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Changes in Pension Systems in Central and Eastern European Countries in the Context of Demographic Trends and Public Deficit

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Abstract: Every country in Europe, or in the world, has its own specific pension system. In most countries it was carried out pension reform similar to that which has been introduced in Poland since 1999. The common feature of these reforms was the creation of capital-based pillar in addition to public system. A few years later, many countries have decided to reduce or suspend the payment of contributions to private pension funds to increase revenue to the distributive pillar and thereby reduce the growing debt of public pension fund. The article presents some of planned or implemented changes to the pension systems of selected countries of Central and Eastern Europe. Analyzing proposed or already implemented solutions it seems that in most countries pension system is dismantling towards the return of the state as the main organizer, administrator and decision-maker.

Keywords: pension system, public deficit, pension funds, multi-pillar pension system, contribution, old-age pension, retirement, reforms.

1. Introduction

Contemporary pension systems are still, to some extent, a continuation of Bismarck or the Beveridge's model despite many amendments of their structures as well as principles of operation. However, every country in Europe, or in the world, has its own specific pension system and, in fact, there are not two identical systems even among 27 countries that integrate within the European Union. Although the EU authorities carry out a common policies at the supranational level (e.g. the common agricultural policy or common trade policy), the decisions related to the pension systems remain the responsibility of Member States. The EU has introduced only a so-called Open Method of Coordination, but it does not aim to standardize pension schemes of UE members.

The need to reform pension systems based on the principle of solidarity between generations was widely discussed two or three decades ago. The distributive PAYG (Pay As You Go) pensions system is not resistant to the unfavourable demographic changes and according to presented demographic forecasts it was supposed to generate a growing deficit that will be ultimately funded by the state budget. Future payment of pension benefits is to be ensured by the new, multi-pillar system consisted of the distributive first pillar and the capital-based second pillar organized by private institutions. Moreover, the insured person - the future pensioner - has become an active participant in the pension system. In most countries, part of the state's responsibility for future pension benefits was transferred to insured persons, who were obliged to take care of their retirement savings. Nowadays, discussions about pension reforms have returned in the context of not only the demographic problems, but also the economic crises that have determined the socio-economic reality of many countries for several years. Economic crises force changes in the behavior of governments and businesses entities. Pension systems are particularly vulnerable to such impacts because their origin as well as subsequent expansion based on experiences of economic crises[1]. In crisis situations one seeks for solutions that will reduce the imbalances that arise in the pension system.

There are presented below some of planned or implemented changes to the pension systems of selected countries in Central and Eastern Europe. Analyzing proposed or already implemented solutions it seems that in most countries pension system is dismantling towards the return of the state as the main organizer, administrator and decision-maker.

2. Crucial changes in Polish pension system

Pension scheme, operating in Poland before the reform in 1999, was widely criticized as expensive, unclear and unfair, and above all, threatening the collapse of the horizon of 10-15 years. Significant and growing expenditure on pensions was not accompanied by the conviction of the insured that the level of benefits is satisfactory[2]. One of the evidence for the growing financial crisis of the entire social security system was an increase in the amount of social security contributions. In 1951-1972 the contribution amounted to 15% of remuneration. In the period 1987-1989 it was 38% and since 1993 the contribution has grown to 45% of wage[3]. In the nineties it was

[1] U. Kalina-Prasznic, Systemy emerytalne w warunkach kryzysów – między państwem a rynkiem, http://www.bibliotekacyfrowa.pl/Content/35534/031.pdf (15.08.2011).
[2] T. Bednarczyk, Wybrane aspekty społeczne i ekonomiczne reformy systemu emerytalnego w Polsce, [w:] Zeszyty Naukowe nr 3(21) 2000, pod red. J. F. Kubicy, J. Bednarskiego, Wyższa Szkoła Ekonomiczna, Warszawa 2000, p. 218.
[3] I. Jędrasik-Jankowska, Pojęcia i konstrukcje prawne ubezpieczenia społecznego, Tom 1, Wydawnictwo Prawnicze LexisNexis, Warszawa 2006, p. 37.

revealed the increasing difficulty in ensuring the financial viability of the Social Insurance Fund which also funds pension benefits.

The new Polish pension system, which came into force on January 1, 1999, was supposed to prevent the collapse of the system through the rationalization of the PAYG and the establishment of the capital-based pillar. According to the authors of the main objectives of the system, it had to ensure the highest possible level of benefits to future generations protected against inflation and adequate to the previously earned wages and paid contributions, while maintaining the guarantee of pension for participants in the system receiving retirement pension now[4].

The reform implemented in more than a decade has not been completed until now and the new pension system is already regarded by most economists, as well as by the government, as unsustainable, mainly because of budgetary problems. One of the objectives of pension reform would be to create long-term capital resources through the creation of a capital part of the system with the Open Pension Funds (OPF) as the most important elements. Unfortunately, none of the successive governments cared about building a financial market that would offer long-term financial instruments to the pension funds. Then the OPF would be able to invest in the domestic market, which would promote accelerated economic growth and the rate of return on those investments could be higher in the long run. The limits imposed by the legislator in the investment policy of pension funds, as well as low liquidity of the Polish stock exchange both cause that Treasury securities are the major element in the investment portfolios of the OPF. At the end of March 2011 the share of these instruments in the portfolios of pension funds amounted to 52.4%, and although it is one of the lowest results in relative terms (at the turn of the second quarter of 2009 these instruments accounted for nearly three-quarters of the OPF's portfolio), but the value of bonds was the highest recorded so far (nearly 121 billion PLN). Thus, the Open Pension Funds are the main source of financing the Treasury's debt. The share of pension funds in financing the national debt of the Treasury amounted to nearly 23% at the end of February 2011[5].

Another principle of the new pension system, which has negative consequences for public finance, is the distribution of pension contributions between the Social Insurance Institution and the Open Pension Funds. Transfer of the part of pension contribution to the pension funds (7.3%) has caused a financial loss in the Social Security Fund that is financed by the state budget. To raise funds necessary to finance the Social Security Institution's deficit, the government increases bond issues which are purchased by the pension funds. Since the beginning of the pension reform to March

[4] Bezpieczeństwo dzięki konkurencji. Ocena realizacji reformy emerytalnej – analiza II filara, Urząd Nadzoru nad Funduszami Emerytalnymi, Warszawa 2000, p. 14.
[5] Komisja Nadzoru Finansowanego, Informacja o działalności inwestycyjnej funduszy emerytalnych w okresie 31.03.2008 – 31.03.2011, Warszawa 2011, p. 28-33.

2011 the OPF have generated public debt, with interest, amounting to PLN 232 billion PLN. And this debt continues to accumulate[6].

The crisis in public finances once again began the public discussion about the need for pension system reform. Changes proposed by the government can be described as an attempt to achieve a balance between the responsibility for today and the responsibility for the future. Among the solutions presented in the course of many debates and discussions during the past few months in Poland, most often indicated were as follows[7]:

1. Transfer of contributions from the Open Pension Funds to the Social Insurance Institution;
2. Transfer of Treasury bonds instead of contributions to the Open Pension Funds;
3. Suspension of payment of contributions to pension funds (for two years);
4. Reducing the fee charged by pension funds from contributions;
5. Voluntary participation in the second pillar of the system;
6. The introduction of the so-called A sub-fund (investing dynamically, mainly in equities) and C sub-fund (called safe, investing mainly in bonds);
7. Exclusion of agents from the process of changing the membership between funds from July 1, 2011.

Among the proposed changes outlined above only the first one was eventually implemented. From May 1, 2011 contribution transferred to pension funds has been reduced by 5 percentage points: from 7.3% to 2.3% (in 2017 it is expected to be 3.5%). The remaining 5% of contribution is transferred to special personal accounts in the Social Security Institution, but is used for the current pension payments[8]. The government estimates that the reduction of contributions transferred to the Open Pension Funds will reduce the borrowing needs of the state budget by about 11 billion PLN in 2011 to 17 billion PLN in 2020. With the changes in the pension system, public finances can achieve total savings of 234 billion PLN, nearly 15% of GDP, in 2011-2020[9]. Some economists, however, believe that the implemented solutions will not be an important stimulus for the domestic debt market. Reducing the amount of contributions transferred to the Open Pension Funds may adversely affect the process of privatization of state-owned companies because pension funds are major buyers of

[6] J. Rostowski, OFE: nikomu niepotrzebna beczka prawie bez dna, http://wyborcza.biz/biznes/1,101562,9063344,Rostowski__OFE_to_nikomu_niepotrzebna_beczka_prawie.html (19.08.2011).

[7] Lewicka: zmiany w OFE dobre dla ubezpieczonych, „Forbes", http://www.forbes.pl/artykuly/sekcje/wydarzenia/lewicka--zmiany-w-ofe-dobre-dla-ubezpieczonych,7741,1# (19.08.2011). M. Bojanowski, M. Jędrysik, Emerytalny plan rządu. Cięcia składki i reforma w OFE przed wyborami, http://wyborcza.biz/biznes/,101562,9169581,Emerytalny_plan_rzadu__Ciecia_skladki_i_reforma_w.html (15.07.2011).

[8] K. Walterska, Sejm uchwalił zmiany w systemie emerytalnym, http://finanse.wnp.pl/sejm-uchwalil-zmiany-w-systemie-emerytalnym,135976_1_0_1.html (19.08.2011).

[9] Michał Boni przedstawił projekt zmian w OFE, http://www.forbes.pl/artykuly/sekcje/wydarzenia/michal-boni-przedstawil-projekt-zmian-w-ofe,10441,1(15.07.2011).

shares of such companies. Moreover, this change will impede the development of the Polish capital market, especially the stock exchange.

Among the proposed changes to the pension scheme there was also an idea of transfer of pension bonds issued by the Treasury rather than the pension contribution due to the OPF. This solution has both supporters and opponents. Supporters pointed out, inter alia, that such changes could result in a reduction of public debt and borrowing needs of 23 billion PLN annually. Opponents argued that the exchange contribution to the pension bonds contradicts the idea of a new system whereby the system is to be financed from the savings of future retirees. The transfer of debt securities will only be replacing one debt for another, and the system will still generate a debt, which will have to be repaid by the successive generations in the future[10]. In addition, if the OPF would receive bonds instead of cash their investment activity could be severely limited. According to the assumptions, pension bonds should be non-transferable and pension funds could only exchange it for shares of privatized state-owned companies. In practice, this means a considerable stiffening of the OPF's investment portfolios and the inability to acquire more profitable financial instruments, which give a higher rate of return[11]. As a result, future retirees are the ones who would lose most because of this solution.

The government also decided not to limit the operation of agents on which the General Pension Societies spend more than 0.5 billion PLN annually. There will be no sub-funds which were also discussed while the multi-pillar system was implemented in the nineties. However, there are many critical voices about the current changes in the system as well as lots of opinions about the dismantling of the pension scheme and breaking the contract that was concluded with the society in 1999.

3. Changes in pension systems in selected Central and Eastern European countries

In literature, as well as in practice, much attention is devoted to the principles, structures and reforms of pension systems in countries of Western Europe. Changes in pension systems in Central and Eastern Europe are, as yet, too rarely considered, while many countries in this region also departed from the PAYG scheme only to a mixed, distributive-capital model. Multi-pillar systems were introduced, inter alia, in the following countries: Hungary (1998), Latvia (2001), Estonia (2002), Croatia (2003), Bulgaria and Lithuania (2004), Slovakia (2005) and Romania (2008)[12].

[10] Przyszły emeryt utrzyma nasz budżet, http://www.tvn24.pl/12692,1683680,0,1,przyszly-emeryt-utrzyma-nasz-budzet,wiadomosc.html (19.08.2011).

[11] K. Izdebska, OFE są "be"? IGTE: bzdura, jesteśmy tani i efektywni, http://finanse.wp.pl/kat,2752,title,OFE-sa-be-IGTE-bzdura-jestesmy-tani-i-efektywni,wid,12954660,wiadomosc.html (19.08.2011).

[12] D. Stańko, Transfery członków kapitałowych funduszy emerytalnych na świecie i w Polsce. Analiza racjonalności decyzji członków OFE, Rozprawy Ubezpieczeniowe 2010, nr 1, Warszawa 2010, p. 7.

In recent years, all these countries have experienced problems associated with the financing of current pension payments. Moreover, these problems will still increase as a result of crises, but also unfavorable demographic trends. Demographics affect the system twice: on the one hand, people are living longer and therefore receive more retirement benefits; on the other hand fewer children are born each year. According to the United Nations predictions, by 2050 Latvia's population will decrease by 52%, 36% in Bulgaria, 35% in Ukraine, 15% in Poland and 8% in Slovakia. Currently, one pensioner corresponds to three working persons on average in EU members. According to the European Commission's estimates, in 2030 this ratio will be one to two, while in 2060 the retirees will be the majority and three employed persons will have to work on old-age pensions for four retirees[13]. Such a situation would mean the need to raise contributions, reduce pension benefits or increase the subsidies from the state budget. The following table shows predicted share of public pension expenditure in country's GDP by 2050. As it turns out, Poland is the only country where this ratio will be reduced in the course of the next four decades. The largest increase in this ratio is expected in the Czech Republic.

Table 1: State expenditure on pensions in 2010-2050 (% of GDP)

Country	2010	2015	2020	2025	2030	2040	2050
Czech Rep.	8,2	8,2	8,4	8,9	9,6	12,2	41,0
Estonia	8,9	8,8	9,3	10,4	11,8	15,2	15,7
Latvia	6,6	6,6	7,0	7,6	7,9	8,2	8,6
Lithuania	9,8	10,9	11,9	13,7	15,0	17,0	17,4
Hungary	11,1	11,6	12,5	13,0	13,5	16,0	17,1
Poland	11,3	9,8	9,7	9,5	9,2	8,6	8,0
Slovakia	6,7	6,6	7,0	7,3	7,7	8,2	9,0

Source: F. Chybalski: Liberalizacja systemów emerytalnych w krajach Europy Środkowo-Wschodniej, http://www.europeanvalues.net/docs/ (19.08.2011).

Modern economic crisis worsened by far the socio-economic situation in countries around the world, which triggered the re-discussion about the proper functioning of pension systems that particularly threaten public finances. Some planned or already implemented changes to the pension systems in selected countries of Central and Eastern Europe are presented below. Due to the still ongoing debate, we must wait for the final solutions as well as the effects.

[13] A. Sofuł, Niebezpieczna mieszanka finansów i polityki, „Private Banking", nr XLV, luty 2011, p. 6-7.

Bulgaria

Private and compulsory pension funds operate in Bulgaria since 2004. About 1.7 million people save money in these funds, of which about 100 thousand people belong to the funds for employees eligible for early retirement. In 2010 politicians have proposed to transfer all savings from funds to the state-owned pillar (about 237 million euro), but they abandoned this idea because of many objections of trade unions and the International Monetary Fund. Finally, it was decided that savings of only those persons who will pass on early retirement in the next four years will be transferred to the public fund. These are miners and pilots, who pay pension contributions into the special funds. Their savings - more than 50 million euro - will be transferred to the equivalent of Polish Social Insurance Institution, which will pay the benefits until 2015. After this period, pension funds will take over responsibility for payment. At the same time the Bulgarian parliament raised the pension contributions, limited the possibility of early retirement and extended the retirement age. It will rise gradually from 63 to 65 years for men and from 60 to 63 years for women since 2021[14]. It is pointed out that, thanks to the adopted solutions as well as the minimum wage increase and expected employment growth, the deficit of the state fund, which is over 1 billion euro now, will be eliminated by 2016.

Croatia

The reform of the distributive pension system has begun in Croatia in 1999 (as in Poland). The importance of the public pension scheme was then limited and a compulsory, capital-based pillar has been introduced at this place. In addition, it was decided to change the rules for calculating pension benefits as well as to extend the retirement age to 60 years for women (before the reform it was 55 years) and to 65 years for men (previously 60 years). For those early retirements, the benefit would be lower by 4.08% per year (0.34% per month)[15].

In 2007 it was decided to introduce further changes to the system, which provides, inter alia, equalization of retirement age for men and women by 2020. According to the government proposals, from 2011 to 2019 the retirement age of women will increase by half a year to reach 65 years in 2020, while both women and men can go into early retirement at age 60 with 35 years seniority[16]. Moreover, starting from 2008, in case of early retirement, pension benefit will be reduced by 0.15% per month (1.8% per year).

[14] Bułgarzy odpuszczają funduszom emerytalnym, http://wyborcza.biz/biznes/1,101562,8818614, Bulgarzy_odpuszczaja_funduszom_emerytalnym.html (15.07.2011).
[15] D. Nestić, I. Rašić Bakarić, From work to retirement: Pension system incentives to continued labour market participation in Croatia, http://www.eizg.hr, p. 82-85.
[16] Ibidem, p. 85.

Czech Republic

Capital-based pillar of the Czech pension system is not compulsory and there are no age restrictions for its participants. It was introduced in 1993 and initially consisted of the 40 pension funds. Today, after many mergers and acquisitions, the number of funds decreased to slightly more than 20. About 4.5 million members save money in these funds deriving profits from the state subsidies for contributions. Pension funds have to achieve yearly a return on investment at least as much as inflation was. Otherwise, they have to pay extra into the members' accounts from their own capital[17].

Proposed changes in the pension system impose an obligation on the insured person to save money for future retirement in the capital-based pension funds. The project assumes that persons under the age of 40 will have to provide 3% of their salary to the pension funds. After three years, the contribution will increase to 4% of salary, and after a further three to 5%. This means that the public pillar will get exactly as much less money, and therefore, the deficit of the state fund will increase. All contributions currently paid (amounted to 28% of salary) are used directly to pay current pensions. When a portion of the contribution will be transferred to the capital-based funds, the state-owned fund will record the deficit, which the government will have to finance. This solution, therefore, differs fundamentally from all those which are currently implemented in other countries with compulsory capital-based pillar[18].

Estonia

Fundamental pension reform has been carried out in 1999. It was introduced the possibility of saving in the private pension funds, but this was voluntary. First capital fund was established on April 1, 1999. Three years later, participation in private funds has been made compulsory, and thus from July 1, 2002 an obligatory second pillar of the pension system formally began its operation as the addition to the state pillar. Compulsory contribution was fixed at 6% of salary (2% was paid by an employee and 4% by an employer)[19]. At the moment when changes were implemented, it was assumed that the contribution transferred to the funds will finally increase to 10%. The Estonian private pension funds have 600 thousand members (out of 1.3 million citizens) who save a little bit more than 1 billion euro.

Currently, not only the contribution did not reach the planned height, but has been completely suspended. Estonian government initially wanted to cut it from 6% to 2%, but ultimately suspended it for two years (counting from June 1, 2009). The government promised that if the state budget will be balanced, in 2014-2017, it will contribute to pension accounts the equivalent of 6% of insured persons' salary, so as to

[17] P. Novák, System emerytalny w Czechach, http://www.igte.com.pl/matiinf/2003/012.html

[18] Jak nasi sąsiedzi zmieniają systemy emerytalne, http://wyborcza.biz/biznes/1,101562,8842829, Jak_nasi_sasiedzi_zmieniaja_systemy_emerytalne_.html (18.07.2011).

[19] J.Poteraj, Pension Systems in Europe – Estonia, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, Lublin 2007, p. 5-7.

compensate them the losses associated with the suspension and subsequent reduction of their pension contributions[20].

Hungary

By the end of 2010, capital-based, private pension funds were compulsory for insured persons as a complement to the distributive scheme managed by the state. Employer paid to the public system the contribution rate of 24% of employee's remuneration. The employee also contributed 2% of his salary to the first pillar, and additionally, 8% to the pension fund. In autumn 2010, there was a nationalization of the private pillar of Hungarian pension scheme. Pension savings accumulated in the second pillar amount to approximately 2.7 trillion forints (about 39 billion PLN), which represents 10% of GDP, and will be used to reduce the deficit of the state pension fund. It is assumed that the reform will enable the government to reduce the budget deficit below 3% of GDP and public debt below 70% of GDP by 2014 (at the end of September 2010 public debt amounted to 82.8%)[21]. As the result, the rate of enterprise income tax this will decrease to 10% in 2013, which is the lowest rate in Europe. As from January 1, 2011 Hungarians pay a linear personal income tax (PIT) at 16%.

Members of private pension funds were given time until January 31, 2011 to decide abuot the transition to the state-owned pillar. Theoretically, under the new pension law, they could choose to remain in the private pillar, but then they would lose the contribution paid for them to the state pension fund by the employer as well as the right to state pension. It turned out that the vast majority of insured persons chose the state fund, resigning from the private funds, which only remain slightly more than 100 thousand people (3.3%)[22]. It means virtually the end of the capital part of the pension scheme. Pension funds will cease to function due to a small number of participants. There were 18 capital-based funds so far.

Lithuania

The Lithuanian pension system was extended to the capital pillar in 2004. Accession to this part of the system is voluntary; however, participants can not withdraw from it later. Contributions to the second pillar can be tax deductible[23].

