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Articles

Measuring Success of the Czech Financial Administration before the Supreme Administrative Court: Partial Results of a Quantitative Research of Court Proceedings

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Abstract: The paper discusses the issues of the actions and measures of tax authorities challenged by taxpayers before the administrative justice and thus serves as a contribution to the discussion on efficiency of tax authorities and public administration in general. The authors first address the currently discussed problems of the Czech tax law and tax administration. This is followed by describing their quantitative research focused on answering the question of what is actually the success rate of the Czech Financial Administration before the Supreme Administrative Court in the proceedings on cassation complaints. The ratio of cassation complaints for or against the Financial Administration can be an interesting indicator showing the performance of public administration. Afterwards, it follows an explanation of methodology and presentation of results of the first part of the quantitative research that is focused on analysing the Supreme Administrative Court's rulings on cassation complaints brought (both by taxpayers or the Financial Administration) against the Regional Courts' rulings on legal actions against unlawful interference by the Financial Administration with the taxpayers' rights that cover the period 2013–2017.

Keywords: The Czech Republic; financial administration; court proceedings; analysis

1. Introduction

In the Czech Republic, in principle any administrative decision, interference or failure to act of an administrative authority can be challenged before the administrative justice by way of a legal action brought by a natural or legal person. The actions and measures of tax authorities (in Czech: *spravce dane*) are no exception as tax authorities are only considered specialised administrative authorities. While only a taxpayer can sue the tax authority before an administrative court (in the Czech Republic before a Regional Court, in Czech: *krajsky soud*), extraordinary remedy in the form of a cassation complaint (appeal in cassation, in Czech: *kasacni stiznost*) against a Regional Court's ruling can be brought before the Supreme Administrative Court (hereinafter: "SAC", in Czech: *Nejvyssi spravni soud*) by both of them.

Based on the currently discussed problems of Czech tax law and tax administration, the authors have decided to conduct a quantitative research with the main purpose to determine the ratio of cassation complaints for or against the tax authorities in the past five years (from January 1, 2013 to December 31, 2017), i.e. since the establishment of the new structure of the Financial Administration of the Czech Republic as of January 1, 2013. The main part of the quantitative research is yet to be realised, results of the first part are already finished. The primary focus of the paper thus consists in the presentation of the results of the first part that includes examination of rulings on cassation complaints brought either by the taxpayer or the tax authority against the Regional Courts' rulings in cases of unlawful interference with the taxpayers' rights in the period 2013–2017.

2. Economic Prosperity of the Czech Republic and Problems Related to Tax Law and Tax Administration

The Czech Republic is experiencing an economic upswing: dynamic economic growth makes the country one of the fastest growing countries in the whole European Union,[1] European record low unemployment rate,[2] rising wages,[3] strong exports,[4] manageable inflation[5] and strong financial sector.[6] This is the big economic picture of the Czech Republic in 2018 and in the years before. According to private sector economic analysts,[7] international consulting firms[8] and public sector institutions (e.g. the European Commission,[9] OECD,[10] the Czech Ministry of Finance[11] and the Czech National Bank[12]), the economic performance of the Czech Republic should also be above average in the upcoming months and years. Even the entrepreneurs themselves are optimistic.[13]

Yet, in the long term, less optimistic data and information not influenced by the current conjunction can be found. They are more of a structural nature combined with certain economic and legal deficiencies which can be observed over a longer period of time. The area of taxation and tax law can serve as a good example.

Lack of stability and predictability of future tax law developments and never-ending partial amendments of (not only) tax laws are broadly considered (according to the private sector[14] and even public officials[15]) one of the biggest problems of the Czech legislation.[16] Another problem consists in introducing completely new tax obligations, very slow pace of

bureaucracy reduction and relatively slow implementation of electronic contact with the tax authorities (the Financial Administration of the Czech Republic). Last but not least, a strong criticism has been recently directed against the approach of the tax authorities when enforcing obligations from taxpayers, especially in the field of the value added tax (hereinafter: "VAT"). For instance tax controls are becoming more detailed and with increasing demands.[17]

In general, the tax authorities have recently adopted increasingly restrictive measures to collect as much tax as possible. One of the new measures in the field of tax collection is the extended application of "securing orders" (in Czech: *zajistovaci prikazy*) and their subsequent enforcement within a very short time especially in VAT-related matters.[18] They may be used before the actual tax liability is determined or before a tax control is completed, largely depending on the tax authority's discretion. Securing orders increasingly often serve to collect funds on the tax authority's account where the future collection of the estimated tax liability appears to be endangered while the deadline for depositing the funds does not exceed three workdays. Tax authorities may also freeze bank accounts and attach other assets. These actions, usually undertaken very quickly, may have the effect of paralysing, or even terminating a corporation's business activities. It is to be pointed out that the number of cases in which the tax authorities decided to enforce taxpayers' assets based on securing orders has increased dramatically over the last years.[19] This issue was even the subject of debates in the Chamber of Deputies.[20]

In recent years, there can also be noticed a growing number of court rulings stating that securing orders and other instruments performed by the tax authorities were issued or enforced unlawfully. Especially the decision-making practice of the SAC is correcting to some degree the approach of the tax authorities.[21] The Czech media have reported a number of cases in which the tax authorities intervened against taxpayers who later found support from the administrative courts.[22] In addition, the tax authorities do not always take these court rulings into account,[23] albeit officially declaring that they proceed with prudence and that their enforcement is professionally supervised.[24] The Financial Administration of the Czech Republic is also often trying to point to the cases, in which it was successful[25] or state that it actually respects the case law of administrative courts.[26]

The issue of court cases for or against the tax authorities is what our quantitative analysis is dealing with. To be more precise, it consists in answering the question of what is actually the success rate of the Financial Administration of the Czech Republic before the SAC. The main focus thus lies in determining its success if its actions and measures are questioned by taxpayers before the administrative justice.

3. Financial Administration and Administrative Justice in the Czech Republic

As of January 1, 2013, the structure of tax authorities considerably changed[27] with the establishment of the Financial Administration of the Czech Republic (in Czech: *Financi sprava Ceske republiky,* hereinafter: "Financial Administration") as the main tax authority and the General Financial Directorate (in Czech: *Generalni financni reditelstvi*) as its

central body. The head of the General Financial Directorate is the Director General, who is appointed and removed by the Government of the Czech Republic based on proposal by the Minister of Finance. Its subordinate body is the Appellate Financial Directorate (in the position of the appellate body) to which sixteen Financial Offices are further subordinated (the responsibility of which is territorially limited to one of the sixteen Regions of the Czech Republic) and the Specialized Financial Office (administrating certain taxes of special taxpayers like banks and insurance companies).[28]

The Czech system of administrative justice consists of two components: Regional Courts, seated in each of the Czech sixteen regions, and the SAC with its seat in Brno. The SAC being the supreme judicial body specialised exclusively in the field of administrative justice has a special additional task in ensuring the unity and legality of the case law of Regional Courts and administrative authorities. The principal instrument for achieving this objective is the cassation complaint. The SAC is entitled to hear cassation complaints challenging final rulings of Regional Courts in matters of administrative justice, in which complainants seek the 1. annulment of an administrative decision by way of legal action against a decision of an administrative authority; 2. protection against a failure to act (inaction by an administrative authority); 3. protection against an unlawful interference by an administrative authority with individuals' public right and 4. protection in other matters (like electoral matters and local and regional referendum, matters concerning political parties or political movements, judicial review of measures of a general nature, competence complaints).[29]

The Czech system of administrative justice can be marked as a one-instance-system of judicial review, i.e. Regional Courts acting as courts of first and last instance with no appeal or other ordinary judicial remedy being permissible. There is, however, the possibility of filing and extraordinary remedy – the cassation complaint – before the SAC. It should be noted that, albeit designed as an extraordinary remedy, i.e. a remedy against the final ruling of Regional Courts, the admissibility criteria for a cassation complaint before the SAC are defined quite broadly. A cassation complaint has to be filed within two weeks of the Regional Court's decision becoming final and lie against any final decision of a Regional Court in administrative matters, provided it is not expressly precluded by law. Both errors in the assessment of substantive legal provisions, as well as errors in the procedure before the Regional Court might be challenged. A complainant before the SAC must be represented by an attorney. As a rule, the SAC decides on a cassation complaint without an oral hearing, albeit a hearing might be ordered if further evidence is deemed necessary.[30]

While only a taxpayer can sue the Financial Administration before the Regional Court, a cassation complaint against a Regional Court's ruling can be brought by both of them. By the nature of the administrative court proceedings, the Financial Administration can be sued only within three cases, namely: 1. decision of the tax authority (the Financial Administration, i.e. one of its bodies – Financial Offices); 2. failure of the tax authority to act and 3. unlawful interference by the tax authority with the taxpayers' rights.

4. The Aim of the Quantitative Research of Court Proceedings

Based on the new structure of the Financial Administration, we have decided to pay attention to the past five years (i.e. the period from January 1, 2013 to December 31, 2017) and to examine what is the success rate of the Financial Administration before the administrative justice, or more precisely its success rate in the proceedings on cassation complaints before the SAC. It is clear, that despite the fact that the SAC has the competence to decide on cassation complaints against the rulings of Regional Courts in all of the three matters 1–3, in reality, not every decision of the Regional Court has to be (or can be) challenged by a cassation complaint. Despite that we believe that in view of the broad admissibility criteria for a cassation complaint, the results of a quantitative research will reflect most of the relevant cases.

The data obtained from the quantitative research might be an interesting indicator showing the performance of the Financial Administration in cases heard by the administrative justice. After a deeper analysis, the data might reflect annual developments in the success rate since the establishment of the Financial Administration in 2013, while possible developments could be linked to the number of employees of the Financial Administration (according to the numbers announced in its annual reports) or other factors. Most importantly, the data could serve for a better understanding of public administration and its development and might be an inspiration for legal scholars and practitioners in other jurisdictions considering to undertake a similar approach towards a better understanding of public administration. However, it is obvious that a complete comparability of the results achieved cannot be possible, in particular due to the different judicial systems and models of public administration. It is also clear that that the data will not capture the individual nature of any case. Nevertheless, we are convinced that the ratio of cassation complaints for and against the Financial Administration can be an interesting indicator showing the court performance of one part of the Czech public administration.

Measuring the success rate of the Financial Administration in proceedings on cassation complaints before the SAC in the past five years (i.e. in the period 2013–2017) consists, according to our calculations, in an analysis of several thousand rulings covering the three fields, i.e. the cases in which Regional Courts decided on 1. a legal action against a decision of the Financial Administration (Financial Office); 2. a legal action for the failure of the Financial Office to act and 3. a legal action against unlawful interference by the Financial Office with the taxpayers' rights. Given this amount of rulings, we have decided to proceed step by step and have first analysed the SAC's rulings concerning the third area, i.e. the SAC's rulings on cassation complaints brought either by the taxpayer or Financial Office against a Regional Court's decision in the cases of unlawful interference by the Financial Office issued in the period 2013–2017. In the following chapter we first explain the methodology of the first part of the research which is subsequently followed by the description and explanation of the results achieved.

5. The Methodology and Scope of the First Part of the Research

As the first part of the quantitative research, we have decided to proceed with the SAC's rulings on cassation complaints brought both by the taxpayer and the Financial Administration (Financial Office) in matters of unlawful interference in the period 2013–2017, namely those in which Regional Courts decided on a legal action brought by taxpayers against unlawful interference by the Financial Office. As mentioned earlier, this limited number of rulings is part of a much broader quantitative research since it is also intended to analyse the SAC's rulings in two other main fields, namely rulings on cassation complaints against decisions of Regional Courts on 1. legal actions against a decision of the Financial Office and 2. legal actions for the failure of the Financial Office to act.

As for legal actions against unlawful interference, the concept of interference with individual rights refers to a broad scale of activities of administrative authorities, e.g. an unlawful tax control conducted by the Financial Office etc. Protection against unlawful interference is a complementary form of legal protection, it can only be invoked against some type of activity of an administrative authority which does not result in the issuance of a formal decision that could be challenged (by way of legal action against a decision of an administrative authority). Logically speaking, an unlawful interference is also distinct from the failure to act. In a certain sense then, the protection against unlawful interference creates a "left-over" category, in which a person can challenge the activities of an administrative authority which encroaches upon individual public rights, but which does not constitute a decision or failure to act.[31]

There is a strict time limit for filing such an action, namely within two months of the day the legal or natural person became aware of the interference (the "subjective" time limit) or, at the latest, within two years of the day the interference took place (the "objective" time limit). Should the action be successful, the court will order the administrative authority to discontinue violating the legal or natural person's rights or will confirm the unlawfulness of the interference. It will further order the restoration of the status quo which prevailed prior to the interference.[32]

We have used the following methodology to perform the first part of the quantitative research on the SAC's rulings related to the Financial Administration's unlawful interference:

a) all the rulings of the SAC have been taken from the website database of the SAC;[33]
b) in the website database, only rulings concerning the matter of "Taxes" (in Czech: *dane*) have been selected;
c) only rulings on cassation complaints issued between January 1, 2013 to December 31, 2017 have been taken into account;
d) cassation complaints brought both by the taxpayer (natural or legal person) and the Financial Office against decisions of Regional Courts on legal actions against unlawful interference by the Financial Office with the taxpayers' rights have been considered;
e) only rulings containing the words "Financial Office" (in Czech: *danovy urad*) have been selected in the website database of the SAC, i.e. rulings in which the Financial Office was the party complained in the proceedings before the Regional Court;

f) for the purpose of avoiding rulings of procedural character (i.e. not on the merits of the case), only rulings in the form of a judgment (in Czech: *rozsudek*) have been taken into account;
g) any subsequent intervention by the Constitutional Court and possible annulment of the SAC's judgment have not been considered;
h) partly justified (successful) cassation complaints have been considered as overall successful unless the applicant had success only as to costs;
i) in the event that a cassation complaint was brought both by the defendant (Financial Office) and the plaintiff (taxpayer), we consider which cassation complaint was successful according to the judgement.

6. Results of the First Part of the Quantitative Research: Cassation Complaints on Unlawful Interference in Tax Matters

Based on the above criteria, we are able to present the results of the first part of the research concerning the rate of success of the Financial Administration before the SAC. The results concern only the cassation complaints (filed both by the taxpayer and the Financial Office) seeking to set aside a Regional Court's ruling on protection against an unlawful interference by a Financial Office with the taxpayers' rights. As for a more detailed analysis of the judgments on cassation complaints related to unlawful interference in tax matters in the period 2013–2017, please see below Tables 1–5 which summarise the results of our research.

The total number of judgments in the past five years (from January 1, 2013 to December 31, 2017) on cassation complaints filed in cases of unlawful interference in tax matters is reflected in Table 1. They result in some 109 SAC judgements based on the criteria set in the previous chapter.

Table 1.
The total number of "Unlawful Interference" tax cases before the SAC in 2013–2017

Year	2013	2014	2015	2016	2017	2013–2017 in total
Total No. of Cases	7	23	22	26	31	109

Source: Compiled by the authors.

Table 2 divides the total number of judgments in the past five years (from January 1, 2013 to December 31, 2017) on cassation complaints filed in cases of unlawful interference in tax matters based on the criteria of the applicant, i.e. whether filed by 1. the Financial Administration (its Financial Offices) or 2. the taxpayer that himself also challenged the unlawful interference by the Financial Office before the Regional Court. Based on the criteria set in the previous chapter, out of the 109 SAC judgements, only 6 were issued following the cassation complaints filed by the Financial Offices, meanwhile 103 judgments were issued following the cassation complaints filed by the taxpayer.

Table 2.
Appellants in 2013–2017

Year	2013	2014	2015	2016	2017	2013–2017 in total
Financial Office	0	2	2	0	2	6
Taxpayers	7	21	20	26	29	103
Both	7	23	22	26	31	109

Source: Compiled by the authors.

