall be informed about this right in advance of the hearing.

3.4. Hearing by telephone conference

If a person is in the territory of one Member State and has to be heard as a witness or expert by competent authorities of another Member State, the issuing authority of the latter Member State may, where it is not appropriate or possible for the person to be heard to appear in its territory in person, and after having examined other suitable means, issue an EIO under Article 25 in order to hear a witness or expert by telephone conference.

The rules on videoconference or audiovisual transmission shall apply mutatis mutandis to hearings by telephone conference.

3.5. Information on banks and other financial accounts

An EIO may be issued under Article 26 in order to determine whether any natural or legal person subject to the criminal proceedings concerned holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State, and if so, to obtain all the details of the identified accounts. Each Member State shall take the measures necessary to enable to provide the information.

The information, if requested in the EIO, include accounts for which the person subject to the criminal proceedings concerned has powers of attorney. The obligation shall apply only to the extent that the information is in the possession of the bank keeping the account.

In the EIO, the issuing authority shall indicate the reasons why it considers that the requested information is likely to be of substantial value for the purpose of the criminal proceedings concerned and on what grounds it presumes that banks in the executing State hold the account and, to the extent available, which banks may be involved. It shall also include in the EIO any information available which may facilitate its execution.

An EIO may also be issued to determine whether any natural or legal person subject to the criminal proceedings concerned holds one or more accounts, in any non-bank financial institution located on the territory of the executing State.

3.6. Information on banking and other financial operations

An EIO may be issued under Article 27 in order to obtain the details of specified bank accounts and of banking operations which have been carried out during a defined period through one or more accounts specified therein, including the details of any sending or recipient account.

Each Member State shall take the measures necessary to enable it to provide the information referred to in paragraph 1 in accordance with the conditions under this Article.

The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank in which the account is held.

In the EIO, the issuing authority shall indicate the reasons why it considers the requested information relevant for the purpose of the criminal proceedings concerned.

An EIO may also be issued with regard to the information with reference to the financial operations conducted by non-banking financial institutions.

3.7. Investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time

When the EIO is issued for the purpose of executing an investigative measure requiring the gathering of evidence in real time, continuously and over a certain period of time under Article 28, such as:

a) the monitoring of banking or other financial operations that are being carried out through one or more specified accounts;
b) the controlled deliveries on the territory of the executing State; its execution may be refused, in addition to the grounds for non-recognition and non-execution, if the execution of the investigative measure concerned would not be authorised in a similar domestic case.

3.8. Covert investigations

An EIO may be issued under Article 29 for the purpose of requesting the executing State to assist the issuing State in the conduct of investigations into crime by officers acting under covert or false identity ("covert investigations").

The issuing authority shall indicate in the EIO why it considers that the covert investigation is likely to be relevant for the purpose of the criminal proceedings. The decision on the recognition and execution of an EIO issued under this Article shall be taken in each individual case by the competent authorities of the executing State with due regard to its national law and procedures.

In addition to the grounds for non-recognition and non-execution, the executing authority may refuse to execute an EIO, where:

a) the execution of the covert investigation would not be authorised in a similar domestic case; or
b) it was not possible to reach an agreement on the arrangements for the covert investigations.

Covert investigations shall take place in accordance with the national law and procedures of the Member State on the territory of which the covert investigation takes place. The right to act, to direct and to control the operation related to the covert investigation shall lie solely with the competent authorities of the executing State. The duration of the covert investigation, the detailed conditions, and the legal status of the officers concerned during covert investigations shall be agreed between the issuing State and the executing State with due regard to their national laws and procedures.

3.9. Interception of telecommunications

Regarding interception of telecommunications with technical assistance of another Member State, an EIO may be issued under Article 30 for the interception of

telecommunications in the Member State from which technical assistance is needed. Where more than one Member State is in a position to provide the complete necessary technical assistance for the same interception of telecommunications, the EIO shall be sent only to one of them. Priority shall always be given to the Member State where the subject of the interception is or will be located.