In 2009 the government decided to reduce the contribution transferred to the pension funds from 5.5% to 2% for two years. As the result of this decision, the state system obtained nearly 350 million euro that was spent on the current pension payments. In 2012 contribution was supposed to increase to 3% of salary, and to 4%

[20] Jak nasi sąsiedzi zmieniają systemy emerytalne, op. cit.
[21] H. Kozieł, Rząd Węgier niszczy drugi filar, http://www.parkiet.com/artykul/990402.html (15.08.2011).
[22] Obecny system emerytalny jest ostateczny, Forsal, http://forsal.pl/artykuly/483783,orban_obecny_system_emerytalny_jest_ostateczny.html (19.08.2011).
[23] Litwa w zarysie, Internationales Institut für Politik und Wirtschaft, Hanse-Parlament e.V, Hamburg 2006, p. 13.

one year later. In the years 2014-2017 the contribution of up to 6% of salary was supposed to be transferred to the capital-based funds to compensate for future pensioners the reduction of contributions lasting for several years. In June 2011 it was decided, however, that contributions remain at 2%, so that the state system may receive each year an additional 174 million euro[24]. Moreover, the government decided to extend the retirement age from the current 60 years for women and 62.5 years for men to 65 years for both in 2026[25].

Latvia

The second pillar of the Latvian pension system was introduced in mid 2001. This pillar became compulsory for all employees aged below 30 years and those aged 30-49 years could choose to participate in the new scheme or remain in the old one. In 2001-2006, the private pension funds received a contribution of 2% of employees' salary, followed by 4% in 2007 and 8% in 2008. This contribution should increase to 9% in 2009 and then it should reach the target level of 10% in 2010[26]. However, in 2009, the government decided to cut back pension contributions again to 2%. This action is intended to help reduce debt of the public pension system, which will receive further 63.5 million euro in 2011 and 162 million euro in 2012. As from 2013 the contribution is to be raised to 6% of employees' remuneration[27].

Romania

Since 2008 Romanian pension system has recorded the increasing deficit, which was the equivalent of 3 billion euro at the end of 2010. Economic projections indicate that, in next 50 years, Romania may be among the five EU countries that spend the most money on pensions relative to GDP (it will be outdistanced only by Greece, Luxembourg, Slovenia and Cyprus). Pension expenditures will increase from 8.2% of GDP in 2010 to 15.4% of GDP in 2060. The budget deficit has already reached 9.1% of GDP, while the average for European Union countries is 6.5% of GDP. The increasing expenditures on pensions, enhanced by the aging of the Romanian society, have the greatest impact on the growth of the public deficit[28].

Therefore, the Romanian parliament has introduced amendments to existing regulations concerning the pension system. Firstly, it is planned to extend gradually the retirement age for women from 59 to 63 years and for men from 63 to 65 years by 2015. Moreover, by 2030 the retirement age for men and women will be established at

[24] Jak nasi sąsiedzi zmieniają systemy emerytalne, op. cit.
[25] Na Litwie podwyższają wiek emerytalny, http://www.money.pl/emerytury/wiadomosci/artykul/na;litwie;podwyzszaja;wiek;emerytalny;opozycja;wielu;ludzi;go;nie;doczeka,219,0,848091.html (19.08.2011).
[26] J. Poteraj, Systemy emerytalne w Europie – Łotwa, http://www.univ.rzeszow.pl/ekonomia/ zeszyty/ Zeszyt13/34.pdf, p. 398.
[27] Jak nasi sąsiedzi zmieniają systemy emerytalne, op. cit.
[28] Rumunia: Połowa budżetu na emerytury w 2060 r., www.wyborczabiz/biznes (12.08.2011).

the same level, i.e. 65 years[29]. In 2009 Romania signed an agreement with the IMF, European financial institutions and the World Bank, which granted this country a loan of 20 billion euro. One of the conditions for granting the loan required from Romania to increase savings of public finances and maintain budget deficit at 6.8% of GDP[30].

Slovakia

The reform of the PAYG pension system in Slovakia was carried out in 2004-2005. By creating a multi-pillar system, Slovaks decided to divide the pension contribution in half between the traditional, distributive pillar and the new, capital-based pillar (each receives 9% of employees' remuneration). During the transitional period, between January 2005 and June 2006, the insured persons can choose whether to remain in the PAYG system, or join the capital-based pillar. For those who entered the labour market for the first time after December 2004, participation in the second pillar is compulsory. More than half of workers chose to join the new pension scheme and, at the end of 2007, more than 1.5 million people, out of 2.6 million insured persons, paid contributions in the capital pension funds. In addition, Slovakia equaled the retirement age for men and women at 62 years[31].

In 2008, in order to reduce the budget deficit, few changes in the system were made, including the ability to transfer all pension savings from the capital-based pillar to the distributive pillar or to join the second pillar only for persons insured in the PAYG system. These changes could be made in two deadlines: from January to June 2008 and from November 2008 to June 2009. During these periods, a total of 51 thousand people decided to move to the capital-based pillar, whereas 140 thousand people (out of 1.5 million funds' members) left the second pillar and joined the distributive pillar. This meant that net flows to the first pillar represented only about 5.5% of eligible persons. Additionally, the legislator introduced the principle of automatic participation in the PAYG system for people entering the labor market. Any person wishing to participate in the capital-based pillar must submit an appropriate statement; otherwise it is automatically assigned only to the state-owned pillar. During the first half of 2008, only 4 250 persons has decided to participate in a mixed system out of 30 thousand people who entered the labor market[32].

After elections in June 2010 the new government of Slovakia has announced a return to the principles upon which was based reform introduced in 2004-2005, including compulsory participation in the private pension funds for people entering the labor market for the first time.

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[29] Rumunia podnosi wiek emerytalny, http://biznes.newsweek.pl/rumunia-podnosi-wiek-emerytalny, 64701,1,1.html (19.08.2011).
[30] Rumunia chce ciąć wydatki publiczne, http://biznes.newsweek.pl/rumunia-chce-ciac-wydatki-publiczne,59891,1,1.html (19.08.2011).
[31] L. Kalina, Słowacja reformuje reformę, ale nie tnie systemu kapitałowego, FOR, marzec 2011, p. 1-4.
[32] A. Niewiadomski, Słowacja pójdzie drogą Argentyny?, „Rzeczpospolita" z dnia 27.10.2008.

Ukraine

Ukrainian pension system provides benefits including old-age, disability and survivor pension. Retirement age in this country is at a low level, i.e. 55 years for women and 60 years for men. Nowadays, 13.7 million people receive retirement pension, and 15.2 million employed persons pay the pension contributions into the system. This means that one employed person finances pension benefit for 0.9 retiree, and it is estimated that this ratio will increase to 1.4 in 2050. Benefits paid to retirees are at a very low level, i.e. the average pension is equivalent to about 300 PLN. In 2003 the government made an unsuccessful attempt to establish the second pillar in the form of compulsory private funds.

Another attempt of the pension reform was taken in late 2010. This decision stemmed, inter alia, from the need to balance the financial situation of the Ukrainian Pension Fund that recorded a systematic deficit covered with funds from the state budget. The deficit in 2010 was estimated at 26.6 billion UAH. Another reason of the proposed changes was to increase the level of real pensions[33]. At the end of 2010 the government prepared a bill reforming the pension scheme. This bill, however, was criticized by trade unions, so that in February 2011 the government announced the consideration of proposed changes. Finally, in July 2011, the Parliament of Ukraine passed the law reforming the pension scheme. According to this Act, the retirement age for women will increase from 55 to 60 years and for men from 60 to 62 years. This regulation comes into force from September 1, 2011. In addition, pensions of civil servants will be reduced from 90% to 80% of their salary as well as pension benefits will be limited to a maximum of 10 minimum pension benefits (government proposed 12), and this restriction also applies to pensions currently paid out. The Act provides also the introduction of the second phase of pension reform, which requires employees to pay additional contributions to separate accounts. Initially, the amount of this contribution is to be 2% of salary and increase gradually to 7%[34].

Conclusions

In each of the above countries of Central and Eastern Europe it was carried out pension reform similar to that which has been introduced in Poland since 1999. The common feature of these reforms was the creation of capital-based pillar in addition to public system. Few years later, the debate on the role of the state and private institutions in the area of income security in old age has begun again. Many countries have decided to reduce or suspend the payment of contributions to pension funds in purpose to increase revenue to the state system and thereby reduce the growing debt. These

[33] Parlamentarna debata nad reformą emerytalną na Ukrainie, http://kiev.trade.gov.pl/pl/aktualnosci/article/a,14708,Parlamentarna_debata_nad_reforma_emerytalna_na_Ukrainie.html (19.08.2011).

[34] Parlament Ukrainy uchwalił reformę emerytalną, http://kiev.trade.gov.pl/pl/aktualnosci/article/a,18321,Parlament_Ukrainy_uchwalil_reforme_emerytalna.html (19.08.2011).

changes cannot be regarded as a reform; they are rather ad hoc solutions of the problem in the state budget deficit. Such actions improve the situation of the PAYG systems only temporarily, but at the same time, they threaten to dismantle the pension reform. Without denying the need for necessary adjustments in the pension funds, one should require, above all, an acceleration of development-oriented structural reforms in the economy, which would contribute to sustained improvement in public finances. There should be no retreat from the general principles of pension reform, and any suggestion restore the PAYG system of old-style should be rejected.

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Финансовое обеспечение социально-экономического развития муниципальных образований

(Financial Provision for Economic and Social Development of Municipal Units)

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Аннотация: Раскрываются задачи и направления деятельности органов местного самоуправления по финансовому обеспечению социально-экономического развития муниципальных образований в России. Подчеркивается важность комплексного системного подхода. Отмечаются серьезные объективно существующие бюджетные ограничения и выделяются приоритеты.

Ключевые слова: система, развитие, баланс, бюджет, доходы, долг, инвестиции.

Abstract: The present article covers propositions and directions of local authorities activities in financial provision for economic and social development of municipal units in Russian Federation. The significance of an integrated systems approach is underlined. Serious existent budget constraints and preferences are observed.

Keywords: system, development, balance, budget, revenue, debt, investments.

Усиление роли административно-территориальных единиц и их органов управления в развитии государств является современной общемировой тенденцией[1]. В большинстве индустриальных стран центральное правительство передает решение многих вопросов на местный уровень. Такие же процессы идут в странах с переходной экономикой. Несмотря на исторические и национальные особенности, многие процессы функционирования и развития муниципальных образований схожи, потому весьма важен обмен опытом организации работы органов местного самоуправления и финансового обеспечения их социально-экономического развития.

[1] С.324, Налоговые реформы. Теория и практика: монография для магистрантов / под ред. И.А. Майбурова, Ю.Б. Иванова. – М.: ЮНИТИ-ДАНА, 2010. – 463с.

Социально-экономическая система муниципального образования

Современное муниципальное образование сочетает в себе черты квазикорпорации и социума. Как квазикорпорация муниципальное образование является субъектом собственности и в условиях рынка должно ее эффективно использовать. Муниципальное образование как социум представляет собой общность людей живущих на конкретной территории, и поэтому обязано создавать необходимые экономические и социальные условия для их жизнедеятельности. Одновременное осуществление двух этих миссий формирует социально-экономическую систему муниципального образования, в котором муниципальная собственность занимает сравнительно небольшое место. При этом муниципальные органы несут ответственность за состояние социально-экономической системы в целом.

Социально-экономическая система муниципального образования – упорядоченная совокупность элементов, отношений и ресурсов экономической и социальной сфер, взаимосвязанных и взаимодействующих в процессе производства, распределения, обмена и потребления благ и услуг[2].

Обеспечение эффективного функционирования социально-экономической системы как объективное требование к устойчивому развитию возможно только в условиях, когда органы местного самоуправления имеют рычаги воздействия на все ее элементы, на все ее ресурсы, в первую очередь финансовые. В условиях рынка с присущей ему многоукладностью, взаимодействием разных форм собственности, превалированием косвенных методов управления и определенной автономией местного самоуправления нужна система управления, которая гармонизирует действия всех хозяйствующих субъектов и населения на его территории, объединит их в процессе достижения общей стратегической цели, интегрирует их финансовые, интеллектуальные и материальные ресурсы. Управлениеосуществляется посредством муниципальной финансовой политики через инструменты налогообложения, бюджетного финансирования социальных сфер, финансирования муниципальных заказов и т.д.

При этом важно дальнейшее укрепление статуса муниципальных образований в качестве самостоятельных субъектов, обладающих властными полномочиями в рамках публичного права, правами и обязанностями юридического лица в гражданских правоотношениях.

[2] С.15, Смольникова Л.В., Шушарин А.Л. Финансовое обеспечение стратегического развития города.- Томск: Томский государственный университет, 2003. – 264с.

Сводный финансовый баланс муниципального образования

Развитие социально-экономической системы муниципального образования обеспечивается усилиями федеральной, региональной власти, а также государственных внебюджетных фондов. Каждый из перечисленных субъектов также вносит свой вклад в развитие социально-экономической системы муниципального образования, используя при этом свои финансовые ресурсы. От того, насколько согласованными будут финансовые действия каждого, настолько они будут соответствовать общей цели развития социально-экономической системы муниципального образования. Поэтому, безусловно, очень важным является вопрос такого согласования. Необходима координация использования всех материальных и финансовых ресурсов на территории муниципального образования, в том числе координация соответствующих финансовых потоков. Именно для этой цели был разработан и активно применялся такой аналитически-статистический инструмент, как финансовый баланс территории.

Сводный финансовый баланс территории – это баланс всех доходов и расходов государства, региона или муниципального образования[3]. В сводном финансовом балансе находят последовательное и взаимосвязанное отображение финансовые ресурсы территории, их образование, распределение и использование.

Составление финансового баланса позволяет обеспечить:

- достижение единства в экономическом и социальном развитии, создание поступательного экономического роста;
- определение объемов финансовых ресурсов, имеющихся на территории муниципального образования;
- балансирование материальных и финансовых ресурсов;
- концентрацию финансовых ресурсов на наиболее важных в каждый конкретный период направлениях социально-экономического развития;
- изыскание внутритерриториальных резервов для финансирования запланированных мероприятий;
- нахождение направлений наиболее эффективного использования денежных средств;
- осуществление действенного контроля за мобилизацией и использованием финансовых средств.

Таким образом, сводный финансовый баланс территории является отражением финансового потенциала территории, охватывает весь объем ее ресурсов и путей их рационального использования и поэтому необходим при разработке планов социально-экономического развития.

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[3] С.9, Финансовый баланс территории и его использование / под. ред. Н.Г.Сычева, К.И.Таксира. – М: Финансы и статистика, 2003. – 336с.

Исключение в ходе принятия очередных изменений и дополнений с апреля 2007 года из Бюджетного кодекса Российской Федерации понятия сводный финансовый баланс территории является методологической ошибкой, имеющей негативное последствие для практической работы органов местного самоуправления при бюджетном планировании и разработке планов социально-экономического развития.

Местное самоуправление в России и Европейская хартия

Сложность задачи финансового обеспечения социально-экономического развития муниципальных образований в России во многом связана с тем, что подходы к ее решению являются относительно новыми и находятся в стадии формирования. При том, что местное самоуправление в России имеет глубокие исторические корни (земский уклад жизни был достаточно развит у нашей стране в дореволюционный период), на протяжении длительного времени существования тоталитарной системы местные органы власти были лишены полномочий самостоятельного управления и прав собственности и потому утратили свои компетенции.

Процесс возрождения и развития местного самоуправления в России, как и в других странах с переходной экономикой, связан с децентрализацией государственной системы в целом и финансовой системы в частности. Приняты новые законодательные документы, регламентирующие статус и полномочия местного самоуправления, а также финансовые основы его деятельности. В 1998 году Россия присоединилась к Европейской хартии местного самоуправления.

Важнейшие принципы обеспечения финансовой самостоятельности местных органов власти изложены в Европейской хартии местного самоуправления[4]:

- достаточность собственных финансовых средств местных органов власти и их соразмерность представленным полномочиям;
- свобода распоряжения собственными средствами при осуществлении своих функций;
- поступление хотя бы части финансовых средств местного самоуправления за счет местных налогов и сборов;
- защита более слабых в финансовом плане муниципальных образований за счет механизма финансового выравнивания;
- предоставление субсидий не в ущерб самостоятельности политики местной власти.

[4] Европейская хартия местного самоуправления // http://www.vff-s.narod.ru/dem/un/lsg85.htm

В тоже время современное состояние финансового обеспечения полномочий органов местного самоуправления в России далеко от уровня, декларируемого этим документом.

Современные межбюджетные отношения в России

При передаче органам местного самоуправления отдельных государственных полномочий их финансовое обеспечение должно осуществляться только за счет предоставляемых местным бюджетам субвенций из соответствующих бюджетов. На практике достижение сбалансированности местных бюджетов продолжает оставаться основной проблемой муниципальных финансов в России. Рост расходных полномочий на местном уровне не обеспечивается соответствующим увеличением источников их финансирования. Финансирование выполнения органами местного самоуправления государственных полномочий и расходов на реализацию на местном уровне федеральных и региональных законов осуществляется неудовлетворительно. Однако это обстоятельство не отменяет необходимость выполнения органами местного самоуправления возложенных на них дополнительных обязанностей.

В соответствии с Концепцией межбюджетных отношений и организации бюджетного процесса в субъектах Российской Федерации и муниципальных образованиях до 2013 года, утвержденной распоряжением Правительства Российской Федерации от 8 августа 2009 года № 1123-р, важными задачами, требующими решения в ближайшие годы являются корректировка механизмов оказания финансовой помощи органам государственной власти субъектов Российской Федерации и местного самоуправления, а также совершенствование системы разграничения расходных обязательств между органами государственной власти и местного самоуправления.

Предпринимавшиеся в последние годы меры по регулированию межбюджетных отношений дали лишь частичное приближение к основополагающим целям. Прежде всего, это касается стратегической цели сделать систему межбюджетных отношений мощным инструментом политики стимулирования экономического роста.

Серьезным противоречием принципам бюджетного федерализма является наблюдаемая в последние годы тенденция усиления централизации налоговых поступлений на этапе их первичного распределения между различными уровнями бюджетной системы.

В качестве наглядного примера можно привести данные о распределении налоговых доходов муниципального образования «Город Томск» между бюджетами бюджетной системы Российской Федерации (в %), которые представлены в следующей таблице

Бюджет	2009 год	2010 год	2011 год (проект)
городской	16	13	13
областной	48	43	42
федеральный	36	44	45

Такое распределение налоговых доходов между бюджетами, к сожалению, является типичным практически для всех муниципалитетов России: «Итак, федеральным налоговым законодательством закреплена за местными бюджетами необходимая, соответствующая функциям местной власти и признанным принципам отнесения налогов к местному уровню, но, очевидно, недостаточная по объему и по обеспечению исполнения компетенции собственная налоговая база»[5].

Необходимо обеспечить формирование в России современной системы межбюджетных отношений, которая бы реально разграничила расходные обязательства и доходные источники публично-правовых образований (Российской Федерации, субъектов Российской Федерации, муниципальных образований), а также ликвидировала «необеспеченность федеральных мандатов».

Местный бюджет муниципального образования

В составе финансовых ресурсов муниципального образования, как территориальной социально-экономической корпорации, центральное место принадлежит местному бюджету. Но не потому, что его удельный вес больше – средства, вкладываемые в социально-экономическую систему муниципального образования другими субъектами, многократно превышают расходы местного бюджета. Это место принадлежит ему потому, что его формирование и расходование является прерогативой муниципальной власти, за его счет осуществляется в основном обеспечение жизнедеятельности города, он цементирует многообразные затраты всех элементовсоциально-экономической системы муниципального образования в единую целенаправленную стратегию развития. Местный бюджет не подменяет расходы хозяйствующих субъектов и населения. Он их дополняет, восполняет пробелы и упущения, стимулирует расходы этих субъектов, косвенно их регулирует и корректирует.

Величина местного бюджета и степень его сбалансированности во многом определяют перспективы социально-экономического развития. В тоже время, реальное состояние большинства местных бюджетов муниципальных образований в России близко к критическому. Средств недостаточно для

[5] С. 200, Широков А.Н. Местное самоуправление в современной России: концептуальные основы, законодательное регулирование и практическая реализация / А.Н. Широков, С.Н. Юркова. – М.: КНОРУС, 2009. – 560с.

обеспечения текущего функционирования бюджетной сферы и решения вопросов жизнеобеспечения. О собственных финансовых возможностях на развитие практически говорить не приходится.

В качестве примера, вновь, можно привести бюджет муниципального образования «Город Томск», который по доходам был сформирован с учетом нормативов отчислений от федеральных и региональных налогов и сборов, установленных Бюджетным кодексом РФ, Законом Томской области «Об областном бюджете на 2010 год и на плановый период 2011 – 2012 годов» и Концепцией формирования межбюджетных отношений в Томской области на 2011 – 2013 годы.