Table 3 summarises the cases of failure and success of both 1. the Financial Administration (its Financial Offices) and 2. taxpayers in the period ranging from January 1, 2013 to December 31, 2017. *Successful Cases* means that the SAC decided in accordance with provisions of the Act on the Code of Administrative Justice[34] to set aside a Regional Court's decision and eventually returned the case to that Court on the basis of a cassation complaint filed either by the 1. Financial Office or 2. the taxpayer. On the other hand, *Failed Cases I* shall have the meaning of a Regional Court's ruling confirmed by the SAC and a rejection of the cassation complaint filed either by 1. the Financial Office or 2. the taxpayer. *Failed Cases II* means that in accordance with provisions of the Act on the Code of Administrative Justice, the SAC decided to set aside a Regional Court's ruling and to reject the taxpayer's legal action when ruling on the basis of a cassation complaint filed by the taxpayer.

The Financial Administration filed only 6 cassation complaints in total, 3 of them were successful (i.e. the SAC annulled a Regional Court's ruling and returned the case to it) and 3 of them were unsuccessful (i.e. the SAC confirmed a Regional Court's ruling). On the other hand, taxpayers filed 103 cassation complaints in total, whereby 30 were successful (i.e. the SAC annulled a Regional Court's ruling and returned the case to it) and 73 unsuccessful (i.e. the SAC confirmed a Regional Court's ruling or annulled it and rejected the legal action as inadmissible).

Table 3.
Success and failure of appellants in 2013–2017

	Year	2013	2014	2015	2016	2017	2013–2017 total success/failure
Financial Office submitted a Cassation Complaint	Successful Cases	0	1	1	0	1	3
	Failed Cases I	0	1	1	0	1	3
Taxpayer submitted a Cassation Complaint	Successful Cases	3	4	8	3	12	30
	Failed Cases I	3	17	11	20	17	68
	Failed Cases II	1	0	1	3	0	5

Source: Compiled by the authors.

Table 4 shows the total number of successful and unsuccessful cases of both 1. the Financial Administration (its Financial Offices) and 2. taxpayers in the period ranging from January 1, 2013 to December 31, 2017. The Financial Administration's successful cassation complaints *(Successful Cases)* are aggregated with the failed cassation complaints brought by taxpayers *(Failed Cases I and II)*. It results the total number of 76 successful cases of the Financial Administration. On the other hand, if the same calculation is applied to taxpayers, all of the Financial Administration's failed cassation complaints *(Failed Cases I)* have to be aggregated with the taxpayers' successful cassation complaints *(Successful Cases)*. Here, some 33 taxpayers' and 76 Financial Administration's total successful cases result.

Table 4.
Total successful cases in 2013–2017

Year	2013	2014	2015	2016	2017	2013–2017 in total
Financial Office's Successful Cases	0	1	1	0	1	3
Taxpayers' Failed Cases I and II	3 + 1	17 + 0	11 + 1	20 + 3	17 + 0	73
Financial Office's Total Successful Cases	4	18	13	23	18	76
Year	2013	2014	2015	2016	2017	2013–2017 in total
Financial Office's Failed Cases I	0	1	1	0	1	3
Taxpayer's Successful Cases	3	4	8	3	12	30
Taxpayer's Total Successful Cases	3	5	9	3	13	33

Source: Compiled by the authors.

Table 5 depicts the average success rates of the Financial Administration before the SAC in the period 2013–2017. The figures for the *Financial Offices' Total Successful Cases* are taken from Table 4 and further divided by the figures of the *Total No. of Cases* extracted from Table 1, which is afterwards multiplied by one hundred (converted to percentage ratio) and rounded down to the nearest unit. From this calculation result the percentage ratios (rounded *Average Success Rate*) for each year and the total percentage ratio (rounded *Total Average Success Rate*) in the right bottom field for the whole five-year period.

Table 5.
Average Success Rates of the Financial Administration in 2013–2017

Year	2013	2014	2015	2016	2017	2013–2017 in total
Total Cases	7	23	22	26	31	109
Total Successful Cases	4	18	13	23	18	76
Average Success Rate (rounded)	57%	78%	59%	88%	58%	68%

Source: Compiled by the authors.

Finally, on the basis of the above calculations, it can be concluded that in the period 2013–2017, the Financial Administration had an average success rate of 68% in the SAC's rulings on cassation complaints challenging the decisions of Regional Courts on legal actions of taxpayers against unlawful interference by the Financial Offices. From this, it can be further concluded, that if 1. decided on the merits of the case by the Regional Court and 2. later subject to a cassation complaint (filed either by a Financial Office or taxpayer), there were on average some 32% successful legal actions of taxpayers against unlawful interference by a Financial Office with the taxpayers' rights.

In our view, on the basis of these data it is not yet possible to recognise a clear curve of increase or decrease in cases related to unlawful interference in tax matters decided by the SAC, neither a clear curve of success or failure of the Financial Administration since the figures vary significantly year by year in the five-year period: 57% (2013), 78% (2014), 59% (2015), 88% (2016) and 58% (2017). A further research reflecting other types of legal actions has to be conducted in order to obtain more data and draw general conclusions.

7. Conclusion

In the Czech Republic, in principle any administrative decision, interference or failure to act of an administrative authority can be challenged before the administrative justice by way of a legal action brought by natural and legal persons. The actions and measures of tax authorities are no exception as the tax authorities are only considered specialised administrative authorities. One of the currently discussed problems of Czech tax law and tax administration is the recently adopted restrictive approach of the tax authorities towards taxpayers. The media have reported an increasing number of cases in which actions and measures of the tax authorities have been found unlawful by the administrative courts.

While only a taxpayer can sue the tax authority before the Regional Court by bringing one of the three legal actions coming into consideration, i.e. 1. a legal action against a decision of a tax authority; 2. a legal action for the failure of a tax authority to act and 3. a legal action against unlawful interference by a tax authority; extraordinary remedy against a Regional Court's ruling in the form of a cassation complaint can be brought before the SAC both by the tax authority and the taxpayer.

The quantitative research conducted by the authors aims to analyse cassation complaints in all of the three fields, i.e. cassation complaints seeking to set aside rulings of the Regional Courts that decided on 1. legal actions against a decision of a Financial Office; 2. legal actions for the failure of a Financial Office to act; and 3. legal actions against unlawful interference by a Financial Office with the taxpayers' rights. It is thus based on determining the success rate of the Financial Administration in the proceedings on cassation complaints before the SAC.

According to our calculations the quantitative research consists in an analysis of several thousand rulings of the SAC. We have thus resulted to proceed step by step and first analysed the SAC's rulings on cassation complaints against the Regional Courts' decisions on legal actions against unlawful interference by a Financial Office as the tax authority. In the paper there have been presented results of the first part of the quantitative research.

In view of the new structure of the Financial Administration of the Czech Republic as of January 1, 2013, we have decided to cover the period of the last five years (from January 1, 2013 to December 31, 2017). It can be concluded that in the period 2013–2017, the Financial Administration had a total average success rate of 68% in the SAC's rulings on cassation complaints challenging the rulings of Regional Courts on legal actions of taxpayers against unlawful interference by the Financial Administration. The figures of average success rates differ significantly year by year: 57% (2013), 78% (2014), 59% (2015), 88% (2016) and 58% (2017).

The obtained data are part of a much broader quantitative research to be realised in the near future. The follow-up research will include an analysis of several thousand rulings. We hope the chosen methodology and approach might serve as an inspiration for other legal scholars and practitioners in other jurisdictions considering to undertake a similar approach towards a better understanding of public administration and especially administration of taxes by tax authorities.

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Public Bureaucracy from the Perspective of the State Budget

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Abstract: The state covers needs that are necessary for the running of the state from its revenues (most often from tax revenues). If territorial self-governments exist, certain public goods are funded from territorial budgets. The state contributes concurrently to territorial self-governing units to the performance of delegated powers – most often through subsidies. The contribution to the performance of state administration can be considered one of these subsidies. At all levels of government, the effect of bureaucracy is manifested in the form of coercion consisting of the use of "normative" power and "rewarding" power.

Keywords: state budget; public goods; contribution to the performance of delegated power; bureaucracy

1. State Budget and its Functions

The original narrow fiscal role of the state budget, that is based on the classical theory of political economy, began to change at the end of the 19th century. Regarding the earlier theoretical conception and the practical application of public finance the state budget was a tool for amassing taxes. The practice, however, tends towards the economic concept of the state budget on the basis of the development of the new theoretical conceptions. This conception of the state budget is reflected in the fact that the original term "state budget" has a wider content in comparison to previous definitions that consisted of the collection of taxes and the reimbursement of narrowly defined state expenditures. Budgets are entrusted with other than just fiscal targets.

The state budget begins to fulfil the allocation role, i.e. it begins to influence the allocation of factors of production according to the needs of economic development, and concurrently to apply its distributional function which consists in influencing the income situation of the productive sphere and of the population. Together with the growth of expenditure of the state, the budget revenues have to increase. The possibility of hindering

or eliminating economic crises is attributed to the expenditures of the state budget. However, this effect of the state budget has been greatly overestimated in the last decades and current practice has corrected some of the theoretical starting points in this field.

Even today, the state budget is the basic financial plan of the state that is approved on a yearly basis in the form of an act and serves to amass the financial resources of society and to irrevocably allocate these resources. The resources are then allocated on the basis of the determination of the tasks that are determined especially for the financial covering of the state functions (i.e. fiscal purpose) and for the influencing of the national economy (non-fiscal purpose).

The state budget is entrusted with the particularly important role of amassing and re-distributing that part of the gross domestic product that is intended for the needs of society. The function of the state budget is thus not only economic but also political. Depending on the amount of financial resources collected and, in particular, on the purposes (including their priority arrangement) for which these resources are spent, the character of the state policy could be considered.

The process of reproduction to which the state budget serves is currently not only recognised from a narrow point of view of material production but also as an activity aimed at the development of the immaterial needs of a particular society and related relationships. Further changes of this process could be expected regarding the introduction of robotisation. Interests of society (i.e. the material aspect of the state budget) are also secured from the procedural point of view, i.e. through the competencies of the state bodies in which the approval of legal regulation of budgets and the control of their application (fulfilment of their requirements) is vested. The budget process represents the annual concretisation of state policy for the following year and the state final account discussed after the end of the budget period represents the assessment of the state policy.

Regarding the economic effect of the state budget, it can be stated that the allocation, distribution and control and register functions of the budget are applied. The distribution and placement of financial resources (the allocation function) in the respective economic spheres represents the essence of the economic impact of the state budget. The state budget is supplemented by other financial plans, however, it does, in comparison with them, carry out the distribution of both monetary and material resources definitively. The distribution (redistribution) function is the actual mission of each budget. This means the redistribution of gross domestic product in respect of the needs of society. Other functions such as control or stimulus functions can be included in the budget functions. These functions represent the possibility to affect the reproduction process by the state budget in various ways and they are therefore considered an instrument of the state's financial policy.

The functions of the state budget are not only economic, but also political. Depending on the amount of financial resources amassed and in particular on the purposes for which they are spent the character of the state's policy can be recognised. Through the state budget, the government can finance certain activities that ensure the essential functions of the state. The government can also affect the economy of territorial self-governing units (especially the amount of subsidies). The budgets of the territorial self-governing units, as well as the budgets of the state funds then perform similar functions as the state budget and form together with the state budget a system of public budgets.

2. Public Goods, Their Financing and Bureaucracy

There are public goods in the economy for which the concentration of resources in the state budget is necessary (e.g. defence, justice) and other goods whose financing seems to be more effective at the level of the territorial budgets. However, there are also public goods where it is possible to finance them through the territorial budgets or budgets of state funds – i.e. these goods can be financed by different public budgets at the same time. Thus, through public budgets, resources are redistributed from resource-generating entities to those that do not generate resources but are an integral part of society. How large the redistribution will be, either among the population groups or between the regions of the state, depends on a number of factors. In particular, it is about the interaction of the principle of solidarity and the principle "everyone for his own" (i.e. non-solidarity). Ensuring a certain standard level of the most important public goods for the entire national territory is essential. It is equally necessary to ensure a certain stabilisation of economic development which is only possible through the central budget. On the other hand, the regional budgets should respect different population preferences.

National public goods are those goods of which the inhabitants of the entire state benefit. These goods include the construction of roads, the regulation of watercourses, etc. This kind of public expenditure is financed by the resources of both municipalities and regions or the state. A specific group of public goods consists of so-called preferred goods when the state decides how certain goods will be consumed, for example, by determining that the municipality or region has to ensure these goods and the citizens have to consume them. For example, the law provides for a certain obligation (e.g. school attendance) and territorial units have an obligation to ensure its realisation. There is a national standard for the goods that are controlled by the government and subsidies are usually provided for the financing of these goods. Such public goods are available to all citizens regardless of their financial situation.

Public goods are provided by territorial units through their budget. However, the state budget is also involved in the financing of these public goods. Expenditure on securing public goods, such as expenditure on security or territorial government, should be covered by tax revenues in respect of their budgetary determination and by transfers from the budgetary system (i.e. subsidies). However, there are also local public goods – those goods that municipalities provide primarily for their inhabitants and that can be measured as regards the consumption and on which user charge can be imposed (e.g. charge paid for the use of water supply for wastewater treatment) to a certain extent.

State administration is built as a tool for satisfying public interests. Between the citizen as the consumer and the official as the administrator of the budget expenditures, there is a chain of mechanisms that effectively guarantee considerable autonomy. The administration of "public goods", which is the actual reason for the existence of the public sector, can be easily manipulated. For example, certain interest groups are able to convince the public administration of the necessity to provide such "public goods" which are beneficial only to such groups. The demand for "public goods" is often generated by bureaucracy itself with the support of various regulations and decrees.

Bureaucracy is a term that can determine a hierarchical organizational form of government. It had been known since antiquity but its newer form has occurred in connection with the development of the so-called welfare state. Bureaucracy exercises its power in several underlying ways. These ways are:

- Coercion that consists, for example, of repeated inspections, requiring information and constantly supplementing background material for administrative decisions about fines and regressive measures.
- The use of "normative" power that can be considered to consist in creating a certain prestige of the administrative apparatus which is based on direct determination of the conditions of mutual dialogue with the citizens by such administrative apparatus. The relationship of superiority and subordination of bureaucrats and citizens is not given by the authority of the institution but by the conditions laid down by this superior power.
- The influence of "rewarding" power can be used as a definition for the latent, material and also non-material impact of corruption on the government and decision-making of the administrative apparatus.

Although the possibilities for bureaucracy development are numerous in the Czech Republic, it is possible to mention the area of budgetary law in a broad sense. The current budgetary system is linked to the collection of taxes and other compulsory levies on the one hand and, on the other hand, it is linked to the determination of conditions for drawing public funds (in the area of subsidies or public procurement, etc.). A certain cumbersomeness of the Czech system leads to greater demands on ensuring all processes related to selection and drawing of public funds.

3. State Expenditures on the Exercise of Delegated Powers

In addition to the public expenditures on public goods, the state contributes to the activities of territorial self-governments that they take over from the state. The state secures by its own resources not only its own activities, but it also contributes to territorial self-governing units to the performance of delegated powers. This is done in different ways – most often by various forms of subsidies. One of them is contribution to the performance of state administration.

Contribution to the fulfilment of tasks of territorial self-governments that come under the delegated competence can be described as state budget expenditure determined by a special act (i.e. by the State Budget Act for the relevant year). The State Budget Act determines the total amount of the contributions to all municipalities to the performance of state administration and in the annex to this Act the procedure for determining the amount of the contribution to the performance of state administration provided to individual municipalities is subsequently regulated.