An EIO shall also contain the following information:

a) information for the purpose of identifying the subject of the interception;
b) the desired duration of the interception; and
c) sufficient technical data, in particular the target identifier, to ensure that the EIO can be executed.

The issuing authority shall indicate in the EIO the reasons why it considers the indicated investigative measure relevant for the purpose of the criminal proceedings concerned.

In addition to the grounds for non-recognition or non-execution, the execution of an EIO may also be refused where the investigative measure would not have been authorised in a similar domestic case. The executing State may make its consent subject to any conditions which would be observed in a similar domestic case.

An EIO may be executed by:

a) transmitting telecommunications immediately to the issuing State; or
b) intercepting, recording and subsequently transmitting the outcome of interception of telecommunications to the issuing State.

The issuing authority and the executing authority shall consult each other with a view to agreeing on whether the interception is carried out in accordance with point a) or b).

When issuing an EIO or during the interception, the issuing authority may, where it has a particular reason to do so, also request a transcription, decoding or decrypting of the recording subject to the agreement of the executing authority.

4. Conclusion

It needs to be emphasised, that the survey was conducted prior to the implementation deadline for the European Investigation order. So the practitioners did not have any chance to use it in practice.

From the survey it is evident that the law enforcing personnel considers one of the most important needs in the practice the effective smooth and quick cross border exchange of evidence and information. This was also the primary aim of the new coming European Investigation Order. As spoken above, the idea of a European investigation order came from down (the Member States) to the top (European Parliament) as a result of the activity of the member states. The place of the EIO within the mutual recognition programme.

It explores the lessons arising from experience with mutual recognition (specifically the European Arrest Warrant, EAW) and the need for mutual trust. The EIO will extend the mutual recognition programme to enable nearly all mutual legal assistance to be achieved through a single, mutual recognition instrument. In doing so, it represents not

only a further step in the evolution of the mutual recognition agenda, but also a break with the traditional mechanisms of mutual legal assistance. The existing way of obtaining most kinds of evidence from abroad is by using commission rogatories or letters of request.[11]

Due to the EU with the EIO, mutual recognition moves the untested application of the principle from the exchange of existing evidence to active evidence gathering. This is a step into unchartered waters without time to acquire knowledge from the experience of the EEW. The EIO is a departure from the traditional paradigm of recognition of judicial decisions to requests for active participation in criminal investigations with little in the way of refusal grounds. It is also a departure from the traditional method of mutual legal assistance.

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Complaint in Tax Administration as an Instrument to Ensure Good Administration[1]

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Abstract: This contribution deals with the legal institute of complaint as an instrument to ensure good administration, more precisely good tax administration. The main aim of the contribution is to confirm or disprove the hypothesis that a complaint is an institute that effectively protects people involved in tax administration and thereby mediates good governance. In the contribution, the method of analysis will be used to analyse and define theory and legal regulation.

Keywords: good governance; good administration; good tax administration; law; Tax Law; Tax Code; complaint

1. Introduction

The aim of this contribution is to discuss the legal institute of *complaint* as an instrument to ensure good tax administration. Good administration (governance) as one of the basic pillars of the modern rule of law must be obviously protected. This protection is ensured through a variety of institutes. For example, we can refer to the means of protecting the rights of tax subjects which, in addition to this protection, also ensure respect for the principles of good administration. One of these means is a complaint which has a special place among the other means of protecting the rights of taxpayers. It should serve as a fast, operational and effective institute.

The hypothesis of this contribution is that the complaint is an effective institution protecting good governance (and the rights of taxpayers). Throughout the paper, an analytical method will be used to build the text of this contribution.

Nowadays, the issue of complaint is elaborated particularly in decisions of regional courts and judgments of the Supreme Administrative Court. In the academic environment, the topic (complaint) was in general a subject of research especially of Jeroušek,[2] Burda[3] and partly myself.[4] However, these works do not take complaint as complexly as this paper.