Общая сумма доходов местного бюджета в 2010 году составила 9,3 млрд. руб., в том числе 4,6 млрд. руб. собственные доходы (49%), 4,7 млрд. руб. (51%) трансферты из вышестоящих бюджетов.

В структуре собственных доходов на долю налоговых приходится 3,8 млрд. руб. - 84%, неналоговых (доходы от использования и продажи муниципального имущества) 0,8 млрд. руб. - 16%.

Анализируя соотношение собственных доходов местных бюджетов и расходов на основные полномочия органов местного самоуправления, следует признать, что фактически без трансфертов бюджетов вышестоящих уровней исполнение полномочий не представляется возможным. К примеру, в расходы местного бюджета муниципального образования «Город Томск» только на образование, здравоохранение и культуру в 2010 году (3,9 млрд. руб.) составили 87 % от суммы собственных доходов (4,5 млрд. руб.).

Любое муниципальное образование, независимо от величины его собственной доходной базы, обязано обеспечить для населения определенный минимум муниципальных услуг, гарантируемых государством. Величина этих услуг должна определяться социальными нормами и минимальными государственными стандартами. Федеральный закон «Об общих принципах организации местного самоуправления в Российской Федерации» устанавливает порядок, обеспечивающий для каждого муниципального образования минимальный местный бюджет путем закрепления доходных источников на постоянной либо долговременной основе. В случаях, если доходная часть минимального местного бюджета не может быть обеспечена за счет этих источников, органы государственной власти обязаны передать органам местного самоуправления иные доходные источники федерального бюджета и бюджета субъекта Российской Федерации, а если этого недостаточно – дотации и другие трансферты.

Фактически этот порядок не соблюдается. Минимальные государственные стандарты до настоящего времени находятся в стадии разработки. Соответственно отсутствуют нормативы минимальной бюджетной

обеспеченности. Поэтому большинство субъектов Российской Федерации устанавливает органам местного самоуправления нормативы налоговых поступлений, ставящие их в критическое положение.

Совершенствование администрирования доходов местных бюджетов

Задачи совершенствования администрирования всех видов доходов местных бюджетов и пути их решения широко обсуждаются на страницах профессиональных журналов, в том числе учеными-практиками, непосредственно руководящими муниципальными финансовыми органами[6,7], что подчеркивает их актуальность для всех муниципальных образований России.

Работая в условиях установленного порядка распределения налоговых платежей, когда из собранного на территории рубля налогов в местном бюджете остается 13 копеек органы местной власти муниципального образования «Город Томск», безусловно, направляют значительные усилия на увеличение неналоговых доходов.

В соответствии с Бюджетным кодексом Российской Федерации к неналоговым доходам местных бюджетов относятся:

- доходы от использования имущества, находящегося в муниципальной собственности;
- доходы от платных услуг, оказываемых бюджетными учреждениями, находящимися в ведении органов местного самоуправления;
- средства, получаемые в возмещение причиненного вреда;
- штрафы, зачисляемые в местные бюджеты в соответствии с законодательством и др.

По каждому виду дохода принимаются меры по его возможному увеличению, но поскольку более 30% от общей суммы неналоговых доходов бюджета муниципального образования «Город Томск» обеспечивается поступлениями от арендной платы за землю, работа по повышению эффективности использования муниципальных земель является приоритетной. В частности, запланировано проведение мероприятий по развитию и наращиванию неналогового потенциала, способствующих увеличению доходной части бюджета путем:

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[6] Домбровский А.Н. Налоговое администрирование и резервы доходной базы бюджетов муниципальных образований в условиях финансового кризиса // Финансы, 2009, - № 3. – С. 33-36.
[7] Ярцева И.Ю. Проблемы администрирования неналоговых доходов // Проблемы Учета и финансов, 2011. – 2011. - № 1. – С. 59-70

- перехода на взимание арендной платы за земли от кадастровой стоимости земельных участков;
- разработки и внедрения механизмов побуждения к оформлению документов для лиц, не оформивших в надлежащем порядке право пользования земельными участками;
- усиления муниципального земельного контроля за целевым использованием земель;
- корректировки методики установления арендной платы за сдаваемое в аренду муниципальное имущество в направлении максимального ее приближения к уровню, сложившемуся на рынке, и четкого обоснования исключений из этого правила.

Привлечение заемных средств и управление муниципальным долгом

В странах с развитой рыночной экономикой роль заемных средств в реализации задач социально-экономического развития муниципальных образований достаточно велика. Привлечение заемных средств осуществляется в форме выпуска муниципальных ценных бумаг и банковских кредитов.

В России, как и во многих зарубежных странах, расширение использования заемных средств связано с усилением ответственности органов местного самоуправления за предоставление услуг населению, развитие социальной и инженерной инфраструктуры. Многие муниципальные образования привлекают кредиты на финансирование как инвестиционных, так и текущих расходов. Муниципальную политику привлечения заемных средств следует строить на базе использования общих принципов кредитования, учитывать экономический потенциал территории, состояние муниципальных финансов, сбалансированность и достаточность местного бюджета. Одними из основных критериев для оценки кредитной привлекательности муниципального образования являются дефицит бюджета муниципального образования и муниципальный долг.

Важным показателем работы органов местного самоуправления является эффективное управление муниципальным долгом. В соответствии со ст.107 Бюджетного Кодекса Российской Федерации предельный объем муниципального долга не должен превышать общего годового объема доходов бюджета без учета объема безвозмездных поступлений и поступлений налоговых доходов по дополнительным нормативам отчислений. По состоянию на 1 января 2011 года объем муниципального долга муниципальное образование «Город Томск» составил 1,6 млрд. руб. или 39% от максимально допустимого значения. В его структуре 1 млрд. руб. (61%) составил объем муниципального долга по ценным

бумагам и 0,6 млрд. руб. (39%) – объем муниципального долга по кредитам коммерческих банков.

Томск один из немногих муниципалитетов работающих на рынке ценных бумаг. На сегодня значительный объем выпущенных облигаций Томска имеет срок погашения до 2014 года. Данное обстоятельство положительно влияет на кредитный рейтинг города и позволяет привлекать кредитные ресурсы коммерческих банков под невысокие проценты.

Привлечение внебюджетных инвестиций

Понимая ограниченность возможностей местного бюджета и бюджетов вышестоящих уровней, в целях развития муниципального образования безусловным приоритетом в работе органов местного самоуправления является привлечение внебюджетных инвестиций.

Несмотря на непростую посткризисную ситуацию в мире в целом и в России в частности власть и на местном уровне способна создать, если не идеальную, то реально привлекательную среду для комфортного проживания, для развития территории и для привлечения инвестиций.

Меры по улучшению инвестиционного климата в муниципальном образованиидолжны реализовываться по следующим основным направлениям:

- создание благоприятной для инвестиций административной среды;
- создание подготовленной для инвестиций инфраструктуры;
- формирование финансовых механизмов привлечения и поддержки инвестиций;
- налоговое стимулирование инвестиций;
- формирование привлекательных тарифных условий для инвестиций;
- помощь в обеспечение сырьем производств, создаваемых в результате инвестиций;
- кадровое обеспечение производств. создаваемых инвесторами;
- стимулирование спроса на продукцию производств, создаваемых инвесторами.

Успех по реализации задачи улучшения инвестиционного климата на территории муниципального образования может быть обеспечен при выполнении еще как минимум двух обязательных условий: совет по взаимодействию с инвесторами должен возглавлять руководитель муниципального образования и состав совета должен формироваться не только из числа работников местного самоуправления и инвесторов, но и из представителей экспертного сообщества. Целесообразным, как показывает практика, также является создание в муниципальном образовании специализированного агентства по привлечению инвестиций и работе с инвесторами.

В заключении следует отметить, что только комплексный подход к решению задачи финансового обеспечения социально-экономического развития муниципального образования позволит добиться поставленной цели.

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The Reform of the System of Financial Administration Authorities in the Czech Republic

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Abstract: This paper deals with the system of financial administration authorities in the Czech Republic, which consists of the Ministry of Finance, the General Financial Directorate, Financial Directorates and Tax Offices. At first the paper focuses on the definition of financial administration authorities from a theoretical point of view. Then it focuses on three legal regulations of financial administration authorities. The first is legal regulation that was in force and effective before the end of 2010, the second one is current legal regulation in force and the third one is legal regulation that should be effective from 1st January 2012.
The first part of the reform of financial administration authorities was realized in the Czech Republic from 1st January 2011 and its main purpose was a creation of new central administrative authority with a national scope of authority, the General Financial Directorate. The second part of the reform should be effective from 1st January 2012 and its main purpose is to replace 8 Financial Directorates and 199 Tax Offices by only one Appellate Financial Directorate and 15 Tax Offices (14 Tax Offices and the Specialized Tax Office).
The aim of this paper is to assess whether the reform will help to make activities of financial administration authorities more efficient. Emphasis is put on comparison of particular legal regulations of financial administration authorities and on main differences between them.

Keywords: financial administration authorities, reform, the General Financial Directorate, the Appellate Financial Directorate, Tax Offices, the Specialized Tax Office.

Introduction

In this paper I would like to deal with the ongoing reform of the system of financial administration authorities in the Czech Republic. Nowadays it is very actual topic because the Government of the Czech Republic passed the proposal of the Act on

Financial Administration of the Czech Republic on 10th August 2011 and this act should come into effect on 1st January 2012[1].

First of all I will deal with financial administration authorities from a theoretical point of view, i.e. from a point of view of current financial law publications. After that I will focus on the system of financial administration authorities in the Czech Republic in three above-mentioned time periods.

Initially the system of financial administration authorities in the Czech Republic before the end of 2010 will be described and assessed. Then I will deal with the current legal regulation of financial administration authorities. The third time period which is the subject of interest of this paper is the system of financial administration authorities according to proposed legislation, i.e. the system of financial administration authorities that should be effective from 1st January 2012.

The aim of this paper is to assess whether proposed reform will help to make activities of financial administration authorities more efficient, mainly in the field of tax administration. Emphasis is put on the comparison of particular legal regulations of financial administration authorities and on main differences between them[2].

Financial administration authorities from a point of view of theory of financial law

The **Prague textbook of financial law**[3] deals with financial administration authorities in the chapter dealing with subjects of financial law relationships. It counts financial administration authorities among financial authorities, i.e. state administration bodies that represent the Czech Republic in financial law relationships. This textbook counts Tax Offices, Financial Directorates and the Ministry of Finance among financial administration authorities.

The **Brno textbook of financial law**[4] concerning the term financial administration authority refers to the Prague textbook of financial law and it says that it is impossible to interchange terms financial authority and financial administration authority because the second one is narrower term from a point of view of financial law.

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[1] See the Resolution of the Government of the Czech Republic of 10th August 2011 No. 591 to the proposal of the Act on Financial Administration of the Czech Republic and to the proposal of the Act that amends some other acts in connection with a passage of the Act on Financial Administration of the Czech Republic.

[2] This text was written with a financial support and within the Research plan of the Faculty of Law of the Charles University in Prague, registered under No. MSM 0021 620 804, named "The Changes of Law at the beginning of the 3rd millennium – roots, solutions and perspectives".

[3] BAKEŠ, Milan, KARFÍKOVÁ, Marie, KOTÁB, Petr, MARKOVÁ, Hana. Finanční právo. 5. aktualiz. vyd. Praha : C. H. Beck, 2009. 576 s. ISBN 978-80-7400-801-6. s. 34.

[4] MRKÝVKA, Petr, et al. Finanční právo a finanční správa : 1. díl. Brno : Masarykova Univerzita, 2004. 320 s. ISBN 80-210-3578-1. s. 90.

The latest **Pilsen-Brno textbook of financial law**[5] does not distinguish terms financial authority and financial administration authority, or more precisely it uses term financial authority for financial administration authority. Among financial administration authorities it counts the Ministry of Finance, Financial Directorates, Tax Offices, but also the Czech National Bank, the General Directorate of Customs, Directorates of Customs and Customs Offices. Unfortunately this different view on financial administration authorities is not explained in the textbook and so it is not clear if it is an intention or terminological imprecision.

Personally, I prefer conception of first two textbooks and I assume that financial administration authorities include the Ministry of Finance, Financial Directorates and Tax Offices. Of course I have to count also the General Financial Directorate that was established on 1st January 2011 among the system of financial administration authorities and it cannot be mentioned in textbooks because they were published until 2009.

In following text I will count among **financial administration authorities**: the Ministry of Finance, the General Financial Directorate, Financial Directorates and Tax Offices.

The legislation of the system of financial administration authorities before the end of 2010

This part deals with the legal regulation of the system of financial administration authorities before the end of 2010. Its aim is to describe the legal regulation of that period to clear ongoing changes.

At that time legal basis of the system of financial administration authorities was made up by the **Act on the Territorial Financial Authorities**[6], effective from 1st January 1991. According to this act the system of financial administration authorities before 31st December 2010 included Tax Offices, Financial Directorates and the Ministry of Finance.

It should be noted that the Act on the Territorial Financial Authorities did not use termfinancial administration authorities and it does not use it even today. For Tax Offices and Financial Directorates it uses term "**territorial financial authorities**". Scope of authority of the Ministry of Finance as a financial administration authority is only set by enumerative method.

Regarding Tax Offices and Financial Directorates can be added that legal concept of these authorities differs from theoretical concept. As above-mentioned, financial law theory counts these financial administration authorities into broader

[5] JÁNOŠÍKOVÁ, Petra, MRKÝVKA, Petr, TOMAŽIČ, Ivan et al. Finanční a daňové právo. Plzeň : Aleš Čeněk, 2009. 525 s. ISBN 978-80-7380-155-7. s. 52.
[6] The Act No. 531/1990 Coll., on the Territorial Financial Authorities, as amended.

category of financial authorities. The Act on the Territorial Financial Authorities uses a broader term "financial authorities" for these authorities and not a narrower term "financial administration authorities". It is not a problem in terms of its function, some discrepancies may however occur from a theoretical and pedagogical point of view.

Financial Directorates and Tax Offices are expressly termed by the Act as administrative authorities. Administrative authorities are a part of the executive in the Czech Republic and to establish them and determine their scope of authority is only possible by act[7].

Tax administration can be considered as a principal scope of authority of territorial financial authorities according to the Act on the Territorial Financial Authorities. Tax administration was in accordance with the Tax and Fees administration Act[8] valid and effective at that time. These administrative authorities also exercised other scope of authorities beside the principal one[9].

From the perspective of **subordinate structure**, Tax Offices were controlled by Financial Directorates. Until 31st December there were 199 Tax Offices and 8 Financial Directorates in the Czech Republic. All Financial Directorates were controlled by the Ministry of Finance. Within the Ministry of Finance this scope of authority was executed by the Central Financial and Tax Directorate as an internal organizational part of the Ministry of Finance.

Financial Directorates were established as budgetary organizations. Tax Offices were not budgetary organizations, it was only said that their personnel and material needs were provided by Financial Directorates that controlled them. In 2001 Financial Directorates which were established as budgetary organizations became **state organizational units** according to the Act on the Property of the Czech Republic[10]. The Act on the Territorial Financial Authorities was put in accordance with this Act on 1st January 2006,[11] when the provision saying that a Financial Directorate is a budgetary organization was replaced by new provision expressly saying that Financial Directorates are accounting units. Nevertheless the principle that personnel and material needs were provided by Financial Directorates was maintained. Act on the Property of the Czech Republic said that a state organizational unitis an accounting unit only when it is expressly said by act. Although it was expressly said with five-year delay, in fact Financial Directorates have been accounting units since 1st January 2001.

The fact that Financial Directorates were, unlike Tax Offices, accounting units meant in practice that in fact there were 14 separate state organizational units (accounting units), mainly in terms of state property administration competencies and

[7] See Art. 79 of the Constitution of the Czech Republic.
[8] The Act No. 337/1992 Coll., the Tax and Fees administration Act, as amended.
[9] See § 1 of the Act on the Territorial Financial Authorities.
[10] The Act No. 219/2000 Coll., on the Property of the Czech Republic and its performance in legal relationships, as amended.
[11] The Act No. 444/2005 Coll., that amends the Act No. 531/1990 Coll., on the Territorial Financial Authorities, as amended.

from inclusion of employees into these state organizational units. Thus each Financial Directorate was relatively independent of property and personal issues.

Current legal regulation of the system of financial administration authorities

A relatively major change in the system of financial administration authorities was brought by theAct No. 199/2010 Coll[12]. During its discussion in the Parliament of the Czech Republic a part substantially changing the system of financial administration authorities was added into draft of this Act, based on a parliamentary motion to amend[13].

The basis for this motion to amend formed the proposal of the Ministry of Finance to amend the Act on the Territorial Financial Authorities, which was consulted by the Legislative Council of the Government within the legislative process in early 2010. The Legislative Council, however, did not recommend its adoption[14].

However, despite the above mentioned fact, the proposal was approved by the Parliament of the Czech Republic and Act No. 199/2010 Coll. came into effect on the 1st January 2011. I consider adoption of such a fundamental law through the motion to amend incorrect, as it is to circumvent the regular legislative process in the executive authority. Additionally, it is obvious that the Legislative Council of the Government, i.e. the government's advisory body in its legislative activities disagreed with the proposal.

The merit of the Act No. 199/2010 Coll. is to establish anentirely **new financial administration authority**, the General Financial Directorate. The Act on the Territorial Financial Authorities counts among the territorial financial authorities besides Tax Offices and Tax Directorates the General Financial Directorate as well. In this context it should be noted that the law in this regard is not logical, since the authority with national authority is ranked among territorial financial authorities. From a legal point of view is incorrect, that the authority with national authority is designated as a territorial authority with its territorial authority limited to a certain part of the Czech Republic. The Act on the Territorial Financial Authorities still regulates the authority of the Ministry of Finance as a financial administration authority.

[12] The Act No. 199/2010 Coll. which amends the Act No. 586/1992 Coll., on the Income Taxes, as amended, and the Act No. 218/2000 Coll., on Budgetary Rules and on changes of other Acts, as amended, and other Acts.

[13] Psp.cz [online]. 2011 [cit. 2011-08-09]. Parliamentary Press 959/3. Amendments and other proposals to Parliamentary Press 959/0. Chamber of Deputies, 5. election period, 2006-2010. Available from WWW: <http://www.psp.cz/sqw/text/tiskt.sqw?o=5&ct=959&ct1=3>.

[14] Vlada.cz [online]. 2011 [cit. 2011-08-09]. Results of 58. session of Legislative Council of the Government from 25th February 2010. Available from WWW: <http://www.vlada.cz/cz/ppov/lrv/tiskove-zpravy/vysledky-58--zasedani-legislativni-rady-vlady-25--unora-2010-68768/>.

An originally three-level system of financial administration authorities (Tax Offices, Tax Directorates and the Ministry of Finance) was extended to **four-level system** (Tax Offices, Tax Directorates, the General Financial Directorate and the Ministry of Finance). At first sight this may seem as unfounded, as only further financial administration authority was added. However, it should be noted that the merit of change is in determining which of these authorities the unit of account (see below) is. In addition, it is only a kind of passage on the path to the target state, which is described in the section dealing with the system of financial administration authorities according to the Financial Administration Act approved by the Government.

General Financial Directorate is the administrative office for the performance of tax administration and the exercise of other authorities with national territorial authority seated in Prague. Concerning relationships of superiority and subordination, the General Financial Directorate is subordinated to the Ministry of Finance and superior to the Tax Directorates. Essential is the legal rule, which provides that the General Financial Directorate is an accounting unit. Given that the Tax Directorates lost the position of an accounting unit, this fact means that property and personal matters of the entire system of territorial financial authorities (i.e. the General Financial Directorate, Tax Directorates and Tax Offices) have been centralized into a single financial authority with a national territorial authority. This should enable more efficient performance of competences by those authorities. Only time will tell if this is true. In fact, the General Financial Directorate originated mainly from a separate Central Financial and Tax Directorate as an internal organizational unit of the Ministry of Finance.

There are still 8 **Tax Directorates**. In terms of territorial authority this Tax Directorates carry out their powers within the territorial district consisting of the territorial districts of the Tax Offices, managed by the directorates. As I pointed out earlier, the directorates lost position of accounting units and the jurisdiction for state property management and the jurisdiction for the fulfillment of other obligations and exercise of the rights and obligations arising from employment relationships of employees in Tax Directorates passed, with effect from the 1st January 2011, to the General Financial Directorate[15]. For state property management, including the state budgetary funds, accounting and employment relationships, particular Tax Directorates have positions of internal organizational units of the General Financial Directorate. They are therefore administrative authorities, which are state organizational units; however, they are not accounting units, but only internal organizational units of other administrative authority (the General Financial Directorate).