The term contribution expresses the fact that the state only contributes to municipalities and regions to the performance of public administration. Many of the agendas that the regions and municipalities carry out serve not only the state but also these municipalities

and regions. These agendas, for example, are the issuing of identity cards, the keeping of the population register, as well as other activities regulated by law. The state contribution to the exercise of the delegated power is thus intended to cover a part of the expenses related to the performance of state administration.[1] This construction is based on the fact that the territorial self-governing units have revenues generated by the agendas, for example, in the form of administrative charges that remain in their budgets. The contribution can also be referred to as a non-purpose subsidy whose form of drawing is not controlled.[2]

The calculation of the contribution to the performance of state administration, i.e. to the delegated competence, is determined differently for the regions, municipalities and Prague. The contribution for the regions is determined by the Ministry of Finance on the basis of the recalculated work time dedicated to performance of the delegated competences that have been determined at the time of the establishment of the regional offices. Determination of the amount and the distribution of the contribution to the regions is not affected by the Ministry of the Interior in any way. However, the situation is different with regard to the distribution of the contribution to the municipalities. The particular act states that *"the municipal budget shall bear the expenses associated with the performance of state administration that is vested in the municipality by law"*.[3] These are, in particular, wage and operating expenses linked to staff employed by state administration.

The contribution is allocated to municipalities on the basis of the size of the municipality and the size of the administrative district of the municipality that is expressed by the number of inhabitants. As regards the municipalities with extended competence, the ratio of the size of the administrative district to the size of the administrative centre itself is important. Both of these parameters are expressed in the number of inhabitants. In the calculation of the contribution, five types of administrative roles of municipalities are considered: basic competence, registry offices, building authorities, municipalities with authorised municipal office, municipalities with extended competence. The total contribution of a particular municipality consists of partial contributions for each relevant role. As regards the contribution, the specific category of cities with a specific status, which represent the agglomeration background of large cities, is considered.[4]

Overall, it can be stated that the state, regional and municipal expenditures are interlinked. Financial transfers ensure the unity of public budgets and concurrently – as the range of activities that are included among public goods get broader – the role of the entities involved in securing the public goods grows and thus, as a rule, the amount of funds that are redistributed between public budgets also grows. The role of bureaucracy does not disappear, but it grows.

4. Conclusion

Inability to control its costs forces the public sector to raise taxes. This in turn enables public budgets to inflate. Tax collection and tax defence forces the rest of the economy to focus more on redistribution of existing wealth than on creation of the wealth. Within the Czech public sector there is no internal motive to increase the efficiency of its system.

Bureaucracy cannot disappear because of its nature. In each system there are functions and activities whose performance is delegated to the higher authorities by the public. The society voluntarily restricts its own sovereignty and freedom of decision and expects the state to be responsible for it. The line of de-bureaucratisation of the state is the reduction of the administrative burden. Fully functional measures need to be taken to concentrate on related agendas, develop functional digitalisation of state administration and to reduce the amount of required information. Transformation of state administration through information and communication technologies must therefore be considered as the overriding task of all political forces.

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2 Until 2002 the allowance was set at a particular rate per 100 inhabitants of the administrative district for municipalities with basic competence, for municipalities with the competence of the registry office, for municipalities with the competence of the building office and the authorised municipal office. Rates were set by the Ministry of Finance.

Between 2003 and 2005 the role of the Ministry of the Interior was to determine (and adjust) the number of posts transferred from district offices that determines the amount of the contribution for municipalities with extended powers. The rate (used for determination of the contribution) for one post was set by the Ministry of Finance. In 2003 the rate was about 334,000 CZK, in 2004 about 351,000 CZK. And in 2005 about 368,000 CZK.

For 2006 the Ministry of the Interior prepared a new methodology for determining the amount of the contribution for municipalities which brought the unification of calculation and introduction of two criteria (the size of the administrative district and the ratio of the size of the centre to the size of the administrative district).

Recently, every year, the Ministry of the Interior proposes a method of allocating funds to municipalities that are intended to cover state administration carried out by municipalities.

3 Section 9 par. 1 (c) of the Act No. 250/2000 Coll., on Budgetary Rules of Territorial Budgets, as amended.

4 For the year 2018 the total amount of funds transferred to the performance of delegated power by municipalities was increased by 5% and similarly it should be increased in 2019 and 2020 (this is based on the budgetary outlook for those years). The same percentage increase was made in 2017. The parameters for the increase of funds for regions and the capital city Prague are the same as for municipalities. For the year 2018, the part of the contribution to the delegated competence that consists of flat-rate payments is being enforced. Such payments try to take into account the frequency of selected agendas at particular offices. The elements of transparency and targeting in compliance with the fulfilment of the Strategic Framework of Public Administration Development are strengthened. For more detail, see David Sláma, Novinky ve financování přenesené působnosti obcí v roce 2018, Obec a finance č.5/2017.

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Computerisation of Public Administration in Slovakia – Impact on (the Fiscal Position of) Municipalities[1]

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Abstract: The authors of the paper will analyse the structure of revenues and expenditures of local governments and evaluate the actual level of their independence. The authors will try to identify the room for improving of the financial position of the municipalities and special attention will be paid to a certain means of rationalisation of public administration, particularly computerisation within the e-Government projects that should, inter alia, lead to reduction of the administrative burden laid upon (local) government bodies and also saving of the budget. The analysis, largely based on a survey conducted by the authors within primary research, shows that performance of reforms in terms of rationalisation efforts may be a way forward, hence, the one analysed in this paper was not implemented in a fully satisfactory manner.

Keywords: municipality; self-government; computerisation; rationalisation; e-Government; local tax

1. Introduction

The process of fiscal decentralisation in the Slovak Republic started in 2005,[2] though there are various opinions on the current level of decentralisation in the Slovak Republic as such.[3] The Constitutional Act No. 460/1992 Coll., Constitution of the Slovak Republic (hereinafter referred to as "Constitution") designates the municipalities and higher territorial units (hereinafter referred to as "HTU") as the basis of self-government in its Article 64. Due to the limited scope of this paper, the authors will only deal with municipal[4] finances and leave aside the situation of the HTUs. Municipalities are responsible for the

performance of self-governing functions as well as transferred State administration. For this purpose, the structure of their budgetary revenues consists of two source types, i.e. those acquired within their own authority (based on a special law) in terms of fiscal decentralisation and those transferred by the State. Article 65 of the Constitution declares that municipalities and HTUs shall fund their needs predominantly with the use of their own revenues, and subsequently from State grants. Although they are allowed to earn their own revenues (e.g. through local taxes), the financial situation of municipalities is generally perceived as under-funded.

The complex aim of this paper is to evaluate the current state of funding of municipalities in Slovakia. In this context, the authors therefore analyse the composition and significance of particular municipal revenue sources to evaluate the fiscal position of municipalities and aim to identify the room for possible improvement (targeted at the possible use of the potential of the real property tax). Subsequently, the research task will be the assessment of one particular recent measure of rationalisation of public administration, namely the computerisation of public administration, following the previous research of the authors.[5] Based on the results of their own empirical research, the authors' aim will be the critical assessment of the outcomes of implementation of this measure in view of confirming or reputing the benefits of the measure for the municipalities from the viewpoint of improving their fiscal position (especially by administrative and/or financial efficiency).

The authors used standard methods of scientific research, namely: analysis, deduction, induction and synthesis. The paper contains the presentation of the results of the survey that was carried out from October 2016 to December 2017 on the research sample consisting of all the municipalities in the Slovak Republic (2,927) and their employees (according to availability of information on municipal employees). The number of responses received as regards the municipalities was 830 and 2,909 as regards their employees. The individual segments of the research sample were sorted out by size (municipalities by population density unit of 500 inhabitants); cities and city districts were treated separately. In the processing and evaluation of the collected primary and secondary data, the authors used standard statistical methods of descriptive statistics. The outcomes are presented in graphical and tabular forms.

2. Fiscal Position and Budgets of Municipalities

The actual sources of municipal revenues are defined by Act No. 369/1990 Coll. on Municipalities as amended (hereinafter referred to as "Act on Municipalities") and Act No. 583/2004 Coll. on Fiscal Rules of Local Self-governments and on the change of and amendments to certain acts (hereinafter referred to as "Act on Fiscal Rules") setting forth that revenues of the budgets of municipalities consist of their own and other resources.[6] Other important acts include Act No. 564/2004 Coll. on Budgetary Determination of Income Tax Revenue for Local Self-governments and amending certain acts as amended (hereinafter referred to as "Act on Budgetary Determination of Income Tax"), Act No. 582/2004 Coll. on Local Taxes and Local Charge for Municipal Waste and Minor

Construction Waste as amended (hereinafter referred to as "Act on Local Taxes"), and Act No. 447/2015 Coll. on Local Charge for the Development and on amendment to certain acts (hereinafter referred to as "Act on Local Charge").

Own resources as defined by the Act on Fiscal Rules are created by:

- revenues from local taxes – these are based on Act on Local Taxes which entitles the municipalities to impose real property tax, dog tax, tax on the use of public areas, accommodation tax, vending machines tax, non-winning gaming machines tax, tax on the use of public areas, tax on entry and stay of motor vehicles in historical parts of towns and nuclear facility tax. They are fully administered by the municipalities and the taxes are actually imposed by municipalities by means of generally binding regulations (hereinafter referred to as "GBR"). Within these, municipalities are allowed to adjust tax rates, value of civil construction plots, floor surcharge, additional reliefs, instalments, reporting duties and the data to be reported to the tax administrator, etc., which enables them to regulate local taxation according to their local needs. Among local taxes, the most important own tax resource is the real property tax. The property tax is three-tier and is levied on a) lands, b) buildings, and c) flats and non-residential premises;
- revenues from local charges – there are two of them, firstly, the local charge for municipal waste and small construction waste (hereinafter referred to as "charge for municipal waste") regulated by the Act on Local Taxes and, secondly, the local charge for development (hereinafter referred to as "charge for development") governed by the Act on Local Charge, the latter being levied upon constructions on land[7] within the territory of the municipality for which valid building permissions are issued;[8]
- non-tax revenues from the ownership of municipal property (including its transfer) and activities of the municipality and its budgetary organizations;
- interest and other revenues from the funds of the municipality;
- sanctions for violations of financial discipline imposed by the municipality;
- donations and revenues from voluntary collections to the municipality;
- the share of the taxes administered by the State – based on the Act on Budgetary Determination of Income Tax, the revenue from the income tax to be transferred to municipal budgets is in the amount of 70.0% and to budgets of HTUs in the amount of 30.0%. The sums are distributed to particular municipalities and the HTUs pursuant to specific criteria defined by the Government Regulation No. 668/2004 Coll. on the Distribution of Personal Income Tax Revenue to Local Self-governments (comprising the data on the number and structure of residents, the area and other coefficients); and
- other revenues on the condition that a special law provides so expressly. A municipality is also allowed to use extra-budgetary monetary funds, funds obtained from their own business activities, refundable sources of financing, and joint financial resources.

The others include:

- subsidies from the State budget covering the costs of the transferred performance of the State administration and subsidies from State funds (granted following the details of the State budget for a particular budget year from the budget chapters of the particular ministries, e.g. the Ministry of the Interior regarding the operation of the registry offices, reporting of residence of citizens, and the operation of the Registry of Inhabitants of the Slovak Republic, the elections, funding of regional education, etc.);
- additional subsidies from the State budget – these cover usually the issues like housing development, support of territorial development, etc.;
- purpose-built subsidies from the HTUs or from the budget of another municipality to carry out contracts under special acts (municipalities may, under Article 7 para. 2 of the Act on Fiscal Rules, provide grants to another municipality or the HTU, if they secure certain tasks for the municipality or for assistance in liquidation of consequences of natural disasters, accidents or other similar events in their area; they also may establish joint extra-budgetary cash funds for funding of the tasks common to more municipalities or for any other reason, i.e. cooperation between municipalities[9] – the most common is the joint exercise of responsibilities in the area of technical infrastructure, administration, applying for grants from the European funds for development projects, or others);
- funds from the European Union and other foreign funds granted for a specific purpose; and
- other revenues.

The difference between own and other revenues consists in the fact that the own resources (except for purpose-built donations) may be used by a municipality according to its needs upon its decision, while the others have to be used only for a specified purpose (as is the case of funds transferred for the performance of the transferred State administration). This division may, however, be illogical in some way due to the inclusion of shared taxes into own municipal revenues when these clearly do not truly have a nature of own resources. We assume that this "helps" improve the proportion between own and other municipal revenue sources in favour of the former, albeit just formally.

The above revenues are used for covering the expenditures as defined by the Act on Fiscal Rules, which, in our view, are quite standard, such as: obligations of the municipality resulting from the special regulations; performance of self-governing powers of the municipality and for the activity of budgetary organizations and contributory organizations established by the municipality; transferred State administration; administration, maintenance, and valorisation of the municipal property and the other property used to perform municipal tasks; obligations arising out of cooperation with another municipality or with an HTU or with other persons to ensure the tasks arising from the municipality's competence; duties arising from international cooperation of the municipality; interest on borrowings, loans and repayable financial assistance; expenditure related to the issuance of securities issued by the municipality and the expenses for reimbursement of the returns thereof; and other expenditure provided for by special regulations.[10]

2.1. Actual revenues structure

To provide the reader with the view of the actual significance of the above kinds of revenues, Figure 1 and Figure 2 show the shares of particular revenue types comparing the years 2016 (the most recent data available) and the year 2008. These show that there are only negligible differences in the development of the ratios of various revenues and that the current state is rather stable.[11]

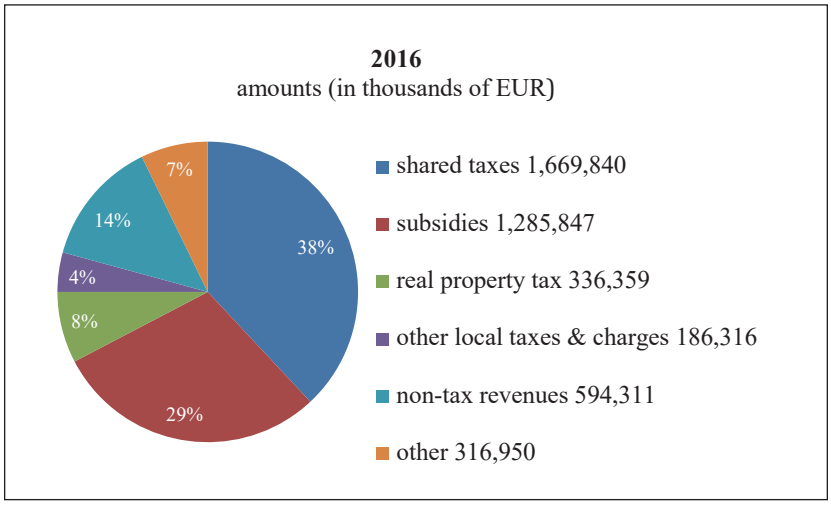

Figure 1.
Municipal revenues structure (2016)

Source: Ministry of Finance of the Slovak Republic. Public administration budget, www.finance.gov.sk/sk/financie/verejne-financie/rozpocet-verejnej-spravy/

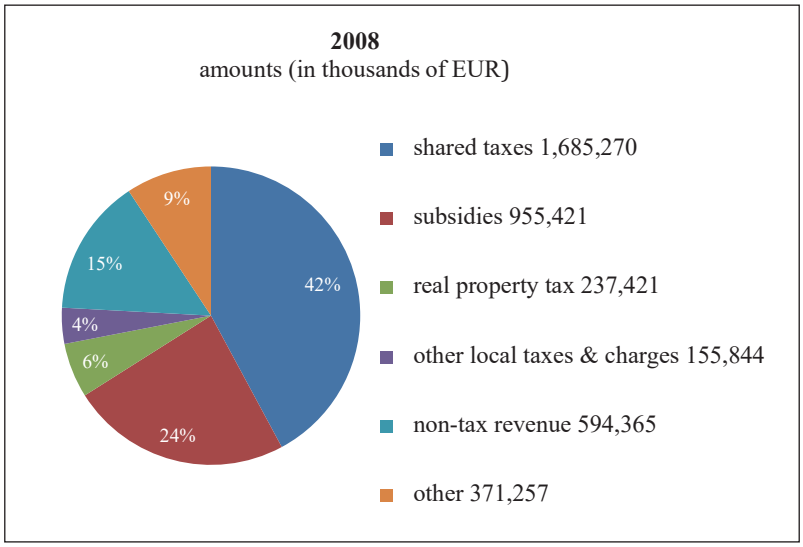

Figure 2.
Municipal revenues structure (2008)

Source: Ministry of Finance of the Slovak Republic. Public administration budget, www.finance.gov.sk/sk/financie/verejne-financie/rozpocet-verejnej-spravy/

The situation as seen from the figures above was set after the major tax reform in 2004[12] which entitled the municipalities to impose local taxes and determine, i.a. the majority of applicable tax rates.[13] The fact that municipalities were granted a right to set the tax rates according to their needs, even – as in case of real property tax – different for various municipal areas/zones and types of properties or the use thereof, changed their position in regard of the ability to influence the amount of received tax revenues and this right was vastly exercised, as is seen from Figure 3.