The article will be split into chapters in which *good administration* will generally be discussed first and then *complaint* will be addressed as an institute targeting to protect this good administration.

2. Good Administration

Good administration, respectively good administrative practice is difficult to grasp and define. On a theoretical level, good administration is defined for example by Potešil according to who the term "good governance" includes a set of requirements that aim to ensure the quality and proper functioning of public administration in the conditions and environment of a modern democratic rule of law based on respect for fundamental rights and the freedoms of individuals. In other words, good administration is about such a performance of public administration that can be denoted by an adjective expressing its positive attribute – good.[5]

The introduction of the concept of good administration into the legal systems of many states is a merit of the Council of Europe, in particular of its Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. This document recommends that the governments of member states promote good administration within the framework of the principles of the rule of law and democracy; promote good administration through the organisation and functioning of public authorities ensuring efficiency, effectiveness and value for money. These principles require that member states ensure that objectives are set and performance indicators are devised in order to monitor and measure, on a regular basis, the achievement of these objectives by the administration and its public officials; compel public authorities to regularly check, within the remit of the law, whether their services are provided at an appropriate cost and whether they shall be replaced or withdrawn; compel the administration to seek the best means to obtain the best results; conduct appropriate internal and external monitoring of the administration and the action of its public officials; promote the right to good administration in the interest of all, by adopting, as appropriate, the standards set out in the model code appended to this recommendation, assuring their effective implementation by the officials of member states and doing whatever may be permissible within the constitutional and legal structure of the state to ensure that regional and local governments adopt the same standards.[6]

To the described Recommendation, the Code of good administration is attached which contains twenty-two basic principles divided into three sections. The most important of these include: principle of equality, principle of impartiality, principle of proportionality, principle of legal certainty, principle of taking action within a reasonable time limit, principle of participation, principle of respect for privacy and principle of transparency.[7]

In the European Union, good governance is based on Article 41 of the Charter of Fundamental Rights of the European Union, entitled the *Right to Good Administration,* under which everyone has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and other bodies of the Union. This right includes, in particular, the right of everyone to be heard before the adoption of an individual act which could affect him; the right of everyone to have access to the file relating to him, while respecting the legitimate interests of confidentiality and professional and business secrecy, and the obligation of the administrative authorities to justify their decisions. According to that article, everybody is also entitled to the compensation of

damage caused by the institutions of the Union or by its employees in the performance of their duties and the right to write to the institutions of the Union in one of the Treaty languages and receive a reply in the same language.

In response to this article of the Charter of Fundamental Rights of the European Union, the European Parliament has adopted the European Code of Good Administrative Behaviour applicable to the institutions and officials of the European Union. The Code emphasises, for example, the principles of legality, non-discrimination, proportionality, prohibition of misuse of powers, impartiality and independence, objectivity, legitimate expectations, consistency, justice, courtesy or replies in the language of the citizen.[8]

2.1. Czech tax law and good administration

The Czech national law, like the EU law, operates with the institute of Good Administration, but it does not define it.[9]

The basic procedural law regulating administrative proceedings, the Administrative Code,[10] in its Article 8(2), rules that the administrative authorities cooperate with each other for the sake of good administration; the legal principle is however not further explained or developed.

The main tax procedural regulation (which a priori concerns this contribution), the Tax Code,[11] does not explicitly include the term of good administration. It contains, however (similarly to the Administrative Code and to the above-mentioned EU documents and documents of the Council of Europe) a catalogue of the basic principles of tax administration, whose incorporation in the law sought to achieve, among other things, good tax administration. These are the principles of legality, legal license, restraint and proportionality, procedural equality, co-operation, instructional helpfulness and courtesy, speed and economy of management, free assessment of evidence, legitimate expectation, material truth or non-publicity.