Even 199 **Tax Offices** still exist, and their territorial jurisdiction is defined in Appendix 1 to the Act on Territorial Financial Authorities. The Tax Offices are subordinated to the Tax Directorates. For state property management, including the

[15] See transitional provisions of Act No. 199/2010 Coll.

state budgetary funds, accounting and employment relationships, particular Tax Offices have positions of internal organizational units of the General Financial Directorate. They are therefore administrative authorities, which are state organizational units; however, they are not accounting units, but only internal organizational units of other administrative authority (the General Financial Directorate). In this respect they have the same status as the Tax Directorates. For completeness, it is necessary to add that in the Czech Republic there are differences between the Tax Offices with respect to their competences exercised. Certain competences[16] are performed by all 199 Tax Offices, but some competences[17] are being exercised by only 14 selected Tax Offices.

The Act on Territorial Financial Authorities allows the establishment or abolition of territorial financial authorities' **branches**, which are their internal organizational units, by the decision of the Director General of the General Financial Directorate[18]. Currently, there is only one branch office established, a branch office of the Tax Office in Brandýs nad Labem - Stará Boleslav, seated in Prague[19].

Proposed legal regulation of the system of financial administration authorities

As already mentioned, the Government of Czech Republic recently approved a draft of the Act on Financial Administration of the Czech Republic[20]. This is a brand new, modernly conceived legal regulation of financial administration authorities, which should replace nowadays inadequate Act on Territorial Financial Authorities, with effect from 1st January 2012.

Sec. 1 par. 1 of the Act on Financial Administration of the Czech Republic states that "*FinancialAdministration of the CzechRepublic isa system ofadministrative authoritiesfor the performanceof tax administration*." As the financial administration authorities of the Czech Republic[21] are General Financial Directorate, Appellate Financial Directorate and Tax Offices to be established.

Novelty compared to existing legal regulation is the designation of financial administration authorities as Financial Administration of the Czech Republic. This corresponds to today's current designation of territorial financial authorities, which are

[16] These include the administration of tax or transfer tax revenues which their collected and enforced and which are not revenues of state budget.
[17] These include oversight of lotteries and other similar games or administration charges for violation of budgetary discipline.
[18] See Sec. 10 par. 5 of the Act on Territorial Financial Authorities.
[19] Cds.mfcr.cz [online]. 2011 [cit. 2011-08-10]. Competence and activities of PFÚ. Available from WWW: <http://cds.mfcr.cz/cps/rde/xchg/cds/xsl/7465.html?year=0>.
[20] Along with this Act have been also approved a draft of the Act on the Customs Administration of the Czech Republic and Acts changing other acts in relation to their adoption.
[21] The Act introduces the abbreviation „financial administration authority".

designated as "tax administration" or "Czech tax administration"[22]. There is no reason why the new system of financial administration authorities should not be called Financial Administration of the Czech Republic. The reason, why not the term "tax", but term "financial" was used is that the new system of financial administration authorities will have as its scope not only the tax administration, but also other competences, especially administration of the social security contributions, contributions for public health insurance and other mandatory financial performances[23].

It should also be noted that, in case that the Act on Financial Administration of the Czech Republic is adopted by the Parliament, there will be a match between theoretical and legislative and factual designation of financial administration authorities. This fact can be welcomed because there is no reason in calling certain authorities in a different way than referred in legal theory, respectively theory of financial law.

As is evident, the Financial Administration of the Czech Republic is designed as three-leveled. Ministry of Finance is not explicitly designated as financial administration authority, nor does the Act on Financial Administration of the Czech Republic explicitly list its authorities in tax administration. This does not mean that the Ministry of Finance will no longer have any authorities in tax administration. Ministry of Finance will continue to be a central state administration body for taxes, according to the Competence Act[24]. Moreover, the Act on Financial Administration of the Czech Republic, the Tax Code and other tax laws regulate certain authorities of the Ministry of Finance in the area of tax administration. It can be stated that in the broadest sense there will be **four-level system** of Financial Administration of the Czech Republic (i.e. the General Financial Directorate, Appellate Financial Directorate and Tax Offices) and the Ministry of Finance.

However, it is necessary to note that the draft of the Act on Financial Administration of the Czech Republic, which has been sent by its submitter (Ministry of Finance) to the government, counted with three-level system of financial administration authorities (Ministry of Finance, General Financial Directorate General and Tax Offices). Appellate Financial Directorate was added based on discussions in the Legislative Council of the Government.

In terms of hierarchy the system of financial administration authorities is a classical model of **superiority and subordination**. Ministry of Finance is superior to General Financial Directorate which is superior to Appellate Financial Directorate which is superior to the Tax Offices. At first glance it may seem strange that a part of

[22] Cds.mfcr.cz [online]. 2011 [cit. 2011-08-11]. Czech Tax Administration. Available from WWW: <http://cds.mfcr.cz/cps/rde/xchg/cds/>.

[23] Social security contributions and contributions for public health insurance will be first administrating from the year 2013.

[24] Act No. 2/1969 Coll., on establishment of ministries and other central bodies of state administration in the Czech Republic, as amended.

the system of financial administration authorities are three administrative bodies that are on their level alone, i.e. perform authorities for entire territory of the Czech Republic. This fact, which is not usual in theoretical terms, shouldn't make any difficulties in practice, because the relationships of superiority and subordination are clearly determined by the law.

All bodies of Financial Administration of the Czech Republic are designated by the Act on Financial Administration of the Czech Republic as for the **administrative authorities and state organizational units**. This is not a substantive change from the territorial financial authorities and new legal regulation in this area continues smoothly in the existing legal regulation.

General Financial Directorate, which now exists under the Act on Territorial Financial Authorities, will become under the proposed transitional provisions from 1st January 2012 the General Financial Directorate under the Act on Financial Administration of the Czech Republic. This will ensure continuity of this financial administration authority, created in 2011. General Financial Directorate will continue to be an accounting unit and will exercise its authorities for the whole territory of the Czech Republic.

The head of the General Financial Directorate will be **Director General**. Under the original draft of the Act on Financial Administration of the Czech Republic, prepared by the Ministry of Finance, Director General should have been appointed and dismissed by the Minister of Finance. However, the government decided that Director General will be appointed and dismissed by the government upon Minister of Finance's suggestion. On one hand the legitimacy of the Director General is stronger; on the other hand, it may be difficult in the future to appoint the Director General, since his appointment depends on the will of the collective body (the government) instead of the individual (the Minister of Finance).

A completely new financial administration authority will be the **Appellate Financial Directorate**. This will be authority having jurisdiction for the whole territory of the Czech Republic and will be seated in Prague. Appellate financial directorate will be state organizational unit, but not the accounting unit.

As its name implies, it should be a financial administration authority, which will mainly act as an appellate body against decisions of tax offices in tax and administrative proceedings. As already mentioned, the draft of the Act on Financial Administration of the Czech Republic, which has been sent by its submitter (Ministry of Finance) to the government, didn't count with the creation of the Appellate financial directorate. In that draft the General Financial Directorate was the appellate authority. In order to prevent Ministry of Finance to be third degree in the financial administration system (i.e. mainly not to decide against the appeal against the decision issued by the General Financial Directorate in the first instance), contained a draft law on Financial Administration of the Czech Republic the decomposition principle. According to this

principle would not submit the appeal, but decomposition, which would decide the General Director of the opinion of the special appellate committee. This principle has been criticized by the Government Legislative Council especially because of creating completely unusual model of system of administrative authorities. Therefore the next level of financial authority administration system, namely Financial Directorate of Appeal, has been proceeded to establish. From theoretical point of view this act is to be welcomed.

The lowest level of the new financial authority administration system is 14 **Tax Offices**. These Tax offices will be subordinated to Appellate Financial Directorate. Each Tax Office will be established for particular higher territorial self-governing unit (region), while every Tax Office will exercise authorities in the territory of the higher territorial self-governing unit of which name is the part of the name of the Tax Office. Compared to current legislation the number of Tax Offices is significantly reduced (from 199 to 14) together with the fact that the Tax Offices will not be distinguished to two categories of authorities, as it is today.

The very innovation should be creating of the **Specialized Tax Office**, i.e. tax office competent to particular selected entities. The legal regulation of Specialized Tax Office is already included in the Act on Territorial Financial Authorities[25], but this legislation will come into effect on 1st January 2012. In addition, on the same day the new provision of sec. 9a of the Act on Territorial Financial Authorities which modifies the legal regulation of Specialized Tax Office will come in to effect. This legal regulation is contained in the Act, which modifies Act no. 235/2004 Coll., on Value Added Tax, as amended, and other related laws, which was passed by Chamber of Deputies of Parliament of the Czech Republic[26]. The third legal regulation of Specialized Tax Office, which should also come into effect on 1st January 2011, is contained in the draft of the Act on Financial Administration of the Czech Republic. How is it possible that three legal regulations concerning Specialized Tax Office will come into effect on the same day?

The legal regulation which is in currently valid version of the Act on Territorial Financial Authorities was adopted by Act no. 199/2010 Coll. This legal regulation, as legal regulation of General Financial Directorate, got into the draft of the Act on Territorial Financial Authorities on the basis of parliamentary amendment (see above). As a consequence of this fact this legal regulation has some defects that could in practice cause serious difficulties during activities of Specialized Tax Office[27]. These difficulties should be removed by reformulating legal regulation of Specialized Tax

[25] See sec. 9a of the Act on Territorial Financial Authorities.
[26] Psp.cz [online]. 2011 [cit. 2011-08-09]. Parliamentary Press 377/1. The decision of Budgetary committee to Parliamentary Press 377/0. Chamber of Deputies, 6. election period, from 2010. Available from WWW: <http://www.psp.cz/sqw/text/tiskt.sqw?o=6&ct=377&ct1=1>.
[27] These include problems in the administration of property taxes, problems of competence of group pursuant to the Value Added Tax and the absence of transitional provisions.

Office in the draft of the Act which amends the Act on Value Added Tax. This is therefore the amendment of legal regulation even before it comes into effect. But why is it necessary to amend current legal regulation when it should be replaced by the Act on Financial Administration of the Czech Republic with the efficiency from 1st January 2012? It is especially because of the legislative care, because it is possible that the efficiency of the new Act on Financial Administration of the Czech Republic could be postponed. Then, without above described amendment of legal regulation of Specialized Tax Office in the Act on Territorial Financial Authorities, the currently valid legislation, which as described suffers from defects, would come into effect. It is probable that on 1st January 2012 either legal regulation concerning Specialized Tax Office in amended sec. 9a of the Act on Territorial Financial Authorities or legal regulation of Specialized Tax Office in the Act on Financial Administration of the Czech Republic come into effect. Above described complicated legislative problem concerning legal regulation of Specialized Tax Office is the evidence of which problems the deferred efficiency of legislation could bring. In following text I will deal with the legal regulation of Specialized Tax Office which is included in the draft of Act on Financial Administration of the Czech Republic.

Primarily it is necessary to emphasize that Specialized Tax Office is the Tax Office, too. This implies that it is subjected to everything that applies for Tax Offices according to the Act on Financial Administration of the Czech Republic (e.g. director of Tax office or material authority of Tax Offices). Specialized Tax Office is also a state organizational unit, but not accounting unit, and will be subordinated to Appellate Financial Directorate. In terms of territorial jurisdiction it will be a financial administration authority with national territorial jurisdiction with the fact that the seat of Specialized Tax Office should be Prague. Special rules for Specialized Tax Office are then contained in Sec. 11 of the draft of Act on Financial Administration of the Czech Republic.

Specialized Tax Office should be competent for the selected entities like banks, insurance companies or business legal entities that achieved and annual turnover of more than 2 million CZK. The reason for this is to increase effectiveness of exercising the powers of financial administration authorities. Concentration of jurisdiction of selected entities of the same type or size at one tax office can namely enable personal and material savings. That should avoid the unjustified differences while exercising the competences against selected entities because these competences will be exercised by one authority of financial administration.

Furthermore, it is necessary to mention **regional offices (branches) of financial administration authorities**. The Act on Financial Administration of the Czech Republic sent by Ministry of Finance to the government presumed that regional offices of financial administration authorities would be established and abolished by the organizational regulations of Financial Administration of the Czech Republic with the

efficiency on 1st January. Every establishing and abolishing of regional office should been published in Financial reporter within 30th June of previous calendar year. Outlined legal regulation has changed in connection with discussing of the draft of Act on Financial Administration of the Czech Republic by the government. The Act on Financial Administration now explicitly solves the existence of regional offices of Tax Offices which are not located in the seat of Tax Office. Concerning regional offices of Tax Offices which are located in its seat and regional offices of other financial administration authorities, a general director of General Financial Directorate remains free to establish and abolish these regional offices by organizational regulations.

Nevertheless regional offices of Tax Offices which are not located in its seat should be newly set by public notice of Ministry of Finance. The internal legal regulation of general director will not be sufficient, but the generally binding legal regulation of Ministry of Finance is needed. This matter of fact is response to apprehension that in smaller municipalities and towns, where Tax Offices are located today, the financial administration authority might not exist there in future. The draft of public notice namely presumes that regional offices will be established in the place where Tax Office is today together with the fact that is not a seat of a new Tax Office.

Conclusion

The system of financial administration authorities currently consists of Ministry of Finance, General Financial Directorate, Financial Directorate and Tax Offices. This system of financial administration authorities in the Czech Republic undergoes these days of rapid development which can be designated as reform of this system.

The reform proceeds in two stages. The first stage of reform already took place with the efficiency on 1st January 2011, while its essence was establishing of new central administrative body with national territorial jurisdiction, General Financial Directorate. This step, especially from the property and personal aspect, led into centralization of existing decentralized system, because General Financial Directorate became an accounting unit in place of 8 Financial Directorates.

The second stage of reform should proceed with the efficiency on 1st January 2012 while its essence is replacing 8 Financial Directories and 199 Tax Offices by one Appellate Financial Directorate and 15 Tax Offices (14 Tax Offices and one Specialized Tax Office). It is obvious that the main feature of this stage is to reduce the number of financial administration authorities. But existing financial authorities should not been completely abolished, but the majority of them should be transformed into regional offices of new Tax Offices. It is also evident that the reform is directed towards larger centralization of decision making powers and towards reducing number of management employees. This matter of fact could influence larger consistency of decision-making of financial administration authorities.

The intent to establish Specialized Tax Office for particular selected entities could be evaluated as positive. Specialization and centralization of performing certain activities within financial administration authorities system into one office is logical consequence of difficulties and administrative complexity that some certain activities bear (for example banking or insurance companies' activities). Specialized Tax Office could in this direction meet the requirements for qualified execution of certain powers within financial administration authorities system.

In conclusion I can only express desire that reform of financial administration authorities in the Czech Republic will be successful and will lead to more effective performance of activities exercised by these authorities. The role of financial administration authorities within public administration is irreplaceable because these authorities provide collection of substantial part of public budgets incomes.

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The Scope of the Local Government's Autonomy Regarding Establishing Fee Rates in Poland - Selected Issues

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1. Local fees in Poland – introduction.

Polish local government units finance their activities mainly from revenue collected independently or through the state's tax authorities. As these units have the power to dispose of their own tax incomes, they are widely regarded as independent from the state.

Polish law distinguishes between fees and taxes, although this distinction is not very clear. Taxes are public, gratuitous, compulsory and non-refundable money duties paid to the State, province (województwo), district (powiat) or municipality (gmina), regulated under the Tax Law[1]. Fees are not defined in these regulations, but it is commonly assumed in literature that fees are public duties which have all the features of taxes, with the exception that they are not gratuitous. Fees are thus in some way equivalent in character in relation to a mutual performance from a public law entity[2].

Municipalities receive revenues from a considerable number of structurally diverse fees, such as the dog possession fee or the visitor's fee. The subject of this paper is to analyse only a few exemplary fees of slightly greater financial importance to municipalities, such as the re-zoning fee, which is charged under the Spatial Planning and Development Act[3], the betterment levy, charged under the Property Management Act[4], and local fees levied under the Local Taxes and Fees Act[5].

2. The constitutional basis of local government units' taxation policy

The Constitution of the Republic of Poland proclaims that all burdens or public duties must be specified by statute[6]. The Constitution explicitly includes taxes to this group, and there is no doubt that public fees are also considered to be public duties. The

[1] Art. 6 of the Ordynacja podatkowa Act of the 29th of August 2007 (OJ, 2005, Nr 8 poz. 60 ze zm.)
[2] J. Gliniecka in: System prawa finansowego T. III (red. L. Etela), Warsaw 2010, p. 883 and next.
[3] Ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym, Dz. U. Nr 80, poz. 717 z późn. zm.
[4] Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami, Dz.U. z 2010 r. Nr 102, poz. 651 ze zm.
[5] Ustawa z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych Dz.U. z 2010 r. Nr 95, poz. 613 ze zm.
[6] Art. 84 of the Polish Constitution.

principle of imposing taxes and, to some extent, fees, only by means of statute is confirmed in Article 217 of the Constitution, which states that the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute.

In relation to the abovementioned provision, Article 168 of the Constitution is *lex specialis*. It states, that "to the extent established by statute, local government units shall have the right to set the level of local taxes and charges." This provision provides a constitutional basis for the transfer of power to local government units to conduct their own fiscal policy and shape the burden of taxes and local fees. It is important to note that the units of local government are only entitled to modify tax/fee rates, not the other components of taxes and fees. This entitlement is also determined by the existence of a legal basis granting such a right, provided for in a statute. Furthermore, the provision outlined in Article 168 of the Constitution cannot be the sole basis for any actions undertaken by local government units which do not have their basis in a statute. A statute also determines the scope of the local government units' discretion in this field, which might be either absolute or subject to limitations.

3. Re-zoning fee rates

The re-zoning fee is a fee charged by the municipality's authority (the vogt, the mayor or the president) in a situation where as a result of an amendment or repeal of the local area development plan an owner or a perpetual lessee of land shall sell the property within 5 years from the adoption of the local area development plan. The fee is determined by way of an administrative decision issued by the vogt (mayor or president).

Alongside with the increase of property value it is essential to determine the percentage rate on which the abovementioned fee is set. This rate is an obligatory part of the local area development plan, which stems directly from Article 15 section 2 point 12 of the Spatial Planning and Development Act. The provisions specify, however, only the upper limit of the percentage rate, which cannot exceed 30%. Case law emphasizes that percentage rates should be determined in such a way that would allow fees to be established[7].

The basic problem is whether the municipality's council, being given the authority to modify the fee rates, is empowered to set a 0% rate in the enacted local area development plan.

The height of the percentage rate is an instrument shaping not only the municipality's spatial policy, but may also affect its economic situation (the fee is the

[7] Judgement of the WSA in Białystok of the 30th of March 2006, II SA/Bk 100/06 CBOSA

municipality's own income[8]). It is relatively easy to imagine a situation in which the municipality, wanting to activate certain areas, could introduce incentives in the form of a 0% rate in order to stimulate the disposal of property. Such actions of the municipality's authorities might be justified in the long term perspective. The municipality's revenue from the urbanized property tax could be much higher than the income generated from the re-zoning fee. This is particularly true in case of property designated in the local area development plan for commercial purposes (industrial or services). In addition, revenue from the property tax is paid on a relatively regular basis; it is not a one-time payment. Admissibility of a full discretion regarding the height of the re-zoning fee, including the possibility of resignation from its collection, would be a useful tool for municipalities conducting their economic policies.