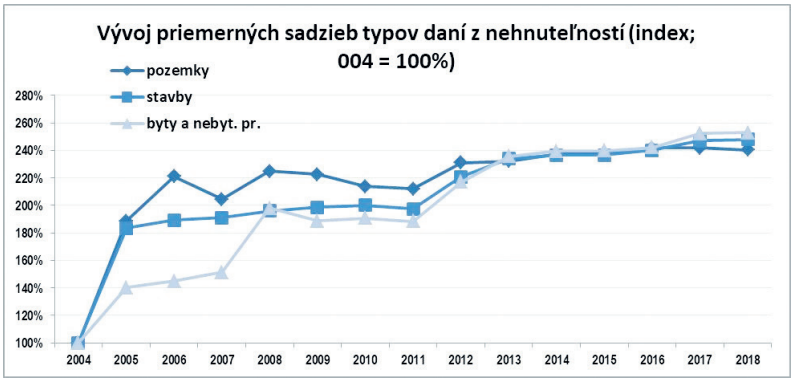

Figure 3.
The development of average real property tax rates from 2004 to 2018

Source: Podnikateľská Aliancia Slovenska, alianciapas.sk/dane-z-nehnutelnosti-sa-tento-rok-takmer-nepohli-vynimkou-je-myjava-mesta-poplatok-za-miestny-rozvoj-takmer-nevyuzivaju/

3. In Search of Measures to Improve the Fiscal Situation and Promote a Greater Efficiency

As Figure 3 confirms, the total revenues of municipalities at the time of implementation of the reform were insufficient and there was a strong need to raise more revenue. In the current situation, we can assess that some elements of the then situation are still present and some of them have improved. The proportion of particular types of revenues have stabilised, but there is still a need for improving the financial situation of municipalities, which are highly dependent on not truly own resources, as was seen in Figures 1 and 2. Raising the real property tax rates by municipalities is no longer an effective tool to acquire more revenue, as we can see from the horizontal curve in Figure 3 in the last 4 or 5 years.[14] The main reason is not the lack of potential of the real property tax (as is demonstrated by comparisons in Table 1), but the lack of political will caused by total unacceptance of the real property tax reform by the public.[15] Although the idea of a reform was included in the National Programme of Reforms in the SR in 2016 as a task of the Government in coordination with the Association of Towns and Municipalities of Slovakia to *"create the technical conditions for a change of the system of the real property taxation towards determining the tax base by the property value in order to increase tax fairness and efficiency concerning local taxes"* and also in the Government Statement for the years 2016–2020, the future of the eventual reform stays uncertain.[16] Should the reform be satisfactorily implemented, it might be a welcome solution to the financial (and other related) problems of local governments.[17]

Table 1.
Real property tax performance comparison

Country/RPT	% GDP	% Total Taxes	% Local government revenues
Moldova	0.1% (2013)	0.3% (2013)	7.6% (2013)
The Czech Republic	0.2% (2015)	0.6% (2015)	1.4% (2012)
Estonia	0.3% (2014)	0.9% (2014)	6.8% (2014)
Lithuania	0.3% (2013)	1.7% (2016)	8.2% (2016)
Slovakia	0.4% (2016)	2.9% (2016)	8.0% (2016)
Hungary	0.6% (2014)	1.6% (2014)	NA
Slovenia	**0.6% (2015)**	**1.7% (2015)**	**10.6% (2015)**
Latvia	0.8% (2015)	2.8% (2015)	9.0% (2014)
Bulgaria	NA	1.6% (2015)	14.3 % (2015)
Romania	0.8% (2015)	4.0% (2015)	9.0% (2015)
Ukraine	0.8% (2015)	3.1% (2015)	5.3% (2015)
Poland	1.2% (2016)	3.9% (2013)	22.0% (2016)
Russia	1.1% (2015)	13.6% (2015)	6.0% (2015)
USA	2.6% (2014)	9.9% (2014)	NA
Canada	2.7% (2014)	8.7% (2014)	NA
OECD av.	**1.1% (2013)**	**3.3% (2013)**	**NA**

Source: Iptipedia and country presentations presented at the *Market Value-based Taxation of Real Property: Lessons from International experience.* Lincoln Institute of Land Policy & Center of Excellence in Finance, Ljubljana, Slovenia, 23–27 March 2015, 16–20 May 2016 and 06–10 March 2017.

This situation leads municipalities to permanent dependence on the State transferred revenues (shared personal income tax income and grants and transfers). This, together with the statutory necessity of a surplus or at least a balanced budget, causes that the municipalities that are unable to gain funding in any other way (e.g. from the disposal of municipal property or by using specific grants or loans) simply do not invest into development of their municipality. Other revenue sources need to be sought.[18] This problem may be addressed partially by a rather new tool – the charge for development, the use of revenue thereof is purpose-built – its revenue may only be used to cover capital expenditures related to constructions (including the settlement of land) to be used as childcare facilities; facilities providing social, sporting and cultural services; social housing; school equipment and devices for practical training; medical equipment; a publicly accessible park or adjustment of the public green; local roads, parking areas and technical infrastructure. We are, however, unable to estimate its fiscal effect, as there are no available data due to its only recent implementation, nevertheless, the first news show quite a low interest of the municipalities.[19]

One of the reasons for criticism of decentralisation in the Slovak Republic is still a large level of bureaucracy and lack of systemisation of public administration, and the municipal level is not an exception. Within the decentralisation of public administration, a large number of duties and responsibilities were transferred to municipal levels, which as such is a good position in respect of the proportionality principle, on the other hand, in many cases, this competence transfer was followed neither by sufficient technical equipment nor by adequate administrative staffing.[20] This is connected to a specific phenomenon of enormously large number of municipalities, which can be found also e.g. in the Czech Republic[21] and more examples can be found.[22] As of the state of the last census in Slovakia in the year 2011,[23] there are 2,927 cities, city districts, and municipalities. In addition to 140 municipalities with the status of cities, 1,919 out of 2,751 municipalities have less than 1,000 inhabitants and still are obliged to fulfil the duties of the public administration authority, which is subject to frequent criticism.[24] The two largest cities in Slovakia, Bratislava and Košice, are divided into city districts, where Bratislava with its 411,228 citizens is divided into 17 city districts and Košice with its population of 240,433 into even more – 22 city districts. All of the city districts serve the administrative purposes as partially independent municipalities with their local governments, administration and bureaucratic apparatus. These huge numbers of separate administrative units are, in our opinion, one of the reasons why the municipal revenues cannot be used as efficiently as they would be, should the bureaucracy be cut and not duplicated under the current situation. We understand that the cost-driven approach cannot be the principal reason for consolidation of municipalities, nevertheless, the growth of efficiency has been proved.[25] As Sopkuliak concludes, the smallest municipalities have a very high share of expenditures spent on general public services (connected to personal and technical running costs) per citizen as compared to larger municipalities and therefore consolidation of local self-governments should improve their ability to save their revenues and use them for other developing activities.[26] One of the measures to enable mainly the small municipalities to "join the forces" under the current legislation is the possibility to run joint municipal offices, which is quite used, especially for special purposes of the transferred State administration, e.g. joint building offices.

One of the most recent reforms aiming at rationalisation of public administration is the digitalisation of public administration. Figure 4 shows the overall current use of e-agenda and e-services at the local level. At the mentioned local level, there have been various projects and grants to fund the implementation of digitalisation of municipal and city administration.

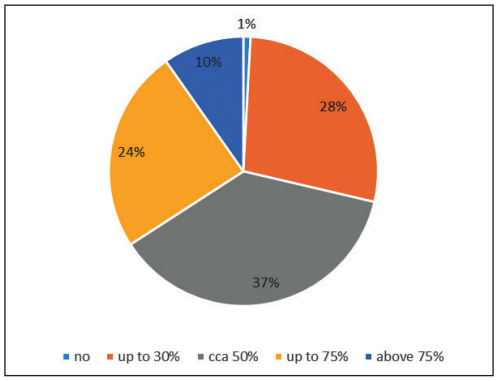

Figure 4.
Share of the use of e-agenda on the municipal level

Source: Drawn by the authors on the basis of the results of the survey conducted by the authors.

A recently implemented DCOM project (Data Centre of Computerization of Local Self-governments of Slovakia) provided the support to Slovak towns and municipalities with the necessary software to perform the e-Government functions and processes. The overall use of the DCOM support has been declared by 79.72% of survey responding towns/municipalities; the rest of them use different e-Government performance enabling software tools.

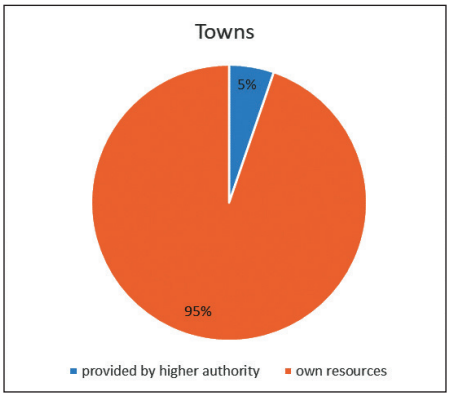

Figure 5.
Funding of software (58 towns – 57 responses)

Source: Drawn by the authors on the basis of the results of the survey conducted by the authors.

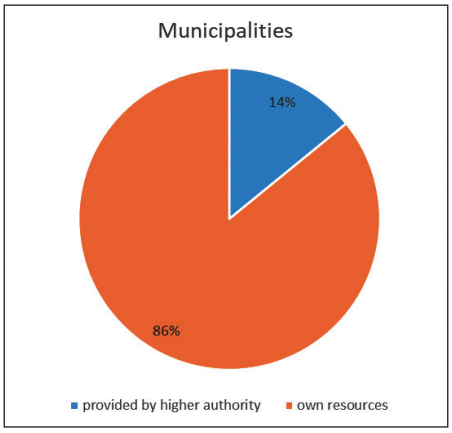

Figure 6.
Funding of software (769 municipalities – 758 responses)

Source: Drawn by the authors on the basis of the results of the survey conducted by the authors.

Figures 5 and 6 show the ratio between the towns and municipalities that have been provided with the necessary software by a superior authority and those which secured it from their own resources. 86.52% of municipalities/towns have acquired the software for electronic administration and data procession from their own resources, while only 13.48% of them have been provided therewith by the superior authorities. Material and technical equipment (as a prerequisite for the actual provision of e-services) is primarily obtained by the municipalities themselves, which, in our opinion, is the main reason why some municipalities still do not provide e-services at all or only to a limited extent and/or in a low quality. Under the current regulation (Act No. 305/2013 Coll., Act on e-Government), as of 1 November 2016, all the municipalities should have provided the services of public administration electronically. Based on this fact, it seems rather surprising that the services of receipt and delivery of electronic documents (within the e-Government performance) have reached very low shares (only 24.72% municipalities declared to deliver their decisions electronically, 22.68% use communication signed by qualified electronic signatures within communication with other public authorities) compared to other e-services, e.g. e-mail or electronic formularies that are used vastly (e.g. internal e-mail communication 81.07%, e-mail communication with other authorities 99.76%; with businesses 74.08%, with citizens 67.96%; use of electronic formularies 53.62%).

The contractual price for the provision and service of the DCOM information system has been set at EUR 62,844,76.34, which together with other projects (the total expenses of those projects are unavailable, since the Slovak Government was, to our surprise!, unable to answer our request for this information) might be quite a high sum. Despite that, altogether with the common-unified web service for electronic communication with public administration (www.slovensko.sk) is not unproblematic.

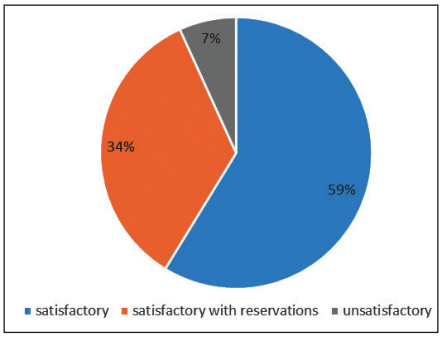

Figure 7.
Overall satisfaction of municipalities with functioning and user comfort of e-services/e-agenda (795 responses)

Source: Drawn by the authors on the basis of the results of the survey conducted by the authors.

Following Figure 7, 59% of the respondents are satisfied with the functioning and comfort level of the current e-Government processes, while 34% are satisfied only partially and 7% are dissatisfied. Most negative responses were regarding the functioning of the qualified electronic signature communication where 58.68% of its users declared dissatisfaction with the user comfort, however, considered it to be rather efficient (cost and/or time saving) – with 84.82% of the users. Within the survey, various objections and remarks regarding the overall assessment of the e-Government functioning were raised by the respondents. We learnt from more than 323 remarks of municipal/city representatives that the most significant defects of the current state are a) malfunctions or incompleteness of the system and technical defects with 77 objections; b) lack of transparency of the system and poor user comfort (including complicated work with the system, unclarity for ordinary users, opaque websites and incompleteness of the data) with 69 objections; c) low level of comprehensiveness and integration/interconnection of the systems and registers administered by the authority itself and with other public administration authorities within various agenda causing duplicity and lack of interoperability with 38 objections together with 11 responses on duplicity of work caused by the need to deal with "paper" agenda, files or communication alongside with the electronic ones. 26 respondents claimed lack of good standard of the Internet connection. 25 respondents depicted low level of adequate technical equipment and qualified staff or financial resources and 27 presented dissatisfaction with a small number and/or poor quality of trainings for the employees; 20 remarks were aimed at unpreparedness, slow implementation, and unsystematic approach within the process of e-Government and 13 claimed their opinion on raise of bureaucracy. 11 respondents claimed low interest or unawareness of the clients/addressees, especially in smaller municipalities and as regards older citizens or persons without adequate technical skills and 6 pointed out low level of awareness. The rest of the remarks were of a general nature or unidentifiable.

As regards the view of respondents on the efficiency of e-services, the majority of them are in favour thereof, as is clear from Figure 8 which also corresponds to the overall preference of the e-service use (Figure 9). A different situation was found concerning the efficiency of communication with qualified electronic signature (which is the substantial part of e-Government), where only 17.94% of the respondents declared time-saving (12.38% declared as not cost-saving and 69.68% were unable to assess it) and similarly only 18.03% cost-saving (16.20% declared as not cost-saving and as much as 65.77% were unable to assess it). Nevertheless, the extension of electronic processes/services currently available would be welcome by only 24.94% of them.