Thus, the basic principles of tax administration, as a whole, ensure good governance in the area of tax law. Their effectiveness is ensured by being directly binding. They are important interpretative rules that need to be taken into account when interpreting individual tax provisions. The principles express certain rules that apply at any stage of tax administration. These basic principles of tax administration govern not only the behaviour of the tax administrator and the tax subjects, but also all other persons involved in tax proceedings. The principles are legally binding unless other special provisions contain exceptions.[12]

2.2. Means to meet the requirement of good governance

As has already been mentioned, the basic principles of tax administration and the good administration provided by them are intertwined through the entire legal regulation of the tax process. The tax administrators are therefore obliged to respect them in all their procedures. But it would be illusory to think that all tax administrators do so in all their actions. It is therefore necessary for the procedural regulation to contain the means

to check compliance with the principles of good tax administration, respectively of all duties of the tax administrator. It is precisely these means that ensure that the tax administrators will act in accordance with the principles of good administration in the exercise of their powers.

The Czech legal framework of tax procedural law contains a wide range of these means aimed at remedying the undesirable situation in tax administration. For example, proper and exceptional remedies can be named.

Among these remedies, which ensure full respect for the principles of good administration, the legal institute of the complaint set out in Article 261 of the Tax Code takes up to a certain extent the specific status. This institute will be the subject of the following text of this contribution.

3. Complaint under Article 261 of the Tax Code – General Principles

Immediately at the beginning, it is necessary to briefly define what the Tax Code understands by a complaint. With a complaint any person involved in tax administration may defend against inappropriate behaviour of tax officials or against the procedure of the tax administrator if the tax law does not provide any other means of protection. It is therefore a universal subsidiary means of protecting the rights of taxpayers as illustrated below in more details. It is clear from this brief definition that the complaint is quite a versatile institute which can be used in many cases of breach of principles of good tax administration.

A brief historical excursion has to be mentioned at the very beginning. Since no legislation can be perceived in isolation, it is necessary to look in the past and identify the origin of the institute under examination. The institute of complaint itself is fairly new in its pure form in tax law. Its tax governance enactment did not take place until January 1, 2011, that is, from the effective date of the new procedural regulation, the Tax Code. The previous legal regulation of the tax process, i.e. the Act on the Administration of Taxes and Fees,[13] explicitly did not include this institute. The explanatory report relating to the complaint states that the complaint institute is newly included as a general means of protecting taxable persons when they encounter inappropriate tax treatment or inappropriate behaviour of tax administrators.

Complaint is therefore a new legal institute within the Czech Tax Law, but not within the entire Czech legal order. The complaint has been taken over in the area of tax administration in accordance with the model applied in the "general" administrative procedure. For more than 10 years, the administrative procedure includes the legal institute of complaint. It was this law that became a model for a "tax" complaint, which caused the legal texts of both legal institutes to be practically identical. However, it is quite clear that, while administrative and tax law are very close, they are not the same legal sector with the same basic foundations, so the simple "copying" of legal regulation from one legal sector to another does not seem ideal.

After a brief description of the historical circumstances, it is necessary to elucidate the basic points of the complaint, since without these the following text would be hardly comprehensible.

As stated above, the complaint can be targeted at inappropriate behaviour of the tax authorities' official or at procedures of the tax administrator. The tax administrator responsible for processing the complaint is under an obligation to assess the claims made in the complaint and subsequently inform the complainant of the outcome of the assessment. If the complainant is not satisfied with the way his complaint was assessed, he/she is entitled to file a so-called request to investigate how the complaint was assessed to the superior tax administrator. The superior tax administrator is required, based on this submission, to investigate whether the complaint has been duly processed. Both the first-rate tax administrator and the superior tax administrator could then take measures to remedy the undesirable situation.