There are several arguments in favour of the admissibility of the 0% rate. Statutory provisions do not introduce a lower limit of the rate, and only specify its upper limit. Admissibility of the 0% rate also stems from paragraph 4 point 13 of the Regulation of the Minister of Infrastructure on the required scope of the local area development plan draft[9]. Under this provision arrangements regarding percentage rates as a basis for determining the fee referred to in article 36 section 4 of the statute, shall include rates ranging from 0% to 30% and cover all the areas identified in the local area development plan draft in accordance with article 15 section 2 point 1 of the statute, but their height might vary for individual areas or groups of areas. Additionally, the existence of 0% rates is acceptable in the Polish legal system, for example there is a 0% VAT rate and there is no doubt that the rate is applied to a tax. A major argument for the admissibility of the 0% rate must also be the relatively easy possibility of circumventing the obligation of setting a rate higher than 0%, simply by setting the minimum rate at 0.01%. The application of such rates is certainly not prohibited. Such a regulation would lead to a situation in which the costs of establishing the re-zoning fee would be much higher than the fees received. This arises from the fact that the property valuation process is formalized and relatively expensive, as a proper valuation study is required to determine property value, and its cost might exceed the worth of the fee itself. Literature and case-law also includes opinions that such a rate should not be admissible[10]. The arguments of the proponents of this opinion deserve attention. According to Z. Niewiadomski the fact that the legislator determined the obligation to pay a fee in the event of meeting the conditions laid down by law is a factor acting in favour of the inadmissibility of introducing the 0% rate, and therefore the degree of freedom in the determination of its height by competent authorities not only suffers

[8] Wider: I. Czaja-Hliniak, Opłata planistyczna jako dochód własny gminy, Casus 2007, jesień, p. 15 – 19.
[9] Rozporządzenie Ministra Infrastruktury z dnia 26 sierpnia 2003 r. w sprawie wymaganego zakresu projektu miejscowego planu zagospodarowania przestrzennego Dz.U. Nr 164, poz. 1587.
[10] Planowanie i zagospodarowanie przestrzenne. Komentarz, pod redakcją Z. Niewiadomskiego, Warszawa 2008, s. 284, M. Wolanin, Opłata planistyczna w planowaniu przestrzennym, cz. III – warunki pobrania opłaty planistycznej, Nieruchomości C.H. Beck, Nr 6, czerwiec 2005, s. 6.

limitations due to the upper limit specified in the statute (30%), but also excludes the possibility of applying a zero per cent rate. Moreover, according to that author, the functional interpretation of this provision, especially the fact of using the percentage rate and not the quota rate, indicates that such a construction was certainly applied in order to proportionally affect all the entities receiving benefits from the changes introduced by the local area development plan, which would not be guaranteed if the quota rate were introduced. Case law includes even further-reaching views concerning the impossibility of applying a zero per cent rate. In its ruling of the 24th of October 2006, the Supreme Administrative Court negated the possibility of introducing such a rate, stating that "there have to be mandatory percentage rates determined in the local area development plan, based on which a re-zoning fee can be fixed, and they cannot be zero percentage rates". The Court also questioned the legality of the provision of paragraph 4 point 13 of the regulation, since its issuing exceeded the authority given in article 16 section 2 of the statute[11]. The decision was based on a view according to which if the legislator allowed the possibility of determining a zero per cent rate, a contradiction between the provisions of article 15 section 2 point 12 and article 36 section 4 of the Spatial Planning and Development Act would occur, since the obligations arising from the latter provision would be impossible to achieve by municipal authorities. The standpoint of the Supreme Administrative Court is worth further consideration. Administrative courts now recognize that they have the authority - as independent judiciary authorities, subject only to the Constitution and statutes – to refuse implementing any executive acts which are inconsistent with statutes[12]. But can the court introduce restrictions where the regulations do not clearly determine them? Practice shows that supervisory authorities also nullify local area development plans containing a 0% rate[13]. This solution can be deemed questionable. The standpoint presented in several judgements issued by the Administrative Court in Gliwice[14] can be considered as a certain breakthrough in the hitherto case-law. The court adopted a functional approach and stated that determining the percentage rates in the local area development plan serves only to establish and collect a non-recurring fee on the increase in property value, stemming from article 15 section 2 point 12 of the statute. The obligation to determine percentage rates in the plan, on which the fee referred to in article 36 section 4 of the statute is established, is not absolute in relation to all areas covered by the draft plan, but the local area development plan must mandatorily include

[11] II OSK 1247/05, Lex nr 289297; an identical position was taken by the NSA in Warsaw in its judgement of the 3rd of October 2006, II OSK 1041/06, LEX nr 289039.
[12] B. Draniewicz, Odmowa zastosowania przepisu rozporządzenia sprzecznego z Konstytucją lub ustawą, Przegląd Podatkowy 2009, Nr 11.
[13] Rozstrzygnięcie nadzorcze z dnia 29 listopada 2006 r. Wojewody Podlaskiego, NK.II.KK.0911-179/06, Lex nr 204136.
[14] Wyrok WSA w Gliwicach z dnia 22 listopada 2007 r., II SA/Gl 378/07, CBOSA, oraz wyrok WSA w Gliwicach z dnia 22 listopada 2007 r., II SA/Gl 377/07, CBOSA, a także w wyroku WSA w Gliwicach z dnia 29 stycznia 2007 r., II SA/Gl 881/06, CBOSA.

the percentage rates only if the actual situation justifies such a finding. The position of the court stems from the fact that the adoption of the local area development plan should be preceded by a planning procedure which would allow property owners/lessees to safely assume that property values will not increase as a result of adaptations or changes in the plan. The Court concluded that since the 0% rate applies to the land which, according to the plan, will not increase in value, meaning that such growth will not occur, there is no reason to state that the regulation should be subject to annulment as contrary to law.

The problem of the 0% rate re-zoning fee shows a correlation with the problem regarding the rates of property tax before statutory minimum tax rates were introduced. Administrative courts have invested much effort in proving the thesis that the rate of 0 PLN in relation to buildings or land violates the law[15]. The courts argued, inter alia, that the municipality has no right to eliminate the tax, and a 0% tax rate can be reduced just to that, or that the rate of 0 PLN is not actually a rate at all. Significantly, the practice of municipalities adopting symbolic rates, sometimes even smaller than 0.01 PLN, was never successfully contested. According to the authors of this paper there are no strong arguments in favour of rejecting the view of the admissibility of the application of 0% rates for both local fees and the re-zoning fee. The argument that the municipality cannot independently eliminate public revenues, which are its income, would have to be supported by indicating a specific regulation. However, such a regulation does not exist.

4. Betterment levy rates

The Polish betterment levy is provided in the Property Management Act and appears in three types. It is a fee on the increase in property value due to: 1) division[16], 2) merging and division[17], 3) construction of an infrastructure facility[18]. The presented fee is a special, non-recurring due, paid by landowners and perpetual lessees and is charged when the value of property increases.The betterment levy is determined by way of an administrative decision issued by the vogt (mayor or president). It is worth mentioning that this fee is not an administrative fee but a different type of public tribute. This view seems to be settled in the jurisprudence of administrative courts. This position was voiced, among others, in the judgement of the Supreme Administrative Court on the 7th of February 2006[19], as well as in the judgement of the Supreme Administrative Court of the 20th of December 2002[20]. The power of the competent municipal authority to establish rates necessary to determine the fee is crucial to the

[15] Np. wyrok NSA w Warszawie z dnia 27 listopada 1992 r. III SA 1210/92, Przegląd Orzecznictwa Podatkowego 1994, Nr 4.
[16] Art. 98 ustawy o gospodarce nieruchomościami
[17] Art. 107 ustawy o gospodarce nieruchomościami
[18] Art. 144-148b ustawy o gospodarce nieruchomościami
[19] I OSK 421/05, LEX nr 194066,
[20] I SA 342/01, Monitor Prawny z 2003 r. Nr 3, poz. 98.

discussed problem. The power to determine the percentage rate was granted to municipality councils, which determine it by way of a resolution which is an act of local law and a universally binding rule of law.

The rate of the betterment levy may not be higher than 30% in the case of property division and not higher than 50% in the case of a merger and split or construction of a technical infrastructure facility. The provisions do not determine the lower limit of the percentage rate. This means that the municipality's council might fix a rate of 0% for this fee. The law does not mention the possibility of introducing a variable rate of interest for each type of real estate. It should be noted, however, that such differentiation is permitted (both of the subjective and objective character) using uniform criteria. In this regard, the municipality's council has a certain degree of freedom in fixing the public duties and can use the betterment levy rate to influence the municipality's income.

5. Local fee rates regulated by the Law on Local Taxes and Fees

The Law on Local Taxes and Fees include four types of regulations on public fees:
- the market fee[21],
- visitor's fee[22],
- spa fee[23],
- dog possession fee[24].

Of the abovementioned fees, only the problem of determining the rates of the market fee will be the subject of this analysis, since it is the most significant of these fees. Moreover, this fee induced the most disputes in case law. In addition, there is no difference in determining the rates of these fees. In fact the legal provisions regulating this matter are all included in the same regulation – article 19 section 1 point 1 of the Law on Local Taxes and Fees. This provision states rather laconically that "the municipality's council, by resolution: 1) lays down the rules for determining the height of the fees specified in the statute, collecting them and establishing payment time limits, provided that: a) the market fee's rate cannot exceed 699.27 PLN per day[25]". This rate is valorised annually with the increase in the price and services index[26].

The analysed legal regulation does not contain any provision which expressly indicates the possibility to vary the market fee's rates. However, such a possibility is clearly allowed in case law[27] and is used in the practice of local government units. From

[21] Art. 15 i 16 ustawy o podatkach i opłatach lokalnych
[22] Art. 17 ust. 1 ustawy o podatkach i opłatach lokalnych.
[23] Art. 17 ust. 1a ustawy o podatkach i opłatach lokalnych
[24] Art. 18a ustawy o podatkach i opłatach lokalnych
[25] On the 1st of September 2011 the rate was approx. €170.
[26] Art. 20 ustawy o podatkach i opłatach lokalnych.
[27] Wyrok NSA z dnia 26 marca 1996 r., SA/Po 2524/95 w: Podatki i opłaty lokalne. Podatek rolny. Podatek leśny. Orzecznictwo sadów administracyjnych w sprawach podatkowych, Warszawa 2009, s. 371-373, wyrok NSA z dnia 19 grudnia 2008 r., II FSK 1233/07, CBOSA

a purely legal perspective, one can have doubts about the correctness of this view. In neighbouring provisions of the Law on Local Taxes and Fees, which regulate the issue of property tax and tax on means of transportation, provisions explicitly allowing the differentiation of rates of these taxes and indicating the criteria of differentiation were included[28]. One could therefore argue that *a contrario*, since in the case of fees such regulations do not exist, then the rate differentiation is unacceptable.

Administrative courts have taken a different stance of the subject; a pragmatic stance. One must take into account that the daily rate of the fee was set at such a high level that it could be unreasonably excessive in relation to the potential income from the trade conducted in some markets and with certain types of goods[29]. For example, even persons selling fortuitously gathered berries, mushrooms or small quantities of agricultural produce from their own crops are charged with the market fee. Adjusting the rates to the theoretically lowest potential earning capacity of trade would lead in turn to the minimization of the revenue from this fee. This does not, however, mean that the municipality was granted full discretion regarding establishing the rate of the market fee. The courts rather consistently indicate that municipalities must comply with constitutional principles; above all the principle of equality. Sole differentiation of the market fee's rates is not treated as a breach of the principle of equality. The courts indicate that "the principle of equality before the law cannot be applied mechanically. (...) The municipality's councils were not deprived of (…) the possibility to determine these rates based on economic and commercial conditions, varying from marketplace to marketplace, where sales are conducted in various ways and pertain to various goods"[30].

The dispute relates mostly to whether a trait that distinguishes a group of entities paying the fee is significant enough to be considered as a basis for differentiation of the market fee. For example, the court held that the mere fact that an entity is registered within a municipality's territory is not such a feature. It is a criterion which discriminates entities outside of the municipality, who would have to pay a higher market fee[31]. It was also held unacceptable to differentiate the fees based on whether or not we are dealing with a municipal marketplace or whether this marketplace is operated by another entity[32]. Interestingly, in the 1990s such practices were the subject of proceedings based on the anti-trust laws of that time. In its ruling of the 11th of May 1994[33] the Antitrust Court stated that "it is a monopolistic practice of a municipality if its council adopts a resolution which varies the height of a market fee, applying a lower fee in a market operated by the municipality and a higher one in other markets, eliminating the municipality's competitors from the market." The basis for

[28] Art. 5 ust. 2-4 oraz art. 10 ust. 2 ustawy o podatkach i opłatach lokalnych
[29] Wyrok NSA z dnia 28 listopada 1997 r. III SA 733/97, Glosa 1998, Nr 9, s. 31
[30] Wyrok NSA z dnia 28 listopada 1997 r. o. cit.
[31] Wyrok SA z dnia 18 maja 2000 r. I SA/Kr 392/00, Przegląd Orzecznictwa podatkowego 2002, Nr 2, poz. 59.
[32] Wyrok NSA z dnia 23 września 1993 r. SA/Gd 1056/93, Przegląd Orzecznictwa Podatkowego 1995, Nr 6, poz. 116.
[33] XVII Amr 64/93, Przegląd Orzecznictwa Podatkowego 2002, Nr 2, poz. 60.

differentiating the rates could only be justified by social and economic considerations[34]. The analysis of case law indicates a large margin of freedom that was granted to municipalities and that the administrative courts show "social and economic rationalism" in assessing whether the criterion for differentiating the rates is reasonable from the viewpoint of the principle of equality.

6. Summary

The given analysis of selected local fees in force in Poland leads to the conclusion that the legislation confers a certain degree of autonomy to the units of local government in determining the height of these fees. The rates alone are determined by a quota or percentage, but the regulations of statutory delegations determine only their upper limit. This approach allows municipalities to shape the height of these rates, which has a direct impact on generated revenues. The applied solution stimulates certain processes which can be utilized by municipalities, with the help of various instruments, to introduce incentives.

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[34] Wyrok WSA w Łodzi z dnia 21 stycznia 2004 r., I SA/Łd 128/03, NSAiWSA 2004, Nr 2, poz. 40.

Local Taxesin the Process of Creating Entrepreneurship

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The paper was developed under the project "The Influence of Tax Interpretation Institution on Corporate Finance", funded by the National Science Cenre, Poland.

Abstract: Municipal authorities, using the transferred authority for imposing and shaping technical elements of a tax as well as collecting taxes, tend to attain their public objectives, including goals of stimulating entrepreneurship. Entrepreneurs, in turn, analysing the local tax structure make decisions of locational, asset and financial nature, selecting these solutions which significantly contribute to the implementation of their economic targets. Given the conflicting interests of public authority - which seeks to create fiscally efficient instruments and entrepreneurs – interested in the best tax solution encumbering costs of their activities, an attempt was made to present and analyse the fiscal instruments fostering entrepreneurship, with special attention paid to the possibilities of local taxes utilisation.

Keywords: local taxes,entrepreneurship,municipalrevenues, cost of economic activity.

1. Introduction

Evolutionary changes in the economic and legal basis of operations of local governments' units in Poland offer great opportunities for local authorities to influence the processes occurring in the real sphere of the modern economy. Not only does the scope of responsibility of municipal authorities for the process of encouraging entrepreneurship increase systematically, but also the level of autonomy in the conduct of budgetary policy. Encouragement of entrepreneurship by local governments is not only their legal responsibility, but also stems from the dependence of budget revenues from tax receipts from natural and legal persons residing and conducting business activity in the community. In this way the public objective of municipal government is related to the interests of individual members of the local community and, above all, the entrepreneurs present in the territory.

In terms of entrepreneurs' discretion as to the location of enterprises and the scope of business activity the task of municipal authorities is to create conditions conducive to the location of economic activity in the territorial unit represented by them and systematically increase the opportunities for competitive operation of existing enterprises in their territory. In practice, municipal governments have the possibility to

use for this purpose, various instruments, of organizational, institutional as well as financial character. Among the principal are[1]:

- coercive instruments, which include planning instruments (plans and strategic projects for spatial and economic development) and the instruments of regulatory powers (set bans and orders, decisions and permits issued),
- asset management tools resulting in accessibility of land and municipal facilities as well as infrastructure maintenance and development,
- information instruments manifested in both the information and assistance to entrepreneurs, as well as sharing of databases created by the municipal authorities,
- budgetary policy instruments pursued, on both, the revenue as well as the expenditure side.

Given such a wide range of instruments, of both direct and indirect impact, an attempt has been made to present and analyse the fiscal instruments of fostering entrepreneurship, with special attention paid to those to whom the municipality has limited tax power and, hence, the possibility of using not only their fiscal functions, but also stimulating ones.

2. Powers of local authorities in shaping local taxes

Considering the categories of own revenues of municipalities it should be noted that the tax revenues play primary role in this respect. Taxes powering budgets of municipalities do not have a homogeneous nature; hence attempts are made to classify them. Taking into account the criterion of connection with a municipality budget a division into local government taxes and shares in state taxes can be made. Among the local taxes should be indicated taxes regulated by Local Taxes and Charges Act, namely, a property tax and motor vehicle tax[2], and taxes regulated by other laws, including such taxes as: agricultural, forest, civil-law transactions, inheritances and gift, and a fixed amount tax. Among municipal taxes, which simultaneously constitute the tax burden on entrepreneurs, the property tax and motor vehicle tax should be indicated firstly. These taxes represent a special group of municipal taxes, as these are taxes, all of which are revenue of the municipality in respect of which the municipal authorities have statutorily defined scope of the tax power, which means that the specific characteristics of local taxation should include[3]:

[1] B. Filipiak, J. Ruszała: Instytucje otoczenia biznesu. Rozwój, wsparcie, instrumenty. Difin, Warszawa 2009, p. 86-88.
[2] The Act dated 12 January 1991 on Taxes and local charges. The Journal of Law 2010, No.95, position 613 (unified text).
[3] L. Patrzałek: Finanse samorządu terytorialnego. Wydawnictwo Uniwersytetu Ekonomicznego, Wrocław 2010, p. 145-146.

- taxes are statutorily, by decision of state bodies, transferred to municipalities for an indefinite period of time,
- municipal bodies are statutorily provided with powers to shape certain elements of a tax structure,
- municipal bodies have the exclusive rights to use the total receipts from a given tax.

Features of local taxes cause that in practice municipalities have the right to determine tax rates, differentiate the rates, use tax deductions and tax exemptions, and apply cancellation and tax collection deferment. The scope and significance of the powers of self-government in the construction of local taxes is shown in Table 1.

Table 1:The scope of municipal government fiscal autonomy of local taxes

Characteristics of powers	Scope of powers	Decision maker	Influence over tax revenue level
Stating level of tax rates	Within the limits stated by state bodies	Decision-making body (District council)	Significant
Differentiation of tax rates level	Exclusively on the basis of objective criterion	Decision-making body (District council)	Significant
Use of tax deductions and exemptions	Objective criterion exemption	Decision-making body (District council)	Significant
Use of tax cancellation and deferment	Stated by Tax statue	Decision-making body (borough leader, mayor, president)	Insignificant

Source: own study based on: P. Felis: Obciążenia przedsiębiorstw podatkami lokalnymi – selected issues. In: Współczesne finanse. Stan i perspektywy rozwoju finansów przedsiębiorstw i ubezpieczeń. Ed. B. Kłosowska, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Toruń 2008, p. 435

Taking into account the information included in Table 1 it can be concluded that, in the scope of the analysed local taxation, the powers of municipal authority are considerable. The municipality is free to shape the tax rates making allowance for their ceiling rates specified by law, in case of the tax on motor vehicles of the minimum rates for types of vehicles specified by law. It is possible, therefore, to lower or pass taxes on the statutory level. In terms of tax rates their internal differentiation is an important privilege. The statutory limitation of this right, however, should be noted in the field of taking into account the differentiation in tax rates of the objective criterion. The Act states that rates may be varied due to: location, type of building complex, purpose and

method of use, and type of activity in case of property taxes, for instance rates of a tax on motor vehicles can be differentiated on the bases of such criteria as: age of the vehicle, number of seats or the impact of the means of transport on the environment[4].

The district council may also adopt a resolution to exempt from tax certain items of this liability over and above those provided for by the tax law.

Analysing powers of municipal authorities in the field of local taxes attention should be paid to the powers of an executive body that is a borough leader, mayor or president. This body under the Tax Code in relation to the analysed local taxes also acts as a tax authority and as such is entitled to refrain from establishing or collecting the tax because of the important interest of the taxpayer, can defer tax collection, may apply distribution of tax arrears into instalments, and even it is possible to cancel all or part of tax arrears[5].

3. Implementation of fiscal and stimulating functions of local taxation

With reference to the role of local taxes in shaping entrepreneurship, it is necessary to highlight stimulating and fiscal nature of the taxes in question. As it has been noted, there is a feedback loop between the financial capacity of local government and entrepreneurs bearing a tax burden in the interest of the municipal budget. Taxes, fulfilling the fiscal function, become a source of income remaining at the disposal of local authorities on the one hand, on the other contribute to the increased cost of business activity. Each municipality, taking into account the on-going relationship between the yield tax and the responses of entrepreneurs to the used tax solution, applying its granted tax powers, puts into practice one of the four variants of fiscal policy, namely[6]:

1. Liberal policy, which is characterized by a relatively low tax rates and numerous tax preferences. This policy leads to a drop in the share of local taxes in the own income of municipalities, which, in turn, causes a decrease in the total volume of revenues of municipalities and the possibility of making expenditure, including, on measures to promote development of entrepreneurship.
2. Fiscal policy, which is characterized by high tax rates and the lack of tax preferences. This policy leads to an increase in revenues of municipalities and their respective wealth. However, excessive fiscal stringency may cause phenomena of tax flight - first of all entrepreneurs, and this, in turn, may result in the reduction of municipal budget revenues.

[4] The quoted Act on Taxes and Local Charges. Article 5 (property tax), article 10 (tax on motor vehicles).
[5] The Act on 29 August 1997. Tax Statue. The Journal of Law No.8, item 60, articles 67a, 67b.
[6] P. Swaniewicz: Zróżnicowanie polityk finansowych władz lokalnych. Instytut Badań nad Gospodarką Rynkową, Warszawa 1996, p. 75-80.

3. Populist policy, which is characterized by a differentiation of tax rates and preferences. Low rates and tax preferences most often refer to most taxpayers (potential voters), while the business entities are subject to high tax rates and limited right to tax reliefs and exemptions. The concept of this policy is based on the assumptions of public choice theory. The optimal strategy for local authorities is to accede to the views represented by the voters.
4. Stimulating policy, which is characterized by low tax rates, especially for investors. Residents pursuing investments (e.g. construction), entrepreneurs conducting development activities can take advantage of numerous tax preferences. In short-term this policy is detrimental to the revenue of municipalities. But in the long term - as a result of stimulation of entrepreneurship, increased investment and accelerated development – municipality's revenue will grow.