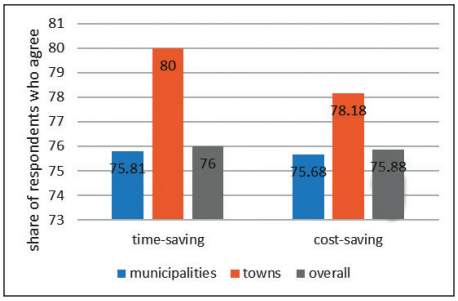

Figure 8.
Time and cost saving of e-services/e-processes (800 responses)

Source: Drawn by the authors on the basis of the results of the survey conducted by the authors.

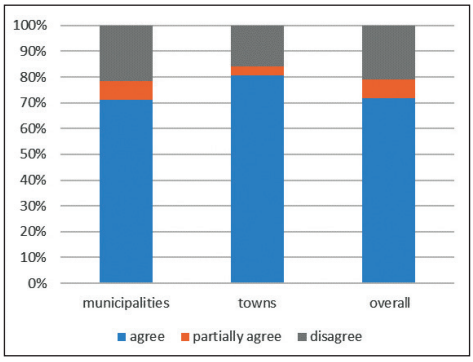

Figure 9.
Preference of e-services/software use over physical/paper form (812 responses)

Source: Drawn by the authors on the basis of the results of the survey conducted by the authors.

4. Conclusions

Should we look at the primary goal of fiscal decentralisation, it definitely would be the creation of an independent self-government that is capable of funding its needs and execute its policy by its own resources.[27] Slovakia truly started to fulfil this idea only after 2004 when local taxes as a true local revenue source were established. As we look at the current budgetary situation of the Slovak municipalities, one may conclude that there is still a high level of dependency on the State and its grants, transfers and shared state taxes (see Figure 1). Even though the shared taxes are statutory designated as own resource, the true own municipal resources do not represent a major revenue source. The real property tax as the most relevant own tax revenue has been criticised due to low revenue in the light of the GDP ratio[28] (see Table 1), which is true, nevertheless, any potential real property tax changes are very sensitively addressed by the public which hinders any substantial or even minor changes in the current system. It is not only the mentioned low revenue, but also the unbalanced tax burden[29] between taxation of businesses and households (which are strongly undertaxed), and there is also room for covering a larger scale of various property types (e.g. currently not taxed pipelines and constructions without roof or ceiling) or improving enforcement.[30] Despite this, its system does have many positive features, such as the administrative simplicity, adjustability and high level of comprehensibility for the tax payers. Since the lack of political will or rather "know how" to "sell the reform", other means of improving, very often non-flattering, of the fiscal situation of municipalities have to be sought. We have mentioned a very lately introduced, now local charge for development.[31] Nevertheless, there might also be room for more systematic changes, as the one analysed in the paper above – rationalisation tools. Letting alone the idea of limiting the number of municipalities, or at least their administrative apparatuses, which would be very welcome in the authors' opinions,[32] there might be another one – like the e-Government implementation – where one of the goals definitely is the efficiency increase. Such reforms might be very helpful for larger towns but also for small villages where they might counterbalance frequent understaffing and inadequate equipment. These, however, need to be implemented in a satisfactory way, should they improve the current situation. The results of the survey regarding the computerisation reform indicate ambiguous conclusions in this sense. There are many positive responses, however, a large number of problems and negative reactions were found. There has been a vivid discussion about the badly mastered computerisation reform in Slovakia due to various errors in the functioning of e-Government performance as such, not only at the municipal level.[33] We assume that the clients of the reform (citizens, employees of businesses and public authorities) did not receive a quality service for the "money spent" on the reform. A premature implementation of the reform without efficient technical service that is present in the reform at central state administration level is also found at the local level. Here, the problem might also lie with the fact that was mentioned above – a large number of small municipalities that are obliged to fulfil the tasks imposed by the legislation, in many cases without the necessary material, technical, personal or other equipment. The staff of such small municipal offices (not unusually less than 3 employees)[34] is frequently not capable of handling the new (electronic) agenda due to lack of adequate education, training or large amount of other working tasks

demanded due to understaffing.[35] The problem is partially resolved by the existence of joint municipal offices, nevertheless, many tasks for such municipalities remain. It is therefore necessary to remember this fact within all the reformative processes within public administration in Slovakia. Following the results of the survey, we assume that as for small municipalities, imposing of duties as regards computerisation of public administration represents rather a burden than a tool for achieving a simpler and more efficient public administration. For this reason, we do think that this reform has not entirely fulfilled one of its goals – improving the efficiency – as regards the smaller municipal units. Should the reproached negatives be eliminated, the reform will definitely improve the efficiency of administrative tasks of municipalities in terms of both costs and time, as was already indicated by the evaluation within the survey.

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1 This chapter represents the partial output of the implementation of the APVV project No. 14-0598.

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3 Tamošiūnas states that Slovakia belongs to countries with a high level of decentralisation based on subsidies acquired – below 30% (Teodoras Tamošiūnas, Valda Stanytė, Fiscal decentralisation in Lithuania in the context of EU countries, 157, in *Scientific Papers of the University of Pardubice, Series D, Faculty of Economics and Administration,* vol. 35, no. 3 [2015], 149–160, dspace.upce.cz/handle/10195/64708 [accessed 5 January 2018]), however, looking at Figure 1 later, we see that there is a large share of shared taxes, which are transferred by the central government. Based on the cost comparison method (share of the local governments' expenditures on public administration expenditures) with only 17% and the share of the local governments' expenditures on the GDP with only 6.3% – compared to e.g. the Czech Republic – 10.2%, Austria – 16.9%, Hungary – 9.0%, Poland – 13.4%, Denmark – 37.6%, Sweden – 25.7% (in 2012), domestic authors consider the level of decentralisation as rather low. The general perception is that the level is practically high due to many competences transferred to local governments. (Viktor Ňižňanský, Viera Cibáková, Marta Hamolová, *Tretia etapa decentralizácie verejnej správy na Slovensku* [The Third Phase of the Public Administration Decentralisation], 108 (Bratislava, Wolters Kluwer, 2014).

4 Since the legislative term "municipality" includes also municipalities with the status of cities or city districts (not only villages), we will follow the statutory terminology in this regard.

5 Anna Románová, Karolína Červená, Elektronická komunikácia podnikateľov s verejnou správou (právne aspekty) [Electronic Communication of Entrepreneurs with Public Administration (Legal Aspects)], 865–875, in *International Scientific Conference, Current Problems of the Corporate Sector 2016* (Bratislava, EKONÓM, 2016); Karolína Červená, Anna Románová, eGovernment ako prostriedok racionalizácie verejnej správy [e-Government as a Rationalisation Tool of Public Administration], 51–59, in *Racionalizácia verejnej správy* [Rationalisation of Public Administration] (Bratislava, Akadémia Policajného zboru v Bratislave, 2016).

6 Article 3 para. 1–3 of the Act on Fiscal Rules.

7 Except for minor constructions, extensions and outbuildings up to 25 square meters of floor area, emergency construction works, family houses with a floor area of up to 150 square metres, constructions used for social housing or childcare, built-in garage and parking spaces within an existing building, medical facilities, serving to kindergartens or schools, social service facilities, practice of religion, protection of the State, museums, galleries, libraries and cultural centres.

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10 For more see Andrej Sopkuliak, Štruktúra výdavkov miestnej samosprávy na slovensku v rokoch 2012–2014 [Expenditure Structure of Local Self-governments in Slovakia in 2012–2014], 774–780, in Victorie Klímová, Vladimír Žítek (eds.), *XIX. mezinárodní kolokvium o regionálních vědách. Sborník příspěvků* [19th International Colloquium on Regional Sciences. Conference Proceedings] (Brno, Masaryk University, 2016). DOI: https://doi.org/10.5817/CZ.MUNI.P210-8273-2016-99

11 Compare: Miroslav Štrkolec, Príjmy miestnych daní – ústavné predpoklady a realita [Local Taxes Revenues – Constitutional Preconditions and Reality], 338–343, in *15 rokov Ústavy Slovenskej republiky* [15 Years of the Constitution of the Slovak Republic] (Košice, P. J. Šafárik University in Košice, 2008).

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International Cooperation in the Fight against Tax Evasion

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Abstract: As regards the fight against tax evasion individual states do not act isolated, on the contrary the key role is being played by international organisations. Because of the wide fiscal sovereignty of states such cooperation takes many forms and outputs. On the one hand, this article aims to identify areas within which the fight against tax evasion occurs. Furthermore, it aims to analyse the development and current status of important international organisations that fight against tax evasion and to present their selected outputs.

Keywords: tax evasion; international organisation; OECD; European Union

1. Introduction

At the begging, it is necessary to outline the not very clear relationship between the terms tax evasion, tax optimisation, law abuse, circumvention of law, aggressive tax planning and other such terms. Although it may look like a considerably unclear group of terms, from a purely theoretical viewpoint, it is mainly just about labelling concrete practices as legal and the others as illegal. However, it is clear that to define such boundaries is not only difficult, but also under the current circumstances, I dare to say, impossible. This is the reason why there are many practices that could be identified as lying somewhere at the edge of legal and illegal. The borderline between the legal and illegal practices is sometimes being deduced based on the decision-making practice of courts in the particular countries. Given the fact that for a long period of time, the countries on the field of international tax law are not performing separately and that they cooperate firstly on the basis of legally binding exchange of information, and secondly on more or less unbinding cooperation in the area of sharing knowledge and practices that aim to improve the efficiency of the fight against tax evasion, as a result, international organisations play a key role in the area of fighting tax evasion, even though international organisations frequently produce solely unbinding and recommending measures and conclusions.[1] Then it is often upon the particular countries to reflex these

unbinding conclusions into their domestic legislation and decision-making practice in order to make the fight against tax evasion more efficient. This paper deals with the issue of this international cooperation, and apart from a brief outline of historical development, it is also analysing current positions of particular significant international organisations or political coalitions,[2] which have covered the fight against tax evasion on their agendas.

2. Definition of the Area of the Fight against Tax Evasion

This part describes the areas in which tax evasion occurs or have occurred. As it was stated in the introduction, the classification of the term "tax evasion" in the tax law is nearly as unclear as is the definition of the term. It is not the aim of this paper to define tax evasion – that have been tried by many legal scholars throughout history.[3] The area of tax evasion is quite broad, and of course the tools to prevent tax evasion respond to this accordingly.

2.1. Double tax treaties

In the international context, there are situations when the factually generated income, which would under standard circumstances be subject to taxation, cannot be taxed at all in either of the countries when appropriately using some particular processes (e.g. when the place of residency of the subject is modified etc.), especially in cases when there is a double taxation international treaty (resp. double tax treaty) between the two particular countries.[4] Therefore, using gaps and loopholes may not result in double taxation, but in no taxation at all. We can observe this issue more and more often nowadays and operations that aim to cover and modify decisive facts to minimalise tax are highly-developed and more difficult for tax administrators to resolve. Both unilateral domestic and international measures have two roles in international tax law. On the one hand, these measures arise from its initial fundamentals, which consists in elimination of multiple tax, on the other hand, the authorities must deal with using the shortcomings of the measures in order to minimalise tax, especially in the last decades. It is clear that playing these two roles at the same time can be difficult. The Organisation for Economic Co-operation and Development (hereinafter referred to as "OECD") and the United Nations (hereinafter referred to as "UN") are the key international organisations in this field.

2.2. Exchange of information between tax administrators

Another area of cooperation in the fight against tax evasion is exchange of information between the tax administrators from different countries; its aim is to make a picture of the whole situation using partial information, that as such would not be sufficient to reveal and "prosecute" tax evasion. The issue of information exchange is often included in the double taxation treaties. Between the countries that are not parties to such treaties, the bi-partial treaties concerning information exchange in tax issues play an important role. In the

area of information exchange between tax administrators, the OECD, the European Union, the UN and the Council of Europe play a key role.

2.3. Other areas of international cooperation

Apart from the stated areas, there is a wide range of other levels of cooperation. Often it can be the publishing of unbinding reports and recommendations that aim to raise the awareness of efficient procedures to prevent tax evasion that the particular countries voluntarily include into their legislation or administrative practice. Furthermore, cooperation can also be realised on a political level, which means that lists of (un) cooperating countries concerning information exchange and prevention of tax evasion are being issued, these countries can be labelled as so called tax havens. As it was stated above, these lists have an impact primarily on the political and not on the legal level. Moreover, in the context of the fight against tax havens, it is noteworthy to mention the particular "quasi-cooperation" in a form of transposing instruments from other jurisdictions into its own legislation. An example of this measure may be an introduction of higher tax rate on the incomes that are to be subject to tax in the tax havens. *"Coming into force on 1st of January 2013 in section 36 (1) (c) Act no. 586/1992 Coll., Code on Taxation on Income, there is [...] introduced 35% withholding tax rate [...], which applies, in short, when paying income to tax non-residents who are not residents of other European Union member states or European Economic Area member states or non-residents of a country that have entered into a double taxation treaty with the Czech Republic or an agreement on concerning information exchange in tax matters [...]."*[5] We could find many such activities or similar ones in the field of international tax law. Usually they are rather informal recommending instruments powered by political power, which is a result of tax sovereignty of particular countries.

3. The Role of Particular International Organisations and Groups

This chapter is dealing with international organisations which play a key role in the fight against tax evasion, and the outcomes of these organisations. Given the fact that many of the partial instruments are rooted deeply in the past, it is not very convenient to organise the particular subchapter into two periods (history and contemporary state), so the topic will be discussed comprehensively.

3.1. OECD

This organisation has created many interpretation and recommending manuals during the decades, which were more or less accepted by the developed world economies. Due to the nature of this organisation, its main outcomes are researches and recommendations without direct international binding effect which are being afterwards reflected by domestic measures of particular countries. This is the largest difference between the OECD instruments and for

example the European Union instruments, whose instruments may be legally binding. On the other hand, it is important to add that the OECD's political influence is so important in this field, that the member states do accept its conclusions and reflect them in their domestic legislation. In this matter is the role of the OECD quite specific. Should we mention the particular research, it would be the one entitled *Harmful Tax Competition – An Emerging Global Issue*[6] from 1998 or a more recent research entitled *The Global Forum on Transparency and Exchange of Information for Tax Purposes*[7] from 2012.

Furthermore, the OECD in its regular reports presents (or have presented) the imaginary black, grey and white list of countries, depending on their willingness to cooperate on international level in information exchange in tax matters. On the black list there are (or were) jurisdictions that refuse any international cooperation in information exchange in tax matters, on the grey list there are jurisdictions that take first steps towards cooperation, and on the white list there are listed jurisdictions that fully cooperate. The examination of these issues takes place on two levels. The first level concerns the existence of the legal framework for information exchange and transparency. The second level deals with the practical functioning of the legal framework in practice.