The complaint is to some extent an atypical legal institute. It is enshrined only in a single legal provision and this relatively brief regulation to some degree pre-empts its nature. The complaint, more precisely the procedure for its processing, is not bound by extensive procedural rules, which makes the complaint a less formalised means of protection of rights. It is therefore a relatively quick and effective means of remedying the possible misconduct of the tax administrator, in which the emphasis should be on the outcome, i.e. the correction of any maladministration. The words of the Supreme Administrative Court of the Czech Republic are as follows: *"Complaint processing and investigating the way complaints are handled are less formal procedures, whereby the emphasis should be on the outcome of these procedures (removal of illegality), not on the actual procedural aspect of their implementation."*[14]

In the same informal spirit, the process of dealing with complaints is also carried out. The systematic classification of a complaint under the Tax Code in Part Five entitled *Common Provisions, Authorizing, Transitional and Final* leads to the conclusion that a complaint is not handled in the context of "classical proceeding". Similarly, the outcome of the complaint investigation (financial authorities call it "notification") is not a decision. This fact is quite significant. It means, for example, that it is not possible to appeal against it. In addition, rules relating to the content of the decision are not applicable to the notifications. This, of course, does not mean that the tax administrator could handle the complaint with an informal note in which there would be no details about the processing of the complaint. The notification, although not a decision, must contain an adequately detailed and verifiable justification. The financial administration respects the above, while constantly informing the complainant about his/her complaint with notifications in which the tax administrator deals with the individual objections contained in the complaint.

3.1. Admissibility of the complaint

Although the law does not explicitly stipulate that the tax administrator may consider the complaint inadmissible, the tax administrator is constantly doing so within his already established administrative practice. If all the conditions for the admissibility of a complaint

are not met, the tax administrator will consider the complaint inadmissible; as a result of this fact claims stated in the complaint will not be substantively examined. Consequently, the conclusion that the complaint is inadmissible may have a major impact on the complainant. It is therefore necessary to consider thoroughly whether a complaint is admissible or not.

Except in practice virtually non-occurring situations, such as violations of the *ne bis in idem* principle or the submitting of a complaint by a person who is not at all concerned with the contested procedures, the most important condition of admissibility of complaint is compliance with the condition of so called *subsidiarity* of the complaint. The legislation clearly states that a complaint may be successfully filed only if the tax law does not provide any other means of protection. It is clear, therefore, that the complaint is a subsidiary means, a means of *ultima ratio,* as already mentioned above. If there is another means of protection, it is not possible to file a complaint in the same case.

The above conclusion was explicitly stated by the Supreme Administrative Court: *"The complaint and the request to investigate the handling of a complaint are, by their nature, subsidiary, residual remedies which serve to protect the rights of the parties, unless the law foresees the application of other remedies."*[15] In this context, it must be emphasised that the very existence of another means of protection will lead to the inadmissibility of the complaint, it is not necessary for it to be actually used. Similarly, it is not possible to successfully file a complaint against how this other means of protection has been dealt with.

However, it remains a relatively problematic issue which institutions can be included in a group of other means of protection that exclude complaints. The law does not define these at any rate. Generally, in my opinion, these can be defined as any statutory means of protection which are capable of providing protection of the rights of a person involved in the administration of taxes and which that person may initiate. In some cases, there is no dispute that there are other means of protection. For example, if the taxpayer is convinced that the tax administrator is inactive in his case, he should file a complaint to protect the inaction of the tax administrator, not a complaint. In other situations, however, the situation is not so obvious. Some guidance provides the practice of the tax administrator and the related case law of the administrative courts. In its judgment of 3 November 2015, No. 2 Afs 143/2015 – 71, the Supreme Administrative Court stated that: *"The Tax Code regulates the large amount of means of protection that will prevail before the filing of the complaint; such as appeal, remonstrance, objection in the phase of paying the taxes, renewal of proceedings, review proceedings, protection against inactivity, request for an extension of term, complaints about the procedure of the tax payer, objection to bias, etc."* Based on this judgment, it can be concluded that the set of protection meaning of Section 261(1) of the Tax Code is very wide.