From the point of conducted discussion, the most legitimate one seems to be the stimulating policy. Hence, in the interests of local authorities is to search for such solutions, which will enable to affect the behaviour of entrepreneurs and encourage them to invest and multiply the assets used in the conducted business activity. In Table 2 the scale ofthe implementation offiscal and stimulating functions by the municipalitiesinlocal taxescompared to othermunicipaltaxes are presented.

Analysing the implementation of the discussed functions of local taxes it should be noted that with an increasing value of income of municipalities, including tax, the participation of the latter has been reduced systematically and in the period considered it dropped from 35.4% in 2007 to 31.0% in 2010. A similar trend, but with lower dynamics, is characteristic for municipal rates, including local taxes. Against this background, the value of tax preferences - provided on the basis of the municipality power to tax – display systematic growth and their share in the income of municipalities is about 4% of which the major part (over 90%) falls on local taxes.

Table 2: The level ofimplementation of thefiscal and stimulating functions oflocal governmenttaxesin Polandin 2007-2010[in thousand PLN]

Specification	**2007**		**2008**		**2009**		**2010**	
	Amount	**%**	**Amount**	**%**	**Amount**	**%**	**Amount**	**%**
Municipalities revenues	**57,003,129**	**100**	**63,317,775**	**100**	**64,882,149**	**100**	**72,310,510**	**100%**
Tax revenues including:	20,154,990	35.4	22,358,435	35.3	22,382,589	34,5	22,414,626	31.0
Local taxes	*8,083,712*	*14.2*	*8,533,003*	*13.5*	*9,020,225*	*13,9*	*9,621,071*	*13.3*
Other municipal taxes	*2,149,181*	*3.8*	*2,465,178*	*3.9*	*2,803,292*	*4,3*	*2,095,887*	*2.9*
Share in taxes	*9,922,097*	*17.4*	*11,360,254*	*17.9*	*10,559,072*	*16,3*	*10,697,668*	*14.8*
Tax preferences including:	*2,359,937*	*4.2*	*2,470,851*	*3.9*	*2,928,242*	*4,5*	*2,938,158*	*4.1*
Local taxes	*2,188,163*	*3.9*	*1,911,240*	*3.0*	*2,445,146*	*3.8*	*2,854,639*	*3.9*
Other municipal taxes	*171,774*	*0.3*	*559,611*	*0.9*	*480,096*	*0.7*	*83,519*	*0.2*

Own study based on: Sprawozdanie z wykonania budżetu państwa za okres od 01.01 do 31.12.2007 r. Informacja o wykonaniu budżetów jednostek samorządu terytorialnego. Rada Ministrów. Warszawa 2008, Sprawozdanie z wykonania budżetu państwa za okres od 01.01 do 31.12.2008 r. Informacja o wykonaniu budżetów jednostek samorządu terytorialnego. Rada Ministrów. Warszawa 2009, Sprawozdanie z wykonania budżetu państwa za okres od 01.01 do 31.12.2009 r. Informacja o wykonaniu budżetów jednostek samorządu terytorialnego. Rada Ministrów. Warszawa 2010, Sprawozdanie z wykonania budżetu państwa za okres od 01.01 do 31.12.2010 r. Informacja o wykonaniu budżetów jednostek samorządu terytorialnego. Rada Ministrów. Warszawa 2011.

Taking into account the interests of business entities and their desire to achieve financial gain and maintain liquidity, in case of property tax, the following is important:

- First - the powers exercised by the municipality to determine the tax rates and introduction of non-statutory exemptions by resolution. In case of reductions and differentiation of rates by the municipality in respect of property used for business activity purposes decision about the location of business entity (especially small) can be an important determinant of their profits gained.
- Second, the powers of the executive bodies to defer, cancel, and breakdown tax liabilities into instalments, the use of which has a significant impact on the financial liquidity of entities. Especially when they found themselves in a situation of temporary financial difficulties or in a situation threatening the important vested interests of their owners.

  The level of tax applied to property tax is shown in Table 3.

Table 3: Level of implementation of tax preferences in the property tax in Poland in 2007-2010 [in thousand PLN]

Specification	2007		2008		2009		2010	
	Amount	**%**	**Amount**	**%**	**Amount**	**%**	**Amount**	**%**
Local taxes	**8,083,712**	**100**	**8,533,003**	**100**	**9,020,225**	**100**	**9,621,071**	**100**
Property tax	7,595,557	94.0	8,017,974	94.0	8,488,264	94.1	9,060,464	94.2
Tax preferences including:	1,938,718	24.0	1,911,240	22.4	2,122,284	23.5	2,510,980	26.1
Lowering the ceiling tax rates	1,327,886	16.4	1,302,393	15.3	1,421,617	15.8	1,629,714	16.9
Tax reliefs and exemptions (without statutory)	383,080	4.7	431,820	5.1	479,269	5.3	505,136	5.3
Cancellation breakdown into instalments, deferment	227,752	2.9	177,027	2.0	221,398	2.4	376.130	3.9

Source: ibid.

The level of tax preferences utilisation in the property tax varied in the analysed period (ranging from 22.4% realized income from local taxes in 2008 to 26.1% in 2010) and generally showed an upward trend in recent years. Local authorities made greater use of powers to lower property tax rates (the amount of preferences resulting with lowering upper rates accounted for over 15.0% of the gains realized from local taxes). To a lesser extent the powers to apply tax reliefs and exemptions were used, they accounted for slightly more than 5.0% of the realized revenues from local taxes. Wielding the powers of the executive body was the least important element used in the preference applied (the amount of cancellation, breakdown into instalments and deferment ranged 2.0% of revenues from local taxes in 2008 to almost 4.0% in 2010).

Tax on motor vehicles is a particularly significant tax burden for forwarding companies. In this tax frame the tax authorities of municipalities are entitled to similar rights as in the case of property with a similar impact on the financial and liquidity benefits of business entities. The degree of utilization of entitlements with regard to the tax on motor vehicles is shown in Table 4.

In this tax frame the level of utilised tax preferences varied little, but it was important from the standpoint of total revenue realized from that tax in relation to total revenues from local taxes. The granted preferences accounted for about 50% of the realized income from this tax. The reduction of tax burden over the researched period resulted mainly from the reduction of ceiling tax rates. Reliefs and exemptions as well as cancellation and tax deferment were marginal.

Table 4: Level of implementation of tax preferences in the tax on motor vehicles in Poland in 2007-2010[in thousand PLN]

Specification	2007		2008		2009		2010	
	Amount	%	Amount	%	Amount	%	Amount	%
Local taxes	**8,083,712**	**100**	**8,533,003**	**100**	**9,020,225**	**100**	**9,621,071**	**100**
Tax on motor vehicles	488,155	6.0	515,029	6.0	531,961	5.9	560,607	5.8
Tax preferences including:	249,445	3.1	277,511	3.2	322,862	3.6	343,659	3.6
Lowering ceiling tax rates	232,664	2.9	261,396	3.1	303,408	3.4	327,384	3.4
Tax reliefs and exemptions (without statutory)	3,476	0.04	3,585	0.05	4,056	0.03	2,983	0.05
Cancellation, breakdown into instalments, deferment	13,305	0.16	12,530	0.15	15,398	0.17	13,292	0.15

Source: ibid.

Taking into account fiscal and stimulating expectations towards the local taxes as a tool in the hands of municipal authority and amounts shown in Tables 2-4 the general scope of carrying out the functions of local taxes compared to other municipal rates can be displayed, as shown in Table 5.

Table 5: The attainment scope of fiscal and stimulating functions compared to other municipal rates

Tax	Functions	
	Fiscal	Stimulating
Local taxes		
On property	****	***
On motor vehicles	***	***
Other municipal rates		
On inheritance and gift	****	***
On civil law actions	****	**
Agricultural	***	**
Forest	**	**
Fixed amount tax	***	**

** Invisible function, **poorly realized function, ***average intensity function, ****intensive function*

Source: own study based on: the report on the state budget implementation 2007-2010

The presented considerations show that local authorities utilise their powers to shape the level of particular local taxes, and the preferences used significantly reduce the fiscal performance of analysed tax revenues while alleviating the tax burden of tax levies, which in turn can provide incentives for locating business in a particular municipality both by business start-ups as well as by entrepreneurs who want to extend the territorial coverage of their undertakings.

4. Effects of stimulating measures takenin the opinion of entrepreneurs

Recognizing the fact that the level of entrepreneurship is determined by the number of enterprises then it should be demonstrated that this number is steadily growing. The number of business entities operating in the Polish municipalities in the researched period is shown in Table 6.

Table 6: The number of enterprises operating in Poland in 2006-2009

Specification	**2006**	**2007**		**2008**		**2009**	
	Number	**Number**	**Dynamics 2006=100%**	**Number**	**Dynamics 2007=100%**	**Number**	**Dynamics 2008=100%**
Registered enterprises	3, 740,741	3,794,422	101.4	3,868,061	101.2	3,880,237	100.3
Enterprises in operation	1,714,915	1,777, 076	103.6	1,862,462	104.8	1,844,520	99.0
Start-ups	316,681	314,091	99.1	340,074	108.2	402,407	118.3
Liquidated enterprises	387,642	257,060	66.3	264,111	102.7	383,440	145.1
Ratio of first year survival (%)	66.5	70.7	x	76.4	x	77.1	x

Source: own study based on: Raport o stanie sektora małych i średnich przedsiębiorstw w Polsce w latach 2008 -2009. PARP, Warszawa 2010

However, it should be noted that the number of operating enterprises after the systematic growth to 2008 has decreased in the analysed period, while there was significant growth of both new entities and businesses closed down. The observed changes have been triggered by micro- and small-enterprises, namely the most sensitive to any changes in the economic environment, affecting their profitability and liquidity.

Changes in the number of business entities, including those actively engaged in economic activity, led to changes in terms of revenue and the cost of

conducted business. The financial results of economic activities accounting for the level of taxes and charges incurred are shown in Table 7.

Table 7: The financial results of enterprises including taxes and fees charged to the operating costs of enterprises in [in million PLN]

Specification	**2006**	**2007**	**2008**	**2009**
Income	2,558,711	2,887,730	3,213,835	3,218,655
Cost	2,381,151	2,660,974	3,002,038	3,014,025
Financial results (Gross)	201,945	253,919	264,808	267,834
Profitability	7.9	8.8	8.2	8.3
Taxes and charges*	53,576	57,743	63,042	57,266
Share in the costs of business operations	2.25	2.17	2.10	1.9

** GUS (Central Statistical Office), present statistical data as fiscal cost according to the generic account taxes and fees without separating municipal rates, hence the amounts shown here represent both the municipal budget revenues as well as the state budget, but they give an idea of the degree of tax burden on entrepreneurs.*
Source own study based on: Wyniki finansowe podmiotów gospodarczych I – XII 2008 r. GUS, Warszawa 2009, Wyniki finansowe podmiotów gospodarczych I – XII 2009 r. GUS, Warszawa 2010, Wyniki finansowe podmiotów gospodarczych I – XII 2010 r. GUS, Warszawa 2011 oraz Przedsiębiorczość w Polsce. Ministerstwo Gospodarki, Warszawa 2010.

Work towards the development of entrepreneurship undertaken by local authorities is seen differently by entrepreneurs. The studies conducted by the Research Institute of Market Economy show that only just over 50% of entrepreneurs notice interest of local authorities in the development of entrepreneurship, with almost 25% of entrepreneurs of this group considering it as inadequate. The utilization of tax preferences is seen as important by entrepreneurs, and such a statement was characteristic for entrepreneurs belonging to a group of small and medium enterprises[7]. The entrepreneurs' expectations towards the utilization of entrepreneurship instruments by the local authorities are presented in Table 8.

[7] Wspieranie przedsiębiorczości przez samorząd terytorialny. Raport z badań przeprowadzonych przez Instytut Badań nad Gospodarką Rynkową, Polska Fundacja Promocji i Rozwoju MSP, Warszawa 2006

Table 8: The entrepreneurs' expectations towards the utilization of entrepreneurship instruments

Instrument	**% of responses**
Allocation of attractive investment plots	64.0
Development of road infrastructure	82.0
Development of telecommunication services	32.0
Increasing qualifications	34.0
Official procedures amenities	49.0
Institutional backup	17.0
Low charges policy for municipal property lease	19.0
Municipal property sale at attractive rates	18.0
Use of tax preferences	45.0

Source: own study based on: Wspieranie przedsiębiorczości przez samorząd terytorialny. Raport z badań przeprowadzonych przez Instytut Badań nad Gospodarką Rynkową, Polska Fundacja Promocji i Rozwoju MSP, Warszawa 2006.

As it is clear from the presented list of tax instruments utilised in practice, in the opinion of entrepreneurs, they are an important (45% of responses) element of fostering entrepreneurship second only to entrepreneurial wealth management instruments (the allocation of attractive investment plots - 64% of responses and the development of road infrastructure - 82% of responses).

5. Summary

On the basis of the issues identified it can be concluded that the taxes on property and on motor vehicles are significant for the development of entrepreneurship. On the one hand the municipalities implementing the task of supporting local entrepreneurship utilize the stimulating function of local taxes, on the other entrepreneurs request for the utilization of tax preferences facilitating business activity. The conducted considerations entitle to a few conclusions.

Firstly, utilization of stimulating function of local taxes should be considered as an important factor shaping the conditions for business environment.

Secondly, decisions made by the municipal authority are of long-term significance - depleting tax revenues by undertaking stimulating activities can result in an increase in tax revenues in subsequent fiscal years as a result of obtained development of entrepreneurship.

Thirdly, local taxes affect the situation of companies influencing costs and results of business operations and the ability to meet the payment of liabilities timely.

Fourthly, entrepreneurs expect to get support from public authorities, which manifests itself, among other things, in the utilisation of tax preferences.

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Autonomy of Communes in Fees in Poland

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Abstract: In this paper the concepts of autonomy, decentralization, independence and the financial power of the communes are presented. The differences between the autonomy and the decentralization are discussed. The legal foundations of financial independence, which are included in the European Charter of Local Self-government and in the Polish Constitution, are described. The range of the tax power of the communes is presented on examples of basic local government fees.

Keywords: autonomy, decentralization, tax power, fees, special assessments.

1. Decentralization and financial independence

1.1 Autonomy and decentralization

The autonomy should be understood as a legal power to self-determination, to decide about oneself on its own[1]. The concepts of the autonomy and the decentralization are associated with the concept of public bodies and the financial power. The main public body and the main financial body is the state. The state is an original and spontaneous body because it is not a subject of any internal or external authority. It has the legal power, which includes the financial power, in which the tax power is included. The other public bodies have been created by delegating the part of the state's legal power including the financial power. It means that the state's legal power has been self-limited, because the state does not interfere in to the legal aspects reserved for other public bodies.

Delegation of the financial power can take place on two levels: law making and law enforcement, which correspond to the concepts of the financial autonomy and decentralization. The financial autonomy is the constitutional delegation of the legal power of regulating the public revenues from the state to the internal public body, while the financial decentralization is the constitutional delegation of the legal power to: collect the public levies (such as: taxes, fees, special assessments and others), enforce

[1] Word autonomia, elaboration M. Kruk (in:) Wielka Encyklopedia Prawa, Warszawa 2000, p. 61.

the financial policy[2] and decide freely about the public expenditure (administrating the public finances)[3].

The range of the financial power, which is delegated to other bodies, is the criterion of specifying non-state public bodies. The most important non-state bodies are LGUs. The legal power can be also delegated to such bodies as international organizations. Currently the most important delegation is the delegation of the tax power[4] to the communes.

The decentralization is not understood identically by Polish lawyers, however in a similar way. "Financial decentralization denotes the delegation of the financial resources and the legal power to dispose them to local government and it can be understood as the territorial decentralization"[5]. Similarly decentralization can be seen as a delegation of tasks and competitions to realize these tasks from the government administration range to the appropriate level of local government range[6].

Decentralization of administration is reflected in the principle of LGUs independency, which is regulated by statutes. One of the aspects of independency of LGUs is the financial independency, which should be understood as a separate principle of assurance of commune revenues, including the legally limited tax power and the independency in budget planning. However, the financial independency denotes neither the financial autonomy nor the self-financing power[7]. The boundaries of financial independency are regulated by the Polish Constitution and statutes. For example, the principle of the limited tax power given to LGUs means that in the unitary state the parliament is obliged to regulate the taxes and the other public levies and define the components of these legal institutions, but on the other hand it means, that the legal power of determining the rates of local taxes and fees in the range determined by sttutes has been given to the LGUs[8].

1.2 Financial independency regulated by European Charter of Local Self-government

Most of the regulations on LGUs' issues included in the Polish Constitution results from the European Charter of Local Self-government ratified by Poland in

[2] T. Dębowska-Romanowska, Komentarz do prawa budżetowego państwa i samorządu terytorialnego wraz z częścią ogólną prawa finansowego, Warszawa 1995, pp. 17-18.
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[6] A. Borodo, Finanse publiczne, Wydawnictwo Prawnicze Lex, Sopot 1999, p. 21.
[7] E. Chojna-Duch, Podstawy finansów publicznych i prawa finansowego, 1st edition, LexisNexis, Warszawa 2010, p. 336.
[8] Op. cit., p. 405.

1993[9]. The Charter contains the basic local government law standards, but some of them has not been accepted by Poland. Non-accepted standards, which are dealing with principles of local government financing are contained in the article 9 (paragraph 1, 2 and 3)[10]. These priority standards are: the requirement, that the local communities have sufficient own financial resources, which can be freely disposed in the exercise of their tasks; the requirement of adjusting the amount of these resources to their tasks determined by the Polish Constitution or law, and the requirement of covering at least the part of these resources from local taxes and fees, which rates can be determined by these communities in the range regulated by statutes. Among the other 12 standards concerning LGUs financing it is worth noting a requirement of using appropriate legal solutions for balancing and protecting the economically weaker local communities and no connecting subsidies with financing of specific projects[11].

As one of the basic standards the European Charter of Local Self-government lists the principle of subsidiarity. According to this principle the implementation of public tasks should take place at the lowest possible level of organization. The principle of adequacy of resources is regarded as a priority standard. This principle postulates that LGUs' financial resources should be efficient and flexible (which allows for the reimbursement of expenditure). Thus, the financial independence means an assurance of LGUs revenues, which poses a real opportunity to realize public tasks assigned to them[12]. According to the Charter tax revenues are granted to LGUs as a consequence of assigning them public tasks and powers within the framework of decentralization to dispose of public resources.

One of the most important standards is the principle of delegating the tax power to LGUs. The essential fact is that in Poland tax resources have been delegated only to the communes. It means than only that kind of LGUs has got the limited tax power. The European Charter of Local Self-government has defined the minimal range of the limited tax power of LGUs as a legal power to determine a rate of local fees and taxes. In many countries, including Poland, the range of the tax power is wider than minimal, because for example it includes a legal power to create tax exemptions and subjective or objective reliefs such as: spreading out the tax in installments, deferring the payment of tax or waiving of tax arrears. Sometimes LGUs are able to adjust the conditions of tax collection, which can be done for example by the collectors. It is worth noting that,

[9] Dz.U. No. 124, item 607 of 1994 with changes; The Charter has been adopted in Strasburg on 25th of August 1985.
[10] A. Kostecki, Harmonizacja regulacji prawnych w zakresie finansowania samorządu lokalnego i regionalnego z wymogami Rady Europy (in:) Aktualne problemy finansów lokalnych i regionalnych w Polsce i innych krajach UE (ed. E. Chojna-Duch), Warszawa 2006, p. 29.
[11] Op. cit., pp. 30-31.
[12] E. Kornberger-Sokołowska, Budżety jednostek samorządu terytorialnego w aspekcie decentralizacji i regionalizacji finansów publicznych (in:) System prawa finansowego, vol. II, Prawo finansowe sektora finansów publicznych (ed. E. Ruśkowski), Oficyna a Wolters Kluwer business, Warszawa 2010, p. 245.

these legal powers cause the deviation from the tax equity principle, as taxpayers with different residences may occur to be in different legal states of affairs.

1.3 Constitutional independence of LGUs

Polish Constitution includes *inter alia* the principles such as: the rule of law, the principle of subsidiarity, corporate nature of LGUs, transparency of LGUs functioning, unitarian nature of the state, equality and adequacy in tasks financing[13]. The most important of these principles are last two mentioned. The principle of the unitarian nature of the state causes that, the local government is a form of public administration decentralization and it is not a form of autonomical law-making activity. The principle of adequacy in tasks financing causes adequate financing of tasks regardless the body performing the task (the state or the local one). The principle of subsidiartity – according to article 164 of the Polish Constitution[14] – proclaims, that a commune is a basic form of LGUs which performs all local government tasks not reserved for the other forms of LGUs.