A current issue that the OECD is dealing with is the issue of base erosion and profit shifting. Following the meeting of the Ministers of Finance and Governors of the central banks of the so called G20 (the Group of Twenty), the OECD issued the common Action Plan,[8] which is in many ways inspired by the previous document issued solely by the EOCD.[9] At the following meeting of the G20 Group, the parties also came to a partial conclusion that the content of the Action Plan, which is primarily concerning double taxation, artificially reducing tax base and shifting profits to more convenient jurisdictions, must be strictly obeyed. The Action Plan contains 15 partial points that must be in a considerably short time dealt with.[10]

On the 1st of February 2014, the multilateral *Convention on Mutual Administrative Assistance in Tax Matters* came into force. The convention was prepared under the auspices of the OECD and the Council of Europe and has been open to a signature since 1998. On the 1st of June 2012, a protocol came into effect which amends the convention and puts it in line with the new OECD standards for information exchange in tax area. The convention amended by the protocol represents a comprehensive multilateral tool developed by the cooperation of the Council of Europe and the OECD that enables all forms of international administrative cooperation that are stated in annex A of the convention.[11]

3.2. The European Union

Concerning documents passed by the European Union (or its predecessor), they can be categorised into two levels. The first level is made up of legally binding documents, typically in a form of secondary European Union law. The second level contains unbinding documents (whatever they are called) which function just as a recommending lead, however, they have a significant impact on the interpretation of the binding rules. Both levels are undoubtedly important. Concerning the binding documents, it is necessary to mention Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC10 that covers the information exchange between the tax

administrators in the member states. A significant document on the second level is the so called Action Plan to strengthen the fight against tax fraud and tax evasion from December 2012.[12] Apart from the evaluation of the current state, it contains a list of particular measures which should be reached in a short or long term.[13] In March 2015, the European Commission issued a package which aims to raise tax transparency in the area of income tax of legal entities. It mentions, for example, the obligation of the tax administrators to exchange the particular tax decision and other aspects that aim to limit tax evasion. A part of the package is the call for revising the Code of Conduct for Business Taxation from 1997,[14] in which the countries have committed themselves not to introduce new potentially harmful tax measures and to limit existing measures of this nature.

3.3. Other international organisations

To provide the readers with a full picture, it is necessary to at least briefly mention that the particular activities related to the fight against tax evasion take place in other political groups, for example the countries of the so called G8 (the Group of Eight)[15] or the already mentioned G20; once again, they solely issue recommendations that are not legally binding. Other activities take place in the Council of Europe, as it was stated above. Last but not least, it is important to point out the UN activities.[16] Worldwide, there are tens of other, often local organisations, and the roles and documents they issue fairly differentiate between each other. Some countries are involved in almost no international cooperation; these are very often the so called tax havens. There are none but political sanction threats for them especially due to the still wide tax sovereignty.

4. Conclusion

To sum up, although some international organisations (typically the OECD) have played a significant role in the area of the fight against tax evasion, it can be said that their influence have consisted solely on the political level, which is a result of the nature of these organisations that are not able to pass a binding legal rule. Even though the outcomes are not binding, their documents have a strong impact on the domestic legal frameworks of (not only) its member states. Apart from the OECD, there are other organisations whose impact lays mainly on the political level, these are the G8, the G20, the UN or the Council of Europe. The most important actor nowadays which can pass legally binding documents is the European Union. Cooperation between the member states against tax evasion takes place primarily on the procedural level (information exchange between the tax administrators), as well as on the substantial level, on which many documents with various names were passed (researches, reports etc.), which have no binding effect, however, they play a key role concerning the interpretation and application of the binding norms of the European Union law. In the previous years the tendencies to fight tax evasion have increased within practically all international organisations, however, any rapid development is hardly to happen in the following years.

References

1 Not exclusively; some measures adopted within the European Union can be used as an example (as discussed below).
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13 In the conclusion it is stated that *"This action plan identifies a series of specific measures which can be developed now and in years to come. [...] In order to ensure that the actions described in this action plan will be duly implemented, the Commission will put in place appropriate monitoring and scoreboards, which includes in particular regular exchanges of views in relevant committees and working groups on the basis of detailed questionnaires."*
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Case studies

Judicial Review of Municipal Legislation on Hazard Games in the Czech Republic

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Abstract: The aim of the article is to discover fundamental regulating legislative activities of municipalities in the field of hazard games. For several recent years there have been a lot of problematic cases relating to authorisations to carry on hazard games in the Czech towns and villages that have had to be decided by the Ministry of Finance and later by administrative courts and the Constitutional Court. Some of the decisions can be considered fundamental and very relevant for fundamental principles of municipal legislation making. The authors focus on elected court decisions with the aim to evaluate the practise of municipalities in the field.

Keywords: gambling; hazard games; legislation; municipality

1. Introduction

Seen through the eyes of the regulator, hazard games (hereinafter also referred to as gambling), at minimum, is a debatable area of social relations as is the operation of gambling itself. Unless gambling is allowed by the authority, the legal relationships arising out of gambling are not protected under the law. Indeed, at some point in time, an insignificant number of countries banned gambling completely. Even when the authority allows gambling, it is subject to countless restrictions. From the beginning of the existence

of the Czech Republic, gambling caused negative reactions particularly on the municipal level where there were relatively large numbers of small gambling establishments with just a few slot machines. Those establishments differ from casinos, not only in the scope of gambling, but particularly in the type of the customer who is frequently a source of issues to local public safety and social cohabitation. This paper aims to shortly define solutions for the legislative regulating administration of gambling on local level, to describe actual challenges of this legislative and its application but also to bring up opinions on the procedural process of application of local ordinances forbidding the administration of slot machines.

2. Constitutional Grounds

The authority of municipality councils of each municipality is based on Article 104 par. 3 of the Constitution of the Czech Republic (hereinafter referred to as the "Constitution"): "[R]epresentative bodies may, within the limits of their jurisdiction, issue generally binding ordinances." The underlining problem of this formulation is that any other articles of the Constitution do not define what is the limit of the jurisdiction of the representative bodies, as Article 104 par. 1 of the Constitution sets forth: [T]he powers of representative bodies shall be provided for only by statute. Therefore, the Constitution does not protect the autonomous competence of the municipalities. A general definition of the municipality competence is described in section 10 of the Law on Establishment of Municipalities (128/2000 Coll.), which delimits three areas of autonomous competence, where the municipalities are allowed to impose duties: 1. for the purpose of safeguarding local affairs in public order; especially it may stipulate which particular activities that could disturb the public peace in the municipality or could run counter to the good morals, protection of safety, health and property can be performed solely on sites and at times specifically determined by a binding ordinance, or stipulate that such activities are prohibited in some public premises in the municipality; 2. for the purpose of organizing, holding and terminating publicly accessible sporting and cultural events, including dances and discotheques, by stipulating binding conditions to an extent necessary to secure public order; 3. or the purpose of maintaining the cleanliness of streets and other public spaces, for the protection of the environment, greenery in built-up areas and other public green space, and for using the municipality's amenities serving public needs. In other areas, municipalities can impose duties only if specifically allowed by a special act. This absence of a general scope of autonomous competence that would allow municipalities to enact ordinances causes disputes subsequently scrutinised by the Constitutional Court. The prime example might be the disputes regarding the regulation of the administration of gambling.

The extent of autonomous competence, where the municipality can impose duties, was the subject of many decisions of the Constitutional Court. In the beginning, following the establishment of the Czech Republic, its Constitution and the Constitutional Court, the Constitutional Court had a rather restrictive view. In this matter, the case Pl. ÚS 5/93 was essential, where the Constitutional Court found that in order to impose specific duties,

a generally binding ordinance must have a statutory basis. Even though the Constitutional Court found a generally binding ordinance to be the underivative juridical norm, the Court still required a concrete statutory basis which are typical for a secondary juridical norm (not primary, as that is usually considered the synonym to the term underivative). After more than 10 years of its existence, the Constitutional Court's restrictive view began to change possibly also because of the personal changes within the Court. In its case Pl. ÚS 63/04 the Constitutional Court first used the four-level test to measure constitutionality of municipalities' generally binding ordinances. This test of abstract control of juridical norms enacted within the autonomy of municipalities, when the Constitutional Court scrutinises the conformity of these norms with the Constitution and laws, consists of four successively asked questions: 1. whether the municipality has the authority to enact the disputed provision of a generally binding ordinance; 2. whether the municipality while enacting the disputed provision of the generally binding ordinance did not exceed the limit of its statutory subject-matter authority (if the municipality did not act ultra vires); 3. whether the municipality while enacting the generally binding ordinance did not abuse the statutory entrusted authority, and 4. whether the municipality enacting the disputed provision did not act evidently unreasonably.

Using this test, the Constitutional Court subsequently scrutinised a generally binding ordinance in a case that became the subject of the decision Pl. ÚS 45/06 where the original restrictive approach of the statutory basis underwent a major change setting forth that the generally binding ordinance must be in accordance with the subject matter authority of the municipality.

3. The Right of Municipalities to Regulate Hazard Games

In the field of regulation of gambling using the generally binding ordinances, the Constitutional Court found two fundamental cases, first the Pl. ÚS 56/10 where the Court scrutinised the ordinance of Frantiskovy Lazne and second the Pl. ÚS 29/10 where the Court scrutinised the ordinance of Chrastava.

The town of Chrastava enacted its generally binding ordinance, based on an express statutory delegation pursuant to 202/1990 Coll., the Law on Gambling (hereinafter the "Gambling Act", this act is null and void as of now), on designated places where interactive slot machines may be administrated, with the purpose to ensure public safety.

It might be necessary, at this point, to explain that at that time the general opinion was that there is a difference between a so-called slot machine, where the game itself is happening within the machine, and a so-called video-lottery terminal, where the game itself does not happen within the machine but on a central computer, and thus the machine is just an access point. This distinction was based on a restrictive interpretation of the then positive law.

The existing interpretation of the authorities found a difference between those types of gambling machines and asserted that the municipalities are (based on the express statutory authority of the Gambling Act) able to regulate just the slot machines. However, the city of Chrastava in its generally binding ordinance set forth that the interactive video-

lottery machines are included within the sort of slot machines and thus those machines are under the authority of a different Chrastava's generally binding ordinance that regulates the operation of those slot machines within the town that was the first time any municipality came with such interpretation.

Although the Constitutional Court agreed with the interpretation that from the point of view of the positive law, there is a difference between the slot machine and the video-lottery terminal, it did not find that the authority of the municipalities to regulate those gaming machines would be limited just to the slot machines. Quite the opposite, the Court found that the express statutory authority found in the Gambling Act can be used in local regulation on all types of gambling machines.

The generally binding ordinance of the town of Frantiskovy Lazne was enacted "in order to ensure the safety of local matters and concerns in the field of gambling limitation". This town argued the above mentioned general definition of autonomous competence in section 10 of the Municipality Act, when its gambling regulation enacted with the goal of ensuring public safety as opposed to the above mentioned statutory authority encompassed in the Gambling Act. Thus, the town used the more general formulation with the goal to increase its possibilities of gambling regulations.

At first, the town of Frantiskovy Lazne in its generally binding ordinance found the operation of gambling using technical machines – slot machine as a potentially public order disturbing conduct, subsequently found just one specific address, namely just one building, where gambling can be operated. This approach, showing the peak of the efforts of the municipalities to regulate slot machines on its premises, was one of the first that in the shape of the general biding ordinance was scrutinised by the Constitutional Court. The Constitutional Court found that the regulation of technical machines – slot machines is within the subject matter authority of the autonomy competence of municipalities.

The Constitutional Court further scrutinised the specificity of the local ordinance, namely the permission to operate the slot machines only on one address within the town (on this address a casino was located), in other words limiting this type of business to a single entrepreneur. According to the Constitutional Court, this limitation stands rather for individual regulation than a general one, and as such, typical for authority decisions as opposed to legal norms. Regulation by a legal norm should respect "the requirement of universality of regulation that the zoning must be based on a neutral and non-discriminatory rational regarding specific persons who are influenced by the regulation". In this very case, rational reasons for limiting the administration of gambling must have had existed. The Constitutional Court found that in this case the rationale was the character of Frantiskovy Lazne as a spa town and the ongoing existence of a casino at that address where the goal was to concentrate gambling into the already existing casino. The Constitutional Court thus confirmed that the generally binding ordinance in question limiting slot machines into one concrete place in the town is constitutional.

The practice of the Constitutional Court based at first upon those two cases helped to open a door for the municipalities to regulate gambling on multiple types of gambling machines on the local level to keep public safety in order. Based on the case regarding the town of Frantiskovy Lazne, municipalities subsequently began to not only completely ban gambling within its premises, but also to delimit so called allowed addresses, in other words

places where the administration of gambling is allowed and consequently limit the administration of gambling in this way.

This development in reaction on the decisions of the Constitutional Court was subsequently supported by the legislator by Act 300/2011 Coll. which amended the Gambling Act and authorised the municipalities to regulate even by a complete ban, all types of gambling machines. Consequent problems are still rotating around the question in what way and for what reason can be the so called allowed addresses chosen.

4. Types of Limitation on Operating Gambling Machines

As time advanced, municipalities, supported by the success of the towns of Chrastava and Frantiskovy Lazne, began to regulate the operating of gambling in local establishments, which was often just a separated part of common restaurants, on a higher scale. It is apt to note, that for the operation of those gambling machines its entrepreneur needed permission which was issued by Ministry of Finance, those permissions in some cases (relatively quite often) were issued for up to 10 years. Villages and towns thus had to cope with the situation when in a specific place within the town an entrepreneur operates a gambling business based on a correct permission issued for a long term, the change, or revocation of which was according to the corresponding statute legal, but the decision must have been made by the Ministry of Finance. The reason for change or revocation of the permission might have been in conflict with the generally binding ordinance which regulates the specific address regarding the operation of gambling machines. Municipalities therefore had to, if they wanted to limit or forbid the operation of gambling games, enact a specific generally binding ordinance. And the municipalities started to do so, after the decision of the Constitutional Court in the above-mentioned cases.

Municipalities chose one of the variants, either forbid gambling on slot machines completely on its entire cadastre or allow it on just specific addresses. In both cases however, the municipalities interfere with the valid permissions to operate and conduct such a business. The first approach as seen from the regulatory view is much better, because the entrepreneurs cannot assert discrimination and it is not necessary to weight and reason the choosing of specific addresses.

The disadvantage of completely banning the administration of slot machines on the premises of the municipality is mainly the impact on its budget, because the taxation on operating slot machines within the premises of the municipality brings significant income to its budget. Another drawback is the possibility of sparking a black market on operating slot machines, which means that the negative social influence of gambling stays without the corresponding income that would come with the taxation, or the possibility that the adjacent town will allow gambling, but the social problems will remain within the first town which forbade gambling.

The ban to operate slot machines on different than certain addresses (done by allowing a certain, named address) keeps the income from the taxation and does not spark the black market but is problematic when it comes to the justification as per why those addresses

were chosen and when it comes to conservation of the free competition of entrepreneurs, when some of them may feel the negative impact of the partial ban.

5. The Procedure of Partial Ban on Gambling Machines

No matter how the local ban of gambling duly allowed by another authority might be considered negative and the due expectations might be generally argued when it comes to the regulation of gambling, it is necessary to weight the underlining principles, where the interest of the society to regulate the negative impact of gambling stands against the due expectations principle.

In the field of gambling regulation, the Gambling Act contained in its section 43 express authority to alter the issued permission: "the body which licensed the lottery or other like game shall withdraw the license if there occur or become known any circumstances for which it would not have been possible to license the lottery or other like game or if it proves later that the data according to which the license was granted are inaccurate."

Because of the existence of this section, the argument of the entrepreneur of gambling machines that the once issued permission allows him to administrate the gambling machines for the time the permission is set forth cannot be accepted. The entrepreneur should have known that there is a possibility of substantial impact, for example the above-mentioned enactment of the generally binding ordinance regulating the operation of gambling machines following the issuance of the permit that might cause alternation of the permission.

Much more problematic is, however, the partial ban done by specifying the so called allowed addresses and that is because, as outlined above, the argument of discrimination of the entrepreneurs on the excluded addresses. It is undisputed that choosing the allowed addresses should be based on rational and duly justified arguments. The question however is, who should be inquiring into this justification and rationalisation of the generally binding ordinance.

The generally binding ordinance is a normative act of the local authority, and by its due process of enactment the conditions for its general authority are fulfilled. From the beginning of its due publication of the accepted generally binding ordinance all persons must act accordingly.

The Czech Republic recognises the process of the government control of the generally binding ordinances of municipalities, when every single ordinance shall be sent to the Ministry of the Interior of the Czech Republic, which scrutinises the ordinance and if the ordinance is not in compliance with the statutory requirements, the Ministry will command the municipality to correct the ordinance; further the Ministry can suspend and subsequently propose the Constitutional Court to scrutinise the ordinance in order to check its specific provision or completely rescind it.