3.2. Actions of the tax administrator that can be challenged by a complaint

As noted above, a complaint is a means for individuals involved in tax administration to prevent "improper conduct by tax officials" or "tax administrator procedure". These are two relatively closed groups of phenomena against which (if other conditions are met) one can successfully be defended by complaint.

3.3. Complaint against inappropriate behaviour of tax officials

The first set of actions to which the legal provisions of the complaint refer is the inappropriate conduct of tax officials. If, therefore, there is a situation during the tax administration in which a person involved in tax administration gives the impression that an official is acting in an inappropriate manner, he or she may oppose such conduct by a complaint. It is quite obvious that the inappropriate behaviour of tax officials is highly undesirable, precisely because it violates the basic principles of good administration, which also include the duty of officials to act professionally and courteously towards the addressees of legal norms.

However, it can be said that complaints aiming to the inappropriate conduct are not so frequent in practice. There are several reasons for this, in my opinion. Firstly, this type of complaint is relatively problematic as regards the proof of misconduct, i.e. the inappropriate conduct of an official. For obvious reasons, these cases will almost always be based on the "claim against claim" situation. Furthermore, there is a problem with regard to possible remedial measures in case of this complaint. The inappropriate behaviour of tax officials will, in the vast majority of cases, take the form of a one-off time-bound act; it will not be a long-term and ongoing process. For this reason, only remedial measures in the form of a finding of inappropriate conduct will be considered and, if necessary, prohibiting further inappropriate behaviour in the future (if the inappropriate behaviour of the official would reach a certain intensity, it is not excluded that the competent authorities would start disciplinary proceedings with the guilty party, but any disciplinary sanction would not be a priori remedy for the complaint). Lastly, it is to be hoped that one of the reasons for the small number of complaints against the inappropriate behaviour of tax officials is the fact that such inappropriate behaviour occurs only exceptionally.

3.4. Complaint against the procedure of the tax administrator

The subject of the complaint may also be the "procedure" of the tax administrator. Given that the law does not define what is meant by such a procedure, this type of complaint is quite problematic. However, from the systemic and regulatory contexts, it follows that the procedure is a generic term involving both formal proceedings and other procedures. Given that it is such a large set, it is necessary to look for guides in the relevant court practice. It follows that a tax audit can be challenged by a complaint (judgment of 13 February 2014, No. 2 Aps 8/2013 – 46). Conversely, one cannot file a complaint to challenge the tax administrator's progress in assessing evidence (judgment of 3 November 2015, No. 2 Afs 143/2015 – 71). In addition, it is implicit in the above-mentioned judgment that a decision cannot be challenged by a complaint, since the court stated that another remedy preventing the filing of a complaint must also be regarded as an appeal and the initiation of a review proceeding.[16] Apart from the above mentioned cases, however, there is no general definition of procedures that may be challenged by a complaint. It may be added that such a definition is practically impossible to make and that such an attempt at generalisation could prove to be counterproductive. There are many different procedures in tax administration, and even the best tax law expert is certainly not able to identify and generalise all of these.

3.5. Investigation of the complaint

The actual process of dealing with the complaint, i.e. its assessing, is not in detail defined in the law. The legal regulation only defines that the tax administrator will assess the facts set out in the complaint. First of all, it follows that the dispositional principle applies in the processing of a complaint, as the tax administrator is required by law to examine only the facts set out in the complaint (of course, this does not change the fact that the tax administrator should correct the unlawful procedures not given in the complaint, if he finds any during the assessing). Furthermore, it follows from the above standard that after the filing of the complaint, the tax administrator is obliged to deal with the claims contained therein. This procedure will not be bound by any rigid procedural rules. It is therefore up to the tax administrator to choose the procedure for the purpose of the assessing the complaint. In this respect, the law prescribes that the tax administrator is (in order to clarify the facts objected to in the complaint) entitled to hear the complainant and other persons whose explanation could help to clarify the matter. In administrative practice, however, the tax administrator does not practice such interrogations. However, it can be inferred from the general principles that if the complainant asks to carry out the interrogation of the persons identified by him (or any other evidence), the tax administrator would have to either do it so or adequately justify why it is not necessary to do so.