The consequence of systemic and competence decentralization is the separation of LGUs budgets from the state budget[15]. The delegation of public tasks to LGUs is a reason of creating their own budgets (based on separated sources of revenues) and the guarantee of their limited financial power. The article 15 of the Polish Constitution proclaims an assurance of authority decentralization. However it does not proclaim an absolute autonomy of LGUs, which can only take advantage of the specified range of independency, including the independency of their economy. These powers are given to them as a result of decentralization.

The financial independence reveals in many aspects and is caused by many different factors. The most important of them are: the revenue sources permanently assigned to LGUs and the amount of resources coming from these sources, which are one of the guarantees of LGUs' independency[16]. Regardless of the degree of independency, the LGUs' finances are the part of public finance, which prevailing part (so far) are state finance. The commune independency comes from equipping them of: a legal personality, ownership and other property rights. The commune can be a subject of public and private law and its rights can be protected by the courts[17]. The LGUs' financial independence is achieved mainly through their budget independence in every

[13] W. Kisiel, Ustrój Samorządu Terytorialnego w Polsce, LexisNexis, Warszawa 2003, pp. 25-26.
[14] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (The Constitution of Republic of Poland of 2nd April 1997) – (Dz.U. No. 78, item 483 of 1997 with changes).
[15] E. Kornberger-Sokołowska, Budżety..., op. cit., p. 231 and next.
[16] I. Czaja-Hliniak, Prawno-finansowe gwarancje samodzielności jednostek samorządu terytorialnego (in:) Finansowanie jednostek samorządu terytorialnego (ed. T. Wawak), Wyższa Szkoła Administracji Bielsko-Biała, Fascile 6, 2001, p. 65 and next.
[17] Article 165 paragraph 2 of Constitution and article 2 ustawy z dnia 8 marca 1990 r. o samorządzie gminnym (The commune's local government Act of 8th March 1990) – (Dz.U. No. 142, item 1591 of 2001 with changes).

stage of the budged process, with the possibility of budged changes during its exercising. That independency has a different nature in the aspect of assembling the revenues and they laying out.

A very important guarantee of the LGUs independence is an assurance of they revenues at the level adequate to the given tasks. This level has been guaranteed directly in the Polish Constitution. The article 163 of the Constitution introduces the diversification of LGUs tasks. According to this regulation the tasks are divided into: LGUs' own tasks (aimed at satisfying the needs of the local community) and other tasks (so-called assigned tasks). The article 167 of the Constitution contains the principle of adequacy, which ensures the participation in public revenues for LGUs on the level adequate to their tasks. Therefore the principle of adequacy can be seen as the primacy of the expenditures (determined by tasks) over the revenues. LGUs' revenues can be divided into: their own revenues, general subsidies, and special-purpose grants. LGUs' own tasks are mostly implemented through their own revenues. It is worth noting that the level of LGUs' own revenues is relatively low despite the growing trend in the years 2000-2008. For example, in the year 2008 LGUs' own revenues were on the level of 15,4% of all public revenues[18]. However, the increasing of the level of LGUs' own revenues would be required if the further decentralization took place. In this case increased revenues should be reserved not for salaries but for the tasks implementation only[19].

The article 168 of the Constitution gives to the LGUs the legal power of determining the rates of local taxes and fees in the range determined by statutes. Therefore it includes the principle of limited LGUs' tax power. However, the article 217 of the Constitution includes the principle of exclusiveness of statutes in the cases of public levies. This article reserves the power of imposing taxes and other levies and determining their components to the parliament.

The constitutional range of financial power should be understood in the wider sense, not only as the tax power but as the public levies power (in the range of all public levies) covering also fees, special assessments and other charges. Therefore the concepts of the fees power[20] and the special assessment power are reasonable.

[18] C. Kosikowski, Naprawa finansów publicznych w Polsce, Wydawnictwo Temida 2, Białystok 2011, p. 288. The author emphasize that all budged revenues has been 65% of all public revenues.
[19] Op. cit., p. 290.
[20] J. Gliniecka, Opłaty publiczne w Polsce, Oficyna Branta, Bydgoszcz-Gdańsk 2007, p. 43 and next.

2. Local fees and special assessments

2.1 The concepts of fees and special assessments

The concept of fees has been specified vaguely[21]. It can be assumed, that a fee is a levy in money to the state for official acts or using public service facilities[22]. This concept can be used analogically for LGUs services. Therefore the local fees are obligatory, unilateral levies in money determined by the state or a local authority and are of a general nature. They are non-refundable and chargeable, collected for specific acts of LGUs or using LGUs' services. Mostly the fees are equivalent in relation to the executed activity or service.[23] Instead, the special assessments are obligatory, unilateral levies in money determined by the state or local authority and collected from private bodies, which achieve particular benefits involving increasing of the market value of their properties or their income (or both), caused by creating or maintaining state or local public services or by statute of the local body[24]. In statutes the special assessments are mostly named fees[25].

2.2. Commune fee power

The public fees as well as public special assessments within the range regulated by statutes, are the communes own revenues. The concept of own revenues is understood variously by the Polish lawyers[26]. For example, own revenues can be described as revenues from sources given to exploitation by the communes (such as taxes and fees)[27]. Defining the concept of the own revenue a time criterion should be taken into account (are the revenues granted to LGUs indefinitely or terminally – currently for a budged year). Important is also whether the level of revenues from a given source is determined by statute or by the local authority.

The range of the fee power and special assessment power depends on a legal title and the nature of the service. The public fees and special assessments can be obligatory or optional (which is not very often). Their rates can be regulated by statute or by the act of the local authority. In a similar way, the conditions of their collection can be regulated by statute or by the acts of local assemblies, which are the law making

[21] Op. cit., p. 11 and next.
[22] K. Ostrowski, Prawo finansowe, Zarys ogólny, PWN, Warszawa 1970, p. 173. Vide definition of tax, p. 140.
[23] About the equiwalence of the fees or the relation between the amount of the fee and the value of consideration vide A. Gomułowicz (in:) A. Gomułowicz, J. Małecki, Podatki i prawo podatkowe, 4th edition, LexisNexis, Warszawa 2008, p. 138.
[24] I. Czaja-Hliniak, Dopłaty publiczne (in:) System prawa finansowego, vol. III, Prawo daninowe (ed. L. Etel), Oficyna a Wolters Kluwer business, Warszawa 2010, pp. 907-908.
[25] I. Czaja-Hliniak, Prawnofinansowa instytucja dopłat jako forma pozapodatkowych danin publicznych, SPES, Kraków 2006, pp. 39-41.
[26] C. Kosikowski, Prawo finansowe w Unii Europejskiej i w Polsce, 1st edition, LexisNexis, Warszawa 2005, p. 355.
[27] Z. Ofiarski, Prawo finansowe, 2nd edition, C.H. Beck, Warszawa 2010, p. 254.

bodies of local authorities. For example, the local assembly can order that the collection of fees and special assessments is done by the collectors. Sometimes the commune's assemblies can specify the tax reliefs and exemptions. Similarly executive bodies of local authorities can be authorised to issue the decisions in individual cases, which specify reliefs, remissions, or spreading out the fees and special assessments in instalments. The range of the discussed power is specially determined by the range of applying or not applying to a given fee the statute - Tax Ordinance Act 1997 – in the range related to taxes liabilities[28]. The wider range of applying the Tax Ordinance Act the wider range of the commune fee power.

2.3. Fees and special assessments as own revenues of the communes

Currently the legal issues of own revenues of the communes are regulated by The Revenues of Local Government Units Act 2003[29]. The communes obligatory sources of revenues are: local taxes, and local fees, such as: a revenue stamp, market toll, locality charge, spring charge, charge on dogs (which is optional), exploitation charge[30] and others paid by virtue of other statutes according to the article 4 paragraph 1 point 2 of Revenues of Local Government Units Act. From the theoretical point of view, a market toll, locality and spring charge are taxes. Among other fees regulated by the different statutes there are special assessments named as fees. The fees in the strict sense, specially these which are not thoroughly discussed in the Polish legal doctrine, and the special assessments are worth further analysis. It is worth noting that all of them are public fees.

3. Fees with a nature of taxes

3.1. Local fees

The fees such as: a tax toll, locality charge, spring charge and charge on dogs are taxes and are regulated by the Local Taxes and Fees Act 1991[31].The range of commune legal power is based on the competence of the commune assembly – which is a kind of a local assembly – to issue a local act which determines the rates, collection conditions and terms of payment in the range regulated by statutes. Furthermore, the commune assembly can order a collection of these fees by the collectors. For all of these fees parliament regulations provide exemptions, but the commune assembly can introduce other objective exemptions.

[28] Ustawa z dnia 29 sierpnia 1997 r. Ordynacja podatkowa (Tax Ordinance Act of 29th August 1997) – (consolidated Dz.U. No. 8, item 69 of 2005 with changes); Dział III (Part III).
[29] Consolidated Dz.U. No. 80, item 526 of 2010 with changes.
[30] In the range regulated by Ustawa z dnia 4 lutego 1994 r. – Prawo geologiczne i górnicze (The Geological and Mining Law Act of 4th February 1994) – (consolidated Dz.U. No. 228, item 1947 of 2005 with changes).
[31] Ustawa z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych (The Local Taxes and Fees Act of 12th January 1991 (consolidated Dz.U. No. 95, item 613 of 2010 with changes); articles: 15-19.

The market toll is due from the individuals, the corporations and bodies without the legal personality trading on the markets. The markets should be understood as places where trade takes place. The market toll is independent from a payment due to using the market facilities.

The locality charge is due from the individuals who stay longer than one day for health, tourism, repose or training in places with favourable climatic conditions and landscapes, and in places located in the areas considered as areas of spring preservation. This charge is taken for every day of the stay in such places.

The spring charge is due from the individuals who stay longer than one day for tourism, repose or training in places considered as springs. This charge is taken for every day of the stay in such places.

The charge on dogsis optional and can be introduced by a commune assembly. It is due from dog owners.

3.2. The exploitation charge

The exploitation charge with an additional surcharge fee is regulated by The Geological and Mining Law Act 1994[32]. From the theoretical point of view, the exploitation charge is a tax. It is due from entrepreneurs for extracting minerals from their deposits. The conditions of this fee assessment are regulated by The Geological and Mining Law Act as a product of the exploitation charge rate for a given type of mineral and the amount of minerals extracted in the settlement period. Furthermore, the exploitation charge is due for extracting the accompanied minerals and it is determined as a product of 50% of amount of the exploitation charge rate and the amount of accompanied minerals extracted in the settlement period. The fee rates are specified by The Cabinet according to the rule that their level cannot be lower or higher, respectively, than the top and bottom limits of rates specified in statute. The exploitation charge rates vary according to the objective criterion. The top and bottom rate limits are valorised each year according to theannual averageprice index ofconsumer goods and servicesplanned in The Budget Act for the current year. The exploitation charge is self-assessed every quarter of the year by the entrepreneur and should be paid by the transfer on authorised bodies bank accounts. The entrepreneur is obliged to submit the required information including the amount of the assessed fee, the name of the authorised commune and the amount of the fee attributable to each commune if the minerals are extracted on the territory of more than one commune, to the concessional body and to the other authorised bodies. In case of failure of paying the exploitation charge or in case of failure of submitting the required information or submitting invalid information the concessional body is obliged to issue the fee assessment decision based on its own assignments. The commune can participate as a party in this proceedings.

[32] Articles 84-87 The Geological and Mining Law Act 1994.

Similar proceedings are applied to the charge for searching mineral deposits. The fee is assessed as a product of the fee rate and the amount of square kilometres of the area on which searching takes place. The fee level, the term and the conditions of its assessment are set each quarter in the concession as a product of the fee rate and the amount of substances introduced to the orogen including underground mining excavations. The fee rates have been set directly in statute. These rates are quota rates, which objectively vary and are valorised each year. The charges for searching mineral deposits should be paid every quarter. The entrepreneur is obliged to submit the required information (including the name of the commune or communes and the amount of the attributable fee). Similarly assessment takes place in the case of storing waste in the orogen including underground mining excavations by the entrepreneur. In case of failure of paying the exploitation charge or in case of failure of submitting the required information or submitting invalid information the concessional body is obliged to issue the fee assessment decision based on its own assignments. The commune cannot participate as a party in this proceedings.

The additional surcharge fee is due from the entrepreneur in case of extracting minerals without the required concession or of a flagrant violation of its terms. The additional exploration fee is assessed by the authorised body's decision. Its rate is a product of the amount of extracted minerals and the rate of the exploitation charge multiplied by 80. The authorised bodies in that case (according to the sort of minerals) are the minister responsible for environment affairs or the district head – the executive body of LGUs called *powiat* – and in case of a flagrant violation of concession terms – the concessional body. In case of other kinds of entrepreneur actions the further surcharge fees may be assessed. Their rates are relatively low and determined either as specific amounts or as the multiplied fee for a given activity. For example, the rate appropriate in the case of storing the waste in the environment is multiplied by ten.

All of the mentioned fees are in the 60% the revenue of the commune where the entrepreneur concessional action takes place. Remaining 40% is an income of The National Fund for Environmental Protection and Water Management. If the concessional activity takes place on the Polish territorial waters the whole the fees constitute the income of The National Fund for Environmental Protection and Water Management.

It is important that to fee issues The Tax Ordinance Act related to taxes liabilities should be applied. The tax power of the tax authorities regulated by The Tax Ordinance Act apply to the communes or The National Fund for Environmental Protection and Water Management. Therefore the communes dispose the entire tax power in case of the exploitation charge, which follows from the Chapter III of The Tax Ordinance Act. It is worth noting, that the commune tax authorities *inter allia* are able to exempt the taxpayer on her/his request if the payment of the fee is against the important interest of the taxpayer, especially if the payment of the fee may reduce the

standard of the taxpayer existence. Also, the tax authorities can defer the payment of taxes in cases justified by the important interest of the taxpayer or the public interest. Moreover, the Tax Ordinance Act's regulations related to liability of taxpayers, taxpayer spouses and collectors are applied to the assessed exploitation charge. Various protection means against not paying specified fees are also used. In case of the fee arrears (if the fee is not paid on time) the commune is entitled to receive the interest for delay in payment. The commune tax authorities can apply the fee reliefs. The optional reliefs are fee postponing or paying by instalments, fee arrear (including the interest) postponing or paying by instalments, and fee arrear (including the interest) remission in cases justified by the important interest of the taxpayer or the public interest. Basically these reliefs can be applied on the taxpayer request. Exceptionally the fee arrear remission can be applied *ex officio* if the amount of the arrear is negligible. The limitation periods of the fee assessment and payment, and solutions applied in case of the fee overpayment regulated by The Tax Ordinance Act are valid to the local fees. The important issue is the possibility of applying The Tax Ordinance Act regulations on the tax liability of the different individuals[33].

3.3. Fees associated with using the alcohol-selling permissions

The fees associated with using the alcohol-selling permissions are partly of the tax nature. The fees for using the alcohol drinks-selling permissions, the fees for one-time permissions andthefees for liquidation sale of possessed alcohol drink stocks by the entrepreneur whose previous permission is out of date are regulated by The Upbringing in The Consciousness and Counteracting The Alcoholism Act 1982[34]. The fee for using the alcohol-selling permissions is collected by the communes from entrepreneurs beginning the trade in this branch. The fee being the amount specified as a quota of money relative to the kind of alcohol is collected before they start their activity. The fee is also collected from the entrepreneurs continuing the trade in this branch. In this case it is the amount specified as the percentage of the alcohol sale value in the previous year. The fee must be paid in three equal installments in specified dates by the transfer on a commune's bank account in each year when the permission is valid. Moreover, the less restricted one-time permissions can be issued to the entrepreneurs who already have got the permission and to the Voluntary Fire Brigades units for the period of two days. The fee for the one-time permission must be paid on a commune's bank account before issuing the permission and is paid as a 1/12 of the year's fee according to the kind of the permission. The further permissions valid for two years can be issued for entrepreneurs, who organize events. The fee for such a permission is on the same level as the fee paid by the entrepreneurs who start selling the alcohol drinks

[33] Accordingly articles: 22, 26, 29, 33-44, 53, 48, 67a, 67d, 68, 70, 72, 76, 93-100, 107-112, 114-116, 118.
[34] Ustawa z dnia 26 października 1982 r. o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi (The Upbringing in The Consciousness and Counteracting The Alcoholism Act of 26th October 1982) – (consolidated Dz.U. No. 147, item 1231 of 2002 with changes).

or are continuing this activity. The revenues from all kind of mentioned fees are reserved for The Commune's Programs for Prevention and Solving the Alcohol Problems and The Commune's Program for Prevention the Drugs Addiction[35], and cannot be spent for different issues. It means that these fees can be classified as targeted fees. The mentioned Act does not regulate the commune competences. The Act refers to the out of date Business Law Act. The body authorized to issue the permissions is a commune's leader (town's mayor, city's president) – which is the executive body of the commune local authority – of the commune where the shop with alcohol drinks is located[36].

4. Public fees

4.1. The revenue stamp

From the fiscal policy point of view, the most important fee is the revenue stamp regulated by The Revenue Stamp Act 2006[37]. The revenue stamp is collected in individual cases of public administration for: an official act based on an application or request, issuing the certificate on a request, and issuing the concession or permission for an individual request or application. Furthermore, it is collected in the case of public administration proceedings or court proceedings, for submitting the document (or its copy) confirming the proxy or power of attorney. The revenue stamp is also collected for an official act, issuing the certificate or permission by the private body according to performing the public tasks commissioned by the public body. The revenue stamp must be paid by the individuals, corporations and bodies without the legal personality if their request or an application is a cause of an official act or issuing the concession or permission. The authorized body in the case of the revenue stamp is a commune's leader, town's mayor or city's president.

The competences of the commune assembly are limited to: the possibility of ordering the collection of the revenue stamp by the collectors, selecting the collectors and defining their wages or salaries[38].

4.2. Fees for perpetual lease and enabling the management of the real estate

Fees for perpetual lease and enabling the management of the real estate are regulated by the Real Estate Management Act 1997[39]. The fee for giving the real estate for perpetual lease is collected as a first one-time payment and complementary

[35] Article 10 paragraph 2 ustawy z dnia 29 lipca 2005 r. o przeciwdziałaniu narkomanii (Prevention the Drugs Addiction Act of 29th July 2005) – (Dz.U. No. 179, item 1485 with changes).
[36] Articles: 111, 18-184.
[37] Ustawa z dnia 16 listopada 2006 r. o opłacie skarbowej (Stamp Revenue Act of 16th November 2006) – (Dz.U. No. 225, item 1635 with changes).
[38] Article 8 paragraph 2.
[39] Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (Real Estate Management Act of 21st August 1997) – (consolidated Dz.U. No. 261, item 2603 of 2004 with changes).

payments which are paid every year[40]. The first one-time fee must be paid before giving the real estate for perpetual lease by the public auction. In case of giving the real estate for perpetual lease without the public action the fee can be paid by interest-bearing installments. The complementary payments must be paid during the whole period of the perpetual lease. The fees are assessed according to the percentage rate related the price of the real estate. The percentage rate of the first one-time payment is specified on the level from 15 % to 25% of real estate price. The level of complementary fee rates is related to the purposes of using the real estate by the perpetual lessee and is specified on the level from 0,3 % to 3 % of the price. In certain cases the fee reliefs, allowances and increases may occur. The level of the complementary payments may be updated if the value of the real estate has been changed.

Fees for enabling the management of the real estate are the yearly collected fees[41] and have to be paid during the whole period of the real estate management. The fees are assessed related to the percentage rate of the price of the real estate. The amount of the mentioned fee rates is related to the purposes of managing the real estate and is specified on the level from 0,1 % to 1% of the real estate price. In certain cases the fee reliefs, allowances and increases may occur. The amount of the fees may be updated if the value of the real estate has been changed.

In case of the fees for perpetual lease of the real estate owned by the commune and fees for enabling the management of real estate owned by the commune the commune's executive body is competent to assess and collect these fees[42]. The mentioned fees are mandatory and their rates are defined in statute.

4.3. Fees for using LGUs' service facilities

Among fees being the commune own revenues[43] it is worth to mention fees for using LGUs' service facilities. These fees are: afee for transit of the oversized vehicles on public roads, fees for crossing the bridges, tunnels and ferry transport, a parking fee, and the additional surcharge fees and sanctions. The Public Roads Act 1985[44] regulates the optional and mandatory fees. There are objective and subjective exemptions from these fees provided by the mentioned statute. Moreover, the act regulates fees for the roadway occupation and fees for providing the technological channel. The range of the commune tax power related to the mentioned fees (excluding the fee for transit of the oversized vehicles on public roads) is relatively wide. The communes are able to decide – in the range regulated by statute – about their amount, and can introduce subscriptions

[40] Articles: 71-77.
[41] Articles: 82-87.
[42] Article 4 point 9, 9c and article 11 ustawy o gospodarce nieruchomościami (Real Estate Management Act 1997).
[43] Their complex elaboration is enclosed in: Opłaty samorządowe w Polsce – Problemy praktyczne (ed. G. Liszewski), Temida 2, Białystok 2010.
[44] Ustawa z dnia 21 marca 1985 r. o drogach publicznych (The Public Roads Act of 21st March 1985) – (consolidated Dz.U. No. 19, item 115 of 2007 with changes); articles 13-13l.

and lump sums. The fees for crossing the bridges, tunnels and ferry transport are optional and their introduction depends on the commune assembly.