This is how the abstract scrutiny of the municipalities' regulation works. This proceeding however might take a long time and its process, if the ordinance is not suspended, does not impede its effects on the influenced persons.

Enacting the ordinance forbidding the operation of slot machines which were previously duly allowed on the location where they are operated, should have an impact on the entrepreneur of the machines that should end in stopping the operations of such machines. In practice, it most certainly started the administrative proceeding of the issuer of the permission (the Ministry of Finance) pursuant to Article 43 section 1 of the Gambling Act, which result should be the cancelation of the issued permission based on the change of factors, that is the enactment of the generally binding ordinance.

Because of the double instance of the administrative proceeding, this process might take up to one year and for the whole time of the proceeding the slot machine is being operated. A substantial question is whether the Ministry of Finance is allowed in the proceedings to scrutinise the reasons why the generally binding ordinance was enacted. As said above, the duly enacted generally binding ordinance has authority against all and thus is binding for the Ministry of Finance as well, as long as it is not proceeded by the above-mentioned process of suspending effectiveness of the generally binding ordinance which may be done however only by the Ministry of the Interior.

The request that the administrative authority (namely the Ministry of Finance) scrutinises the rationality of the enactment of the original legal norm (in this sense the originality of the legal norm, the generally biding ordinance is on the same level as an act) is unacceptable. The administrative authority in case of its acceptance would be authorised to impact the legislative power on the local level but by comparison on the national level. In the end even, the Constitutional Court in its above-mentioned case Pl. ÚS 56/10 touched this question when according to the Court: "The administrative authority is authorized to scrutinize all individual conditions of the case, moreover even if the municipality by including the concrete real estate into the text of the ordinance did not act arbitrarily or in a discriminatory way."

Argument that this scrutiny should be done by the Ministry of Finance while deciding the issuance of the permission to operate the gambling machines is also refuted by the Constitutional Court: "[W]hen the Ministry of Finance finds a collision of permission with the generally binding ordinance it must pursuant to a statute begin the proceeding on the scrutiny of those permissions and proceed in the intention of article 43 section 1 of the Gambling Act. This article assumes revoking the issued permissions not only upon the emerging of new factors for which it would not be possible to permit the lottery of different game, but also when those factors happened after the issuance of the permission. If the Ministry of Finance does not follow this process it acts against the constitutional right of the municipalities for autonomous competence."

Evident drawback of this proceeding which however is in accordance with the current law is the fact that in case that the court finds that the generally binding ordinance was discriminatory when it comes to the local limitation of the allowed addresses, it generally happens at the time when the permission on behalf of which the slot machine was operated is already void and so the administration itself should have ended and the machine should not be making any money to the entrepreneur.

This consequence can be limited only by the act of court that deals with the action against the decision of the Ministry of Finance, which would exclude the effects of such decision and so keeps the validity of such decision (this is however in practice a rather theoretical possibility).

6. Conclusion

The effort of municipalities to regulate gambling within their territories, within its scope of authority, is rational, understandable, and definitely in conformity with the general function of municipalities to provide for public welfare, as operating gambling establishments negatively influence the social cohabitation. The actual impact of those efforts, when the municipalities impose duties using the generally binding ordinances, banning gambling entirely or in chosen localities of the municipality causes numerous disputes as the entrepreneurs operating those slot machines defy the negative impacts of the generally binding ordinances on their business.

Banning gambling entirely in the whole territory of the municipality is quite effective and from the legal point of view less problematic, nevertheless it supports the creation of illicit gambling environment and excludes the possibility of not insignificant income from the taxation of operation of the slot machines. On the other hand, banning gambling in some localities of the municipalities creates more legal issues, in particular such a ban is apt to create a discriminatory environment in operating this sort of business between the entrepreneurs.

Proceedings, when the entrepreneurs influenced by the ban imposed by the generally binding ordinance defend against the rescind of the permit to operate slot machines, are at the moment subject of administrative proceedings judicial review. Generally, the petitioners argue that the reasonableness of the ban delimiting particular parts of the municipality where the operating of slot machines is forbidden should be reviewed with regard to the corresponding generally binding ordinances. They argue that such review should be done rather by the Ministry of Finance in the proceeding where such permit is rescinded, than an administrative court.

But it is impossible to agree with such argument as the Ministry of Finance does not have the authority for such review, indeed neither does the Ministry of the Interior which is the pivotal authority supervising the autonomous regulation. Even the Ministry of the Interior can only submit the generally binding ordinance to the Constitutional Court for its review but cannot invalidate such generally binding ordinance. Such authority of the Ministry of Finance would interfere with the right of municipalities for autonomous government and it would be in breach of the constitutional separation of powers.

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Declaration of Tax Information in Constitutional Court Cases in the Czech Republic

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Abstract: This contribution is focused on the trend to demand various declaration of taxable persons via specific forms issued based only on the wide and vague authorisation of the Ministry of Finance of the Czech Republic. The aim of this paper is to familiarise readers with the relevant Czech regulation and case law of the Czech Constitutional Court and to provide conclusions evaluating this case law and legislation. The beginning of this paper is devoted to respective provisions of the Tax Procedure Code, Charter of Fundamental Rights and Freedoms, Act on VAT and Act on Transactions evidence. Then, the part dealing with the development of the Constitutional Court approach evaluating the practice of the tax administration follows. Finally, the author provides his conclusions estimating future development in this issue. Scientific methods used in this paper are analysis, induction, deduction and description. The aim of the contribution is therefore the evaluation how the recent case law will affect the current legislation and what steps should be made by the Czech Parliament.

Keywords: tax law; form; registered books of invoices return; electronic sales records

1. Introduction

Tax evasion and illegitimate tax avoidance is the modern phenomenon of tax law and overall public regulation. They represent a huge problem affecting all of us since they have not been located just in the territory of one jurisdiction but increasingly across countries globally and also in the European Union. Therefore, it is more difficult to fight them without the joint effort of the international community.

For this reason, international organizations like OECD, the European Union etc. identify the approaches how to tackle tax evasion or illegitimate tax avoidance successfully and effectively. Based on these approaches, member states are often obliged to implement the harmonised regulation usually affecting indirect taxes. However, member states of the

European Union are entitled to adopt legislative measures mostly of the administrative character to tackle tax evasion even in the harmonised fields of indirect taxation.[1] This fact manifests itself by the different measures tackling tax evasion across member states, therefore the international cooperation in tax matters is the important instrument of the global attitude following the decrease of tax evasion and tax avoidance.[2] Still, the basic and the most useful instrument is the declaration obligation of the taxpayer usually by different types of forms.

The Czech authorisation of the Ministry of Finance to create tax forms is vague. That is why this contribution is devoted to two specific instruments adopted in the Czech Republic with the aim to tackle tax evasion and the review of the respective legal regulation by the Czech Constitutional Court. It is because these two particular instruments (registered books of invoices return and electronic sales records) could serve as a model example of the Czech Constitutional Court assessment giving interesting opinions, which could be applied generally on taxation in the Czech Republic and can affect the future development of the declaration obligations of tax payers there.

The aim of this paper is to provide its reader with the basic information about the relevant Czech legislation, to familiarise the reader with two cases of the Czech Constitutional Court and finally, to point out the relevant thesis important for the future. The used scientific methods are analysis, induction, deduction and description.

2. The Basics of Relevant Tax Regulation

The general practice in the Czech Republic is to submit any tax declaration on the form devoted to the respective tax field. However, as it was mentioned before, the Czech legislation regulates the authorisation of the Ministry of Finance really vaguely. According to section 72 par. 1 of the Act No. 280/2009 Coll., Tax Procedure Code, any application for the tax registration, notification of the change of the registered data and any tax declaration shall be submitted only by the form of the Ministry of Finance or on the printed output from the computer printer with the same data, content and order of data as the respective form has. Nevertheless, no legal rule except section 72 par. 2 of the Tax Procedure Code prescribes the content of form issued by the Ministry of Finance in tax matters. The only limitation of the Ministry of Finance is the purpose of the administration of taxes[3] and the constitutional basis of the tax regulation.

2.1. The constitutional level of the tax regulation

The constitutional level of the tax regulation is represented in Article 11 par. 5 of the Charter of Fundamental Rights and Freedoms; taxes and levies shall be imposed pursuant to the act.[4] From a grammatical perspective, such laconic and very general provision entitles the legislative body with the broad authority to regulate the tax system so far as the legislative body abide the form of the primary law in form of an act according to which the tax is imposed. Still, the public authorities are not entitled to impose taxes of any kind even

if the law abides the form of the act since taxes represent the legitimate infringement of the constitutionally protected property rights.[5] Firstly, every intention of the legislative body to impose a new tax shall be supported by objective and rational arguments and criteria.[6] Then, the legislative body must abide the reservation of the law in the form of an act in tax matters.

It does not necessary mean, the it is forbidden to regulate tax matters by the secondary legislation of the ministries and other central administrative offices in the Czech Republic. For the assessment of such reservation, the Czech Constitutional Court established the rule, that the act shall contain all constitutive elements of the particular tax.[7] Consequently, according to the Czech Constitutional Court, every constitutive element of the tax obligation must be regulated by the act and therefore, it is prohibited to allow the executive power to regulate such constitutive elements by the implementing secondary law. Otherwise, the executive power will be entitled to construct the tax system independently of the will of the legislative body. Therefore, if the secondary legislation does not regulate the constitutive element of the tax obligation, it is in accordance with the constitutional level of the tax regulation. As it is added by this court, *"in order to adopt the constitutionally conform tax regulation, this regulation must be based on the act. Other substantive conditions are not prescribed by constitutional law"*.[8]

However, the reservation of the law in the form of act is not applicable just on the regulation of the substantive attributes of the imposition of the tax obligation but also on the complex regulation of the procedure how the respective tax shall be collected in the prescribed amount and time.[9] Based on this argument, the evaluation of the constitutional conformity should also take place in case of all procedural actions of the tax administrators and all rights and obligations of persons affected by the tax administration. Now, it is clear that the field of the automatised and incidental declaration of data relevant to the tax administration is subjected to the constitutional review of the respective law.

2.2. A brief insight into the registered books of invoices return regulation

Since the 1st of January 2016, the taxpayers of VAT have been obliged to submit registered books of invoices return if they carry out or accept taxable transactions defined by law.[10] Regarding the legal nature of this obligation, it is the tax declaration in the sense defined by the Tax Procedure Code.[11] It is evident that the purpose of this instrument is to create a better and greater evidence about taxable transactions by the tax administrators in the Czech Republic with the aim to tackle tax evasion and illegitimate tax avoidance easier. Based on the data collected by Czech tax authorities by the registered books of invoices returns, they should be capable to identify weak spots within the distribution chain and to reveal respective fraudsters committing VAT evasion because they enable matching of taxable transactions between suppliers and purchasers regulated by VAT legislation through the reported data to tax authorities.[12]

Back to the applicable regulation, the Act on VAT regulates this instrument by sections 101c to 101k. Nowadays, the regulation of section 101d par. 1 and 101g par. 5 of the Act on VAT was amended due to the repeal of the original provisions by the Czech

Constitutional Court.[13] These provisions regulate the following elements of the obligation to submit the registered books of invoices return:

- When is the taxpayer obliged to submit the registered books of invoices return?
- What shall be declared in the registered books of invoices return?
- What are the terms for the submission of the registered books of invoices return?
- How can the registered books of invoices return be corrected or submitted after the deadline?
- What is the procedure if the registered books of invoices return is not submitted by the taxpayer?
- What sanctions can be imposed for the breach of the obligation to submit the registered books of invoices return?
- What is the deadline for the imposition of the above-mentioned sanctions?
- When shall the taxpayer not be penalised by the penalty for the late submission of the registered books of invoices return?
- How to ask for the remission of the penalty for the late submission of the registered books of invoices return?

However, the analysis of this instrument is not the objective of this contribution, therefore only the relevant provisions of section 101d par. 1, 101d and 101g par. 5 of the Act on VAT will be briefly mentioned later in the passage devoted to the relevant Czech Constitutional Court finding.

2.3. A brief insight into the electronic sales records

The second most important instrument helping the Czech tax authorities to tackle tax evasion is the instrument called electronic sales records. The adoption of this instrument's regulation initiated even more political and marketing campaign[14] than the adoption of the registered books of invoices return because until the adoption of the Act No. 112/2016 Coll., on transactions evidence (hereinafter: "Act on ESR"), no continual obligation of taxpayers to provide the tax authorities with the information about sales on real time basis had existed in the Czech Republic. Due to this fact, the tax authorities had to count mainly on the incidental tax inspections reviewing the possible tax evasion when the recipient paid the price for the taxable transaction by cash.[15] The remedy of this unsuitable state of the often-uninformed tax authorities should be represented by the electronic sales records.

The philosophy of the electronic sales records is that every transaction made in cash or in a similar way by the businessman of any kind shall be immediately reported to the tax authority and the tax authority should provide him the unique code for the unambiguous identification of the receipt in return. Finally, the businessman shall provide his client with the receipt containing such unique code.[16] The legal nature of this instrument is quite similar to the general evidence duty of every taxpayer according to section 97 of the Tax Procedure Code, however, such evidence duty does not bind the taxpayer to provide the information about every transaction to the tax authorities immediately and to keep it in a prescribed form.[17]

It could be generalised that the obligation of electronic sales records covers the payment in cash or in a similar form if they form the part of the income of the businessman.[18] The correct fulfilment of this obligation is capable to be considered an effective instrument in the field of the fight against business to customer tax evasion[19] and therefore it can lead to the rise in the revenue of personal and corporate income tax and also of VAT. That is why I consider this instrument very needy, because there is no better way how to tackle the shadow economy VAT fraud which is based on the avoidance of the taxpayer registration duty to VAT, when he reaches the prescribed threshold of his turnover.[20] Again, the analysis of this instrument is not the objective of this contribution, therefore, only the relevant provisions affected by the case law of the Czech Constitutional Court will be briefly mentioned later in the corresponding passage.

3. Constitutional Court decisions in case of registered books of invoices return

At the end of the year 2016, we were witnesses of the judicial review of the registered books of invoices return regulation by the Czech Constitutional Court. In this case, the petitioners brought the action against the whole regulation of the registered books of invoices return. Their reasons for this action was a supposed infringement of the constitutional right for privacy, breach of the reservation of law in the form of act pursuant to Article 11 par. 5 of the Charter of Fundamental Rights and Freedoms, infringement of the fair trial regulation and disproportionality between the interference of the fundamental rights of tax payers and adopted legal measure.[21]

As a result, the Constitutional Court did not abolish the whole reviewed regulation but just a few sections of the Act on VAT. In particular, it abolished section 101d par. 1 of the Act on VAT which stated that the taxpayer is obliged to declare prescribed data necessary for the tax administration in the registered books of invoices return and section 101g par. 5 of the Act on VAT which regulated the date when the call of the tax authority for the correction or completion of the registered books of invoices return is effective. However, for the purposes of the aim of this contribution, the finding and argumentation of the Constitutional Court devoted just to section 101d par. 1 of the Act on VAT is relevant.

The problem of the original section 101d par. 1 of the Act on VAT was the designation of the data which should be declared by the registered books of invoices return because this specific tax return must be submitted only in the structure and by the form published by the tax administration. In fact, this regulation authorised the tax administration to determine the scope of the data provided by taxpayers to appropriate tax authorities based on its own discretion due to the lack of the precise determination of the provided data by the Act on VAT.