In order to fulfil the effectiveness and the operability of the complaint, the law requires the tax administrator should settle the complaint within 60 days. The deadline can be exceeded only if it is not possible to provide the necessary documents for processing the complaint. Regarding the time limit, it is noted that the legislation has recently included a rule according to which the tax administrator is obliged to settle the complaint against the inappropriate conduct of the official in the tax audit or the procedure of the tax administrator at the tax audit no later than the end of the tax audit. This standard was omitted from the Tax Code by an amendment made by Act No. 170/2017 Coll. The explanatory statement highlights the frequent occurrence of obstructive complaints filed not for the purpose of remedying the defective condition but for the purpose of continuously extending the tax audit.[17]

If the tax administrator considers the complaint reasonable, the administrator should take corrective action. The law does not specify these measures.

3.6. Request to investigate how the complaint was handled

As already mentioned above, the legal framework of the complaint also contains a quasi-remedy against the assessing (investigating) of the complaint. If the complainant is not satisfied with how the tax administrator has dealt with his complaint, the superior tax administrator may be asked to investigate the way the complaint was handled. The superior tax administrator then evaluates whether the complaint has been properly processed. If this administrator concludes that this was not the case (either because the tax administrator incorrectly judged the complaint as unreasonable or did not take adequate remedies), the complaint will not be returned to the first-level tax administrator (the superior tax

administrator will not proceed on a "cassation" principle) on the contrary, the superior tax administrator will take measures to redeem himself. This approach reflects the nature of the complaint as an institute aimed at an effective and rapid remedy which is not bound by rigid procedural rules.

It should also be noted that, in the past, the financial authorities had a kind of inappropriate way to deal with the described requests to investigate how the complaint was handled. Instead of actually assessing the objections contained in the request, the tax administrator was only focused on how the complaint was handled procedurally. However, this approach has already been abandoned and, in the course of investigating how the complaint is handled, the supreme tax administrators deal not only with the tax subordinate administrator's procedure (adherence to deadlines, the settlement of all claims, etc.) but also with the substantive aspect of the matter (whether the tax administrator considered correctly the complaint reasonable or unreasonable).

4. Conclusion

Good governance is one of the cornerstones of every state governed by the rule of law. It is essential for public administration to be based on principles which, in its entirety, ensure its legitimate, efficient, economic and equitable functioning. Such functioning ("good functioning") will, of course, be subject to scrutiny, both internal (control carried out within the public administration) and external (carried out, for example, by the addressees of the public administration). Such external control takes place in particular on the basis of the individual means of protection initiated by the addressees of public rights and obligations.

A specific position among these means, within the framework of tax law, takes a complaint which is a subsidiary means of protecting the persons involved in the administration of taxes against the procedures of the tax administrator and against the inappropriate conduct of the tax authorities.

From the above mentioned theoretical and legal grounds, in my opinion, it is clear that the complaint is an effective institute of protecting the principles of good administration. It is a very generic means of making it possible for all concerned to draw attention to the mistakes of the tax administrator. The complaint also works on informal grounds, and its main goal is to quickly and operationally remedy the malfunction. The fact that the legal arrangement has a two-stage approach to its handling is added to its effectiveness. If the complainant is not satisfied with how his complaint has been dealt with, he has the right to file a request to the superior tax administrator to investigate the way the complaint was handled. Nor can it be overlooked that the remedy that the tax administrator is obliged to accept on the basis of the complaint is not defined in any detail in the law, which leads to the clear conclusion that the tax administrator is entitled to do anything (legal), which will lead to the correction of the defective state. For these reasons, it is necessary to conclude on confirming the hypothesis of this contribution because the complaint is certainly an effective means of protecting good administration.

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