The fee for transit of the oversized vehicles on public roads is collected after issuing the time-limited or no limited permission for the transit or it can be collected as a one-time fee. The fee rates vary according to the number of transits, vehicles parameters and the number of kilometers. The sanction payment regulated directly in statute is due for transit without the permission. The assessment method is regulated separately in case of collection in an electronic form. According to the public road categories the mentioned fee is mostly the revenue of the General Directorate of National Roads and Motorways.

The fee for crossing bridges is optional. The fee rates vary according to the category of the vehicle. Statute regulates the maximum amount of the fee. The commune assembly is able to introduce the fee on the commune's local bridges only. The amount of the fee and the method of the fee assessment can be regulated by the commune assembly. The commune assembly can also introduce the payment bythesubscription, lump sum or zero rate for some users of the bridge.

The fee for crossing a tunnel (which is longer than 400 meters) varies according to the category of the vehicle. Its maximum amount is regulated by statute. The commune assembly tax power to regulate the described fee is the same as in the case of the fee for crossing bridges.

The fee for ferry transport on public roads can be collected for transporting by the ferry: people, livestock, luggage or vehicles. The fee rates vary according to the kind of transport, and additionally to the category of vehicles. The commune assembly tax power to introduce and specify fee amounts, and create the objective or subjective fee exemptions depends on the localization of the ferry. The LGUs assembly (including the commune assembly) can also introduce the payment bythe subscription, lump sum or zero rate for some users of the ferry.

The parking fee for parking vehicles on public roads in paid parking zones is mandatory. Paid parking zones, the fee rates – according to the maximum fee rates regulated by the mentioned statute – and the method of assessment are defined by the commune assembly. The rates can vary according to the parking place localization. The additional fee must be paid if the regular fee has not been paid. The commune assembly can also introduce the payment bythe subscription, lump sum or zero rate for some users of the car parks.

5. Special assessments

5.1. Betterment levies

Betterment levies from the theoretical point of view, are special assessments. These levies can be divided into: abetterment levy for sharing the cost of construction of technical infrastructure facilities,levy for real estate merging and dividing, and levy only for dividing the real estate. All kinds of these levies are regulated by TheReal Estate Management Act 1997[45]. Betterment levies are collected in case of increasing the market value of the real estate caused by: construction of technical infrastructure facilities co-funded by the state, LGUs, European Union, foreign states or international organizations; real estate merging and dividing or only dividing it. All betterment levies are the communes' revenue.

The betterment levy for infrastructural investment, i.e., the betterment levy for sharing the cost of construction of technical infrastructure facilities[46], is collected from the real estate owners and permanent lessees. The levy is due only if: the facilities have been founded or co-funded from the public funds and the investment has caused the undoubted increase of the market value of the real estate. The mentioned statute defines the construction of technical infrastructure facilities as a road construction or construction of the under-ground, on-ground or above-ground wires or building water supply constructions, sewerage constructions, heating constructions, electrical constructions, gas constructions, and telecommunication constructions. The levy base is the amount of increase of the market value of the real estate, which is practically the difference between the market value of the real estate before and after investment construction. The levy rate is constant and proportional. The Act regulates the maximal rate level as 50% of the increase of the market value of the real estate. The concrete rate level have to be defined by the local act of law issued by the commune assembly. Issuing the levy assessment decision is the competence of the commune's leader, town's mayor or city's president. The levy assessment is optional. The limitation period of the assessment is three years. The Civil Code Act 1964 regulations apply in case of payment delay. Basically, there are no betterment levy exemptions or reliefs regulated by The Real Estate Management Act. Exceptionally, the act regulates the relief as spreading out the levy in installments. The levy-shelter can account the relief only after her/his request. The levy can be distributed in annual installments for a maximum period of ten years. In case of spreading out the levy in installments, the levy payer's liability is guaranteed by the mortgage. The unpaid installments are interest-bearing. The range of commune tax power in case of the described levy is wide, especially because the levy assessment is non obligatory.

[45] Ustawa z 1997 r. o gospodarce nieruchomościami (Real Estate Management Act 1997).
[46] Dział III (Part III), Rozdział 7 (Chapter 7) – Udział w kosztach budowy urządzeń infrastruktury technicznej (The participation in the cost of installing technical infrastructure); article 143-148b.

The betterment levy for real estate merging and dividing[47] is collected from real estate owners, permanent lessees and real estate owner like-possessors. The levy basis of assessment is a quota of the difference between the market value of the real estate before and after its merging or dividing. The levy is mandatory. Statute regulates the maximal rate level as 50% of the difference between the market value of the real estate before and after its merging or dividing. The concrete rate level have to be defined by the local act of law governing the real estates merging and dividing issued by the commune assembly. The person who has received a new real estate of higher value is liable by law to pay the betterment levy. Issuing the levy assessment decision is the competence of the commune's leader (town's mayor, city's president). The decision must be issued in accordance with the agreement between the executive body and the levy's payer or with the local act of law. The collection date and conditions of payment can be enclosed in the agreement between the executive body and the levy's payer. If there is no agreement the collection date and conditions should be regulated by the mentioned local act of law. The collection date regulated by the local act of law cannot be later than the date when the construction of the planned technical infrastructure facilities is to be finished.

The betterment levy for real estate dividing is collected from real estate owners, permanent lessees and permanent co-lessees. The levy object is the increase of the market value of the real estate caused by its dividing. The real estate division is made on the request and at the expense of the person who has the legal interest in the real estate division. The exception is the case when the court rules the real estate division. The real estate division can be made ex officio if it is necessary for public purposes. The levy base is the quota of the difference between the market value of the new real estates and the market value of the previous estates. The act regulates the maximal rate level as 30% of the difference between these market values. The concrete rate level have to be defined by the local act of law issued by the commune assembly. The levy is optional and can be distributed in installments, interest-bearing. Levy payer's liability can be guaranteed by the mortgage. The Civil Code Act 1964 regulations apply in case of payment delay. The limitation period of the assessment is three years.The range of commune tax power in case of the described levy is wide, especially because the levy is not a mandatory one.

5.2. The planning fee

The planning fee is regulated by The Land Planning and Development Act 2003[48]. The levy is collected from real estate's owners and permanent lessees for increse of the market value of their real estates according to the local act of law

[47] Dział III (Part III), Rozdział 2 (Chapter 2) – Scalanie i podział nieruchomości (Merging and dividing the real estates); articles 101-108.

[48] Ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym (The Land Planning and Development Act of 27th March 2003) – (Dz.U. No. 80, item 717 with changes); articles 36-37 and 63.

regulating the local plan issued by the commune assembly or according to the change of this plan. An increase of the market value is not the only circumstance of collecting the levy, the other two are: the change of the real estate destination and its disposal (including sale) before the end of the five years period starting at the day when the local plan or its change has came into force. The levy base is a quota of the real estate market value increase calculated as a difference between the market value of the real estate before and after issuing the local plan or its change. The Act regulates the maximal levy rate as 30% of the market value increase. The concrete levy rate is determined in the local plan. The levy is mandatory and assessed by the commune's leader (town's mayor, city's president)in the administration decision issued after receiving the extract of the agreement which is made by the public notary. In case of failure to pay the levy the Tax Ordinance Act regulations apply. The limitation period of the levy payment is five years. The levy is the commune revenue. The commune tax power is relatively wide, especially because of applying the Tax Ordinance Act.

6. Conclusion

In Poland delegation of the financial power on the level of law enforcement, which correspond to the financial decentralization, takes place. The principle of limited tax power of communes follows from the constitutional principle of obligation to resolve the taxes and other public levies by the parliament and from the right of taking decisions about tax rates by the local authorities limited by the range of tax rates determined by statutes. It is worth noting that tax sources have been given only to the communes. It means that only that one kind of LGUs in Poland has got the tax power.

Similar power to the tax power has been given to the communes in the aspect of fees and special assessments. The range of this power depends on whether commune fees are mandatory or optional. Moreover, the conditions of adjustment of fees in statutes determinate if fee levels are regulated exclusively or can be regulated by further commune acts of local law. Important differences depend also on whether a given public levy is a tax, fee or special assessment.

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Tax Revenues of Territorial Self-government Units and Corporate Finance in Poland

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Abstract: The paper deals with tax revenues of territorial self-government units in Poland. It presents the types of tax revenues obtained by communes, poviats and voivodeships and evaluates the importance of such revenues in these units' financing systems in the period of 2004-2010, i.e. since the Poland's accession to the European Union. It also attempts to identify the relations between tax revenues of territorial self-government units and corporate finance.

Keywords: territorial self-government units, share in state taxes, corporate finance.

1. Background

The system transformation in Poland triggered a number of changes and led to some fundamental developments in the way public authorities operate. The re-establishment of territorial self-government[1] in 1990 started the process of decentralisation, which meant the delegation of specific tasks from the central level to the lower ones[2]. As a result, a three-tier system of territorial self-government was created and has been operating until now, with local level units – communes and poviats and supra-local units - voivodeships. The delegation of tasks should be accompanied by the provision of certain assets, to support local government units, as well as appropriate financial resources and the power to manage these resources – these are the basic conditions needed to perform the imposed tasks in an independent way. Therefore, the decentralisation of public tasks entails the decentralisation of public finance. The financial aspect of the decentralisation of public authority is provided for in the Polish Constitution[3]. In addition, in the European Charter of Local Self-

[1] Act on Territorial Self-Government (1990)
[2] „A self-government and decentralisation are inseparable terms, closely connected with each other, also regarded as synonyms" S. Wykrętowicz (2008), p.20
[3] The Constitution of the Republic of Poland (1997), art.167 and 168

Government[4] special attention is paid to the provision of territorial self-government units with adequate financial resources to allow them to fulfil their responsibilities.

There was a lot of criticism, in terms of the European standards and constitutional principles, about the solutions which were in force in Poland until the end of 2003 and concerned the financing of territorial self-government units (e.g. an insufficient role of their own sources of income and the too dominant role of earmarked grants from the state budget)[5]. Therefore, those solutions had to be changed. The provision of territorial self-government units with sources of finance had to be re-considered because of Poland's EU membership and the need to enable territorial self-government units to absorb EU funds. The reasons outlined above contributed significantly to the introduction of the different regulations, which came into force on the 1st of January 2004[6]. According to the Act on Incomes of Local Self-Government Entities, such income is divided into due (secured) income and potential income[7]. Due income comprises the units' own income, general subsidies and earmarked grants from the state budget. Potential income, in turn, comprises the financial resources such as foreign non-repayable funds, EU funds and other funds, prescribed in other legislation.

Special importance in territorial self-government units' sources of finance is attached to their own income, with tax revenues forming an essential part of such income. Therefore, the deliberations focus on such revenue. The paper aims to present tax sources of income for territorial self-government units in Poland and to evaluate their role in the units' financing systems. In addition, the paper is intended to identify the relations between tax revenue of territorial self-government units and corporate finance.

2. Tax revenues of territorial self-government units

Tax revenues of territorial self-government units in Poland are not homogenous in their character. The literature on the subject uses the term *local taxes*, although this term is not always understood in the same way. Some authors[8] define local taxes as taxes that are in whole paid into budgets of territorial self-government units and in regard to which territorial self-government bodies have a certain statutory level of fiscal power. Local taxes are defined in a similar way in the European Charter of Local Self-Government, according to which "(…) part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate"[9]. Under this regulation, the fiscal power may serve as a criterion for the identification of local taxes. Basically, such

[4] European Charter of Local Self-Government (1985), art.9
[5] A. Borodo (2008), p.63
[6] The Act on Incomes of Local Self-Government Entities
[7] S. Owsiak (2005), p.451
[8] For example, H. Sochacka-Krysiak (1993), p.25
[9] European Charter of Local Self-Government (1985), art.9, par. 3

power comprises three types of competence that a territorial self-government may be entitled to in regard to tax revenues. Here, we should mention the rights to establish legal regulations that introduce taxes, collect income from specific taxes and administer specific taxes.[10] In particular, there may be the right to: impose taxes, determine tax rates, establish tax collection principles, grant general tax reliefs and exemptions, grant individual tax reliefs, exemptions, remissions, permissions to pay taxes by instalments or waive tax collection.

In addition to a narrower (strict sense) definition, under which local taxes are taxes for which there is at least some level of fiscal power, there is also a wider (broad sense) approach, according to which local taxes are based on sources which are regarded by the law as steady and connected with self-government budgets without any time constraints[11].

Referring more specifically to the Polish reality, following the broader approach, local taxes comprise the taxes that are paid (in whole or in part) to budgets of territorial self-government units. These are the taxes from which the income is given entirely to the discretion of territorial self-government units plus a share in state taxes i.e. personal income tax (PIT) and corporate income tax (CIT). It should be emphasized that the only beneficiaries that take advantage of the former group of taxes are communes, since neither poviats nor voivodeships are entitled to any taxes paid in whole.

Communal budgets receive the following taxes:

- taxes governed by the Act on Local Taxes and Charges[12]: a real estate tax and a vehicle tax,
- taxes governed by separate laws: an agricultural tax, a forestry tax, an inheritance tax, a tax on civil law transactions, a lump-sum income tax on economic activities carried out by individuals, payable under a tax book (*księga podatkowa*).

From among the taxes mentioned above, the most essential one, in terms of its fiscal importance, is a real estate tax. The taxable objects are land, buildings, or their parts, and structures, used to carry out economic activities. This tax does not cover e.g. agricultural land and forests (except for the ones occupied for the purpose of conducting economic activities). The taxable base for real estate tax varies, depending on a taxable object. Consequently, the taxable base for land is an area expressed in square metres. In case of buildings, or their parts, this base is a useable area, expressed in square metres as well. The taxable base for structures, or their parts, is a value established as of 1 January of a given fiscal year. Tax rates for real estates, just like their taxable bases, vary. For the taxable base expressed in quantity, e.g. applicable to land and buildings or

[10] J. Głumińska-Pawlic (2003), p. 131
[11] M. Kosek-Wojnar, K. Surówka (2007), p.72
[12] The Act on Local Taxes and Charge (1991)

their parts, amounts are established, but for the taxable base expressed in value, i.e. applicable to structures, a percentage is given. Tax rates for real estates are established by virtue of a resolution adopted by a council of a given commune. These rates, however, cannot exceed the maximum levels given in the Act on Local Taxes and Charges. The upper limits are reviewed on an annual basis, depending on prices of consumption goods and services in the first calendar half of a year that precedes a given fiscal year, compared to the corresponding period of the previous year. It should be emphasized here that the highest maximum rates apply to land and buildings used for economic activities. A commune council, when establishing tax rates for real estates, may differentiate these rates, depending on the types of taxable objects and taking into account, in particular, their location, and type of development, designation and use, technical condition and age of buildings. Real estate tax applies to individuals, corporate entities and organisational entities, including partnerships without legal personality.

Agricultural tax[13] and a forestry tax[14] are certain supplements to the real property tax. The agricultural tax concerns such land that is classed as agricultural land. If certain agricultural land, however, is occupied for the purpose of carrying out economic activities, different from agricultural ones, this land is subject to a real estate tax. The agricultural tax applies to individuals, corporate entities and organisational entities, including partnerships without legal personality, if they are owners, autonomous possessors or perpetual users of specific agricultural land. Basically, the taxable base for the agricultural tax is the number of comparative fiscal hectares. The use of such a conventional unit i.e. a comparative fiscal hectare, results from discrepancies in profitability of farms[15]. The number of comparative fiscal hectares depends on a farm area, the type and class of agricultural land and a fiscal district (communes are classed by the Finance Minister into one of the four fiscal districts). An agricultural tax rate is expressed in an amount, in relation to an average procurement price of rye. The rate is established per one hectare and it is determined in a given commune by virtue of a resolution adapted by its commune council and subject, of course, to specific limitations.

The forestry tax, which applies to individuals, corporate entities and organisational entities, including partnerships without legal personality, is similar to the agricultural tax, in its character and construction. Individuals and entities are subject to the forestry tax if they are owners, autonomous possessors or perpetual users of forests (except for forests occupied for the purpose of conducting other economic activities, different from forestry). This tax is charged on forests and the taxable base is a forest area, expressed in hectares. A forestry tax rate corresponds to an average timber-selling

[13] Act on Agricultural Tax (1984)
[14] Act on Forestry Tax (2002)
[15] A. Gomułowicz, J. Małecki (2006), p.622

price and is expressed in an amount per hectare. A commune council is entitled to determine a tax rate for their commune, taking into account some specific limitations.

Another tax that supplies communal budgets is called the vehicle tax. This tax applies to lorries, tractors, trailers, semi-trailers and buses. The vehicle tax is charged on individuals and corporate entities that own vehicles but only if these vehicles are registered. Organisational entities without legal personality are taxable persons for this tax for vehicles that are registered for these entities. The taxable base for the vehicle tax is expressed in quantity – as the number of vehicles and, as a consequence, tax rates are expressed in amounts. A commune council is entitled to determine a tax rate for their commune, by adopting a resolution in this respect. Just like in case of the real estate tax, the Act specifies the maximum rates, which are reviewed by the Finance Minister on an annual basis. In addition to the maximum rates, minimum rates are established for selected vehicles and, consequently, in this case there are tax bands, within which a commune council is able to determine a specific tax rate.

When analysing the inheritance tax[16], in turn, we can see that this tax is charged on individuals only. The inheritance tax applies to the ownership of objects acquired in the territory of Poland or property rights exercised in the territory of Poland, by title of inheritance, bequest or donation. The taxable base is a so-called 'clear value' i.e. the value of objects and property rights acquired, after the deduction of any debts and encumbrances. When determining the taxable base, it is essential to identify the tax group a purchaser belongs to. There are three tax groups for the inheritance tax. The tax rates are progressive and different for the specific tax groups. Certain reliefs and exemptions can be granted for and from this tax.

The tax on civil law transactions[17] applies to individuals, corporate entities and entities without legal personality. This tax is mainly charged on various types of agreements, such as sale, exchange, loan and donation agreements. In addition to bilateral transactions, there are certain specific unilateral transactions, such as establishment of a mortgage, which are subject to this tax. The taxable base for the tax on civil law transactions varies, depending on the object of taxation. It may be a market value, a value of services etc. The tax rates are usually proportional and they depend on two factors: the type of a right acquired and the type of an object. The applicable rates are 0.1%, 0.5%, 1% and 2%. For the selected taxable objects, a tax rate is expressed in an amount. There are numerous exemptions from tax on civil law transactions, for the specific taxable subjects and objects. The catalogue of exemptions is statutory stipulated and exhaustive, which means that a commune council is not entitled to use their own tax preferences.

[16] Act on Inheritance Tax (1984)
[17] The Act on the Tax on Civil Law Transactions (2000)

Another tax that is a source of income for communes is a tax on economic activities carried out by individuals, which is paid under a tax book[18]. The tax applies to individuals and partnerships formed by individuals, who conduct certain types of economic activities, as specified in the Act. This form of taxation requires a number of conditions to be met at the same time. The tax book rates are rates expressed in an amount, determined on a monthly basis and quite varied. A lump-sum tax rate, under the tax book, depends on the type of conducted activities, the number of people employed and the number of inhabitants in a location where these activities are conducted. The tax book rates are determined by tax authorities (heads of tax offices), which issue case-by-case decisions. For the tax book rates, the legislators specified certain cases in which tax authorities reduce the rates. It should be noted that commune authorities have no competence in this respect.

Another source of tax revenue for territorial self-government units is their share in state taxes. This participation concerns all the three tiers of the self-government structure. It is valid for personal and corporate income taxes (PIT and CIT), but these taxes are treated differently. In 2010 the share in the PIT tax was 36.94% for a commune, 10.25% for a poviat and 1.6% for a voivodeship. The share in the CIT tax, however, was 6.71% for a commune, 1.4% for a poviat and 14.75% for a voivodeship, respectively. The share of territorial self-government units (communes, poviats, voivodeships) in the PIT income earned by the state budget is determined by means of multiplying the overall personal income tax amount by an index which equals the due share (in a year preceding the base year) of PIT tax paid by residents of a given commune, poviat or voivodeship. The share of a territorial self-government unit (a commune, a poviat or a voivodeship) in the income from the CIT tax is determined in a similar way and depends on the CIT tax paid by tax payers domiciled in a given commune, poviat or voivodeship.

To conclude this short summary of tax revenues obtained by territorial self-government units in Poland, attention should be drawn to the multitude and significant diversification of these revenues. Local taxes (in the strict sense) are solely attributable to communes but only for some of these taxes a commune's authorities (a commune council) may determine tax rates on their own, introduce their own reliefs and exemptions. This means that the level of fiscal power varies for specific taxes