Hence, such legal construction is not something new in the Czech legal order. We can meet this principle in the submission of applications related to public registries like business register, commercial register, etc. Considering all circumstances, we can still find some distinctions in the legislative approach. In these cases, the legal obligation of the liable

entity is specified in the secondary legislation where it is stated what data should be provided by the respective form.[22] Therefore, the legal obligation of the liable entity is specified by the secondary legislation upon the prior authorisation by the act in accordance with Article 4 par. 1 of the Charter of Fundamental Rights and Freedoms and the form prepared by the competent authority that only unifies the format of submissions made to a public authority. It is clear that such intergrade of the legal regulation was missing in case of the registered books of invoices return.

The reason for this is obvious and lies in the general legal regulation of the tax declarations by the Tax Procedure Code and existing legislative praxis in tax matters. According to section 135 par. 1 of the Tax Procedure Code, every taxpayer is obliged to submit a tax declaration if it is prescribed by law or if he is called to do so by the tax authority. In the tax declaration, the taxpayer is obliged to calculate his tax obligation alone and to declare all prescribed data and other circumstances relevant for the tax administration. Now returning to the information mentioned above, every tax declaration must be submitted by the form created by the Ministry of Finance pursuant to section 72 par. 1 of the Tax Procedure Code. Probably, nobody is surprised that the intermezzo in the form of the secondary legislation prescribing data asked by the form for the tax declaration is missing again. All things considered, no secondary legislation prescribing the requirements and definitions of the scope of data required by tax declarations exists in the Czech Republic.

Most of the tax professionals anticipated the denial of the action by the Constitutional Court but finally, almost everyone was astonished by the argumentation of this court interpreting the reservation of law in form of an act from the point of view of tax declarations. Although the whole regulation of the registered books of invoices return was considered by the Constitutional Court proportional, this court ruled that some provisions might contradict the constitutional order of the Czech Republic.[23] This indicated contradiction concerned the original text of section 101d par. 1 of the Act on VAT and its discrepancy with Article 4 par. 1 of the Charter of Fundamental Rights and Freedoms, pursuant to which duties may be imposed only on the basis and within the bounds of law and only while respecting the fundamental rights and freedoms. The provision of section 101d par. 1 of the Act on VAT imposed the obligation to provide tax authorities with the prescribed data necessary for the tax administration by the registered books of invoices return, but it did not define the scope of prescribed data and let them be defined by the electronic form of the Ministry of Finance. From this perspective, such form represented the specific kind of the secondary legislation which impose concrete obligations to an indeterminate group of persons (VAT taxpayers).[24] Thus, it was the Ministry of Finance as a central office performing executive power of the state which was authorised to exercise the legislative power, which should be executed by the Parliament.

Summarising its opinion, the Constitutional Court concluded that the act shall define at least the scope of data which must be declared by taxpayers. Even so, it does not mean that it is not possible to authorise the Ministry of Finance to adopt a secondary regulation to determine the particular data required by the registered books of invoices return, but in this case, the Ministry of Finance has to do so in the form of legislation.[25] It is clear, that in the case, when the registered books of invoices return was based on the same principle as every kind of tax declaration which requires the provision of the data by taxpayers without

the specification of the scope of data by the legislation but instead by the form created by the Ministry of Finance, such practice is in contradiction to this finding of the Constitutional Court. It is striking that there is no attempt to take into account this opinion of the Constitutional Court in the Czech Republic currently. Even so, it is capable to affect every tax declaration form used by the Czech tax administration.[26] However, it is still questionable if the Constitutional Court follows this opinion in case of other tax declarations like tax returns, which are the necessary precondition for the functioning of the tax system in the Czech Republic, or if this opinion is not generally applicable. Although I did not expect such a decision, I would like to emphasise the necessity to build the legal system also as predictable to recipients of law since the state has the power to collect taxes, levies and similar payments with public characteristics. When the legality of such basic instrument of tax law could be affected by the case law of the Constitutional Court due to the contradiction with the reservation of law in the form of an act, I am expecting an adoption of appropriate measures preserving the function of the tax system by the state. Unfortunately, this is not the case in the Czech Republic.

4. The Constitutional Court Decision of the Case of Electronic Sales Records

One year later, the decision of the case of the judicial overview of the electronic sales records was made. The respective action was brought before the Constitutional Court by a group of 41 members of the Chamber of Deputies and the unlawfulness was seen in the breach of the procedural rules regulating the adoption of law in the form of act. Further argumentation concerning the unconstitutionality of some provisions of the Act on ESR was based on the allegation that such provisions represent the unconstitutional disproportional infringement of the fundamental right to do business, the right to own property and the right for privacy.[27] For the purpose of this contribution, I do not consider the analysis of the legislative procedure relevant for the possible future of declarative obligations of taxpayers, therefore the following part is devoted to the review of the Act on ESR from the perspective of the breach of the right to do business and the right to own property, respectively the right for privacy.

First of all, it must be highlighted that the Act on ESR did not constitute any new tax obligation which had not existed before the adoption of this act. For this reason, the task of the Constitutional Court was to assess, whether this new form of the evidential obligation of taxpayers is unreasonably burdensome or not.[28] Secondly, the constitutional right to do business belongs by its nature into the group of economic, social and cultural rights regulated by the Charter of Fundamental Rights and Freedoms. Why is this aspect so important? The Constitutional Court emphasises that the economic, social and cultural rights stated under Article 41 par. 1 of the Charter of Fundamental Rights and Freedoms are not directly applicable in the same way as the fundamental human rights and political rights, therefore there exists only a limited scope of the constitutional review of the adopted legislation in such fields.[29] Therefore, the compliance of the Act on ESR was assessed based

on the application of the test of rationality, not the test of proportionality as happened in case of the registered books of invoices return review.

The test of rationality consists of the four following steps:[30]

1. the definition of the essential content of the concerned law;
2. the evaluation whether this essential content of the concerned law is affected by adopted legislation;
3. the assessment whether the adopted legislation follows a legitimate aim;
4. the consideration whether the adopted measures are rational.[31]

Considering the second step of the rationality test, the essential content of the concerned law will be affected only when the state power adopts unreasonable obstacles of public nature affecting the free choice and exercise of the permitted activities by persons owning necessary prerequisites for such activities.[32] All things considered, the Constitutional Court concluded that the essential content of the right to do business is not affected by the adopted regulation of the electronic sales records.[33] Then, during the assessment of the legitimate aim of adopted measures, the Constitutional Court agreed with the Czech Government that the electronic sales records supplements the already existing system imposing on taxpayers the obligation to declare the tax relevant information, tries to equalise the market environment and promotes the effectivity of the tax administration in all segments of the market regardless the size of the taxpayer.[34] Finally, the Constitutional Court proceeded to the forth step of the test of rationality when it concluded that the current state of the knowledge does not provide comparable alternatives to the electronic sales records which constitutes a lower burden for taxpayers.[35] Summing up, the Constitutional Court did not find any part of the Act on ESR in contradiction to the basic right to do business as it is granted by the Charter of Fundamental Rights and Freedoms.

However, a different approach and conclusion was implemented by the Constitutional Court assessing the conformity of the electronic sales records from the perspective of the right for privacy. Due to the fact that the right for privacy represents a fundamental human right, such assessment of the constitutional conformity must be based on the application of the three-phased proportionality test consisting of:[36]

1. test of the capability of adopted measures to reach the objective pursued;
2. test whether the adopted measures are the gentlest if there is a plurality of the adoptable measures;
3. assessments whether the negatives do not overshadow observed positive effects of the adopted measures.

At the beginning of the assessment, the Constitutional Court referred to the already applied test of rationality in this case which provides the conclusion for the first and second phase of the proportionality test (i.e. the electronic sales records are capable to achieve the observed objective and this measure is the gentlest to the comparable alternatives).[37] Concerning the third phase of the proportionality test, this court started with the general declaration that the electronic sales records regulation does not constitute the disproportional breach of the right for personal privacy,[38] however, particular provisions of the Act on ESR do.

The first affected provision relevant for the aim of this paper is section 5 letter b) of the Act on ESR according to which the cashless payment made pursuant to the order of the payer via the payee, who is obliged to record the respective sale,[39] shall also be recorded. For sure, there is no doubt that records of cashless payments improve the effectivity of the electronic sales records, however, the court warned that such payments are potentially traceable. Therefore, the system of electronic sales records should provide taxpayers with the option to decide not to be subjected to this regulation to minimalise the risk of the potential vulnerability of their autonomous sphere of privacy.[40] As it could be derived from the previous case law of the Constitutional Court, the situation when the state disposes of the large scope of information without the necessity of their collection is not in accordance with the constitutional law.[41] This opinion is important because the Tax Procedure Code had already been regulating instruments for the collection of the information about cashless payments provided usually by payment institutions. Therefore, in case the technological development or other eventuality will cause a factual inability of tax authorities to trace the cashless payment, then the legislative body will have a space for an adoption of an appropriate legislative measure.[42] I cannot admit anything against such an approach since it is foreseeable from the settled case law of the Constitutional Court, moreover, when it is constantly reminded by this court that the unique position of the state in the human society does not allow to adopt any kind of measure even if it is a most effective one considering the pursued aim.[43]

The second provision, which was abolished by the Constitutional Court, was section 20 par. 1 letter b) of the Act on ESR stating that one information noted on the receipt about the registered sale delivered to the payer is the tax identification number of the payee. The tax identification number is created from the code "CZ" and from the general identifier[44] which is, in case of natural persons, the personal number. Applying the first phase of the proportionality test, it is true, that it could be derived from the current case law of the Czech Supreme Administrative Court and the processing of the personal number by public authorities is used to secure the fastest possible and most effective processing and searching for data because the personal number appears in several registries and electronic databases.[45] However, this personal data is quite important in the Czech Republic and the regulation grants it the higher protection by the specific Act on evidence of residents and personal numbers. On the other hand, this specific law does not forbid the application of the general protection of the personal data regulated by the Act No. 101/2000 Coll., on personal data protection and newly by the GDPR. And that is why the usage of the tax identification number by the electronic sales records did not pass the second and third phase of the proportionality test. The Act on ESR defines extra identifiers as the security code of the taxable person, signature code of the taxable person and fiscal identification code used by the electronic sales records granting the sufficient identification of the sale and the payee.[46] It is clear that the electronic sales records are using the specific identifiers which do not directly invade into the autonomous zone of the taxable person, therefore, there is no legitimate reason to print also the tax identification number consisting also from the personal number of natural persons to every issued receipt and to expose the taxable person to a hardly limited risk of a malfeasance of this really fragile personal data.[47] From these reasons, the law requiring the issuing of the receipt containing also the personal

number is the unconstitutional breach of the right for privacy protecting humans form an illegal gathering, publication and other misuse of the personal data.[48] Finally, it does not matter that such personal data could be publicly traceable, for example from the collection of documents held by Commercial registries or Cadastral registries.

The last group of provisions abolished by the Constitutional Court was dealing with the authorisation of the Ministry of Finance to adopt the secondary regulation in particular matters related to the constitutive elements of the electronic sales records. However, the Constitutional Court provided the same thesis as it had done before in the case devoted to the review of the registered books of invoices return and the reservation of law in the form of act as it was described above in this paper. Therefore, it is useless to analyse this part of the finding for further conclusions.

5. Conclusion

Tax law is exposed to the swirl of issues it has to deal with in Europe, for example the application of the *non bis in dem* principle and the fight against tax evasion and illegitimate tax avoidance. In the Czech Republic, it is also a question, what administrative obligations could be used to tackle tax evasion and simultaneously be in accordance with the constitutional order. It is clear that the basic administrative obligations of taxable persons are the declarative one. However, with the promotion of digitalisation and the acceleration of the activity of human society, there is a perceptible tendency to automatise the collection of the data related to tax administration. At the same time, the adoption of respective measures imposing the specific obligations on taxpayers must be in accordance with the constitutional order and sometimes it could be quite difficult for the legislative body to find the right balance between the interference into the protected basic or fundamental rights of the individual and the effective legal regulation.

Historically, the Constitutional Court dealt with two cases regarding the newly adopted declarative obligations of taxable persons. The first reviewed legislation regulated the registered books of invoices return and the findings of the Constitutional Court provided us with valuable guidelines how the reservation of law in the form of act must be interpreted. It stated that it is not possible to authorise only the Ministry of Finance generally by an act to issue the obligatory form used to declare required important tax information when no legislation is provided for the definition of the scope of the information required by the form. Such conclusion is even more burdensome when no tax legislation had been prescribing the scope of the required information by any declaration of the taxable person before the delivery of the above mentioned Constitutional Court's decision and now, only the Act on VAT prescribes which information can be required by the registered books of invoices return after its adjustment. Such state of the regulation is unbearable from the perspective of the case law of the Constitutional Court. It must be thereto concluded that any form which shall be used to declare tax relevant data and circumstances by taxable persons must be created based on the legislative definition of the scope of the required information and it is highest time to take the Constitutional Court's decision into consideration by the Parliament.

Also, the second analysed case dealing with the issue of the electronic sales records provided us important information how the tax declaration of the tax relevant information should look like. Nowadays, tax authorities must dispose with the effective instruments helping to reveal the disguised tax evasion. Therefore, it is legitimate to adopt measures with the nature of the automatised collection of the tax relevant data. However, such automatised mechanism of the collection of the tax relevant data could collect only those that cannot be collected by tax authorities by the already existing instrument. Even so, such instrument is not the most effective one. Secondly, the tax declarations and tax receipts or invoices shall contain the less personal data as possible with the stress on the specific vulnerable one like the personal number. On the other hand, I do not deduce the conclusion like some other tax law professionals[49] that the opinion of the Constitutional Court prohibits the usage of the personal number by all administrative forms and its publication in the publicly accessible registries and databases. Contrary to that, according to my opinion, the usage or publication of the personal number is not *en bloc* prohibited, but there is a requirement that the provision of the data on the administrative form or its publication in the publicly accessible source of information must be legitimate. I believe, the Constitutional Court emphasises that the form can require the personal number in the case that this personal identifier is necessary for the correct identification of the person since the law does not provide alternatives how to identify him. So far as the Act on ESR regulated other three identifiers of the recorded sale securing its correct identification, it was not legitimate to demand other identifiers of the taxable person with the special protected status, such as the personal number. All things considered, my opinion is, that the form used for the declaration of the tax relevant data could demand the statement of the personal data, however, the future of the tax identification number assigned to natural persons is at the edge of its existence.

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23 Article 68, Constitutional Court, Pl. ÚS 32/15.
24 Article 69, Constitutional Court, Pl. ÚS 32/15.
25 Article 70, Constitutional Court, Pl. ÚS 32/15.
26 Except the registered books of invoices return which regulation was amended by the amendment to the Act on VAT.
27 Article 5 and 7, Constitutional Court, Pl. ÚS 26/16.
28 Article 67, Constitutional Court, Pl. ÚS 26/16.

29 Article 185, Constitutional Court, Pl. ÚS 83/06.
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31 It does not necessarily mean that such measures must be best, most appropriate or the wisest.
32 Article 28, Constitutional Court, Pl. ÚS 11/08.
33 Article 72, Constitutional Court, Pl. ÚS 26/16.
34 Article 78, Constitutional Court, Pl. ÚS 26/16.
35 Article 79, Constitutional Court, Pl. ÚS 26/16.
36 Červínek, *supra n.* 33, at 21–29.
37 Article 87, Constitutional Court, Pl. ÚS 26/16.
38 Article 93, Constitutional Court, Pl. ÚS 26/16.
39 E.g. the payment by credit or debit card.
40 Article 96, Constitutional Court, Pl. ÚS 26/16.
41 Compare Constitutional Court, Pl. ÚS 24/10.
42 Article 96, Constitutional Court, Pl. ÚS 26/16.
43 Different opinion is provided e.g. by Radim Boháč. Compare Boháč, *supra n.* 21.
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48 Article 101, Constitutional Court, Pl. ÚS 26/16.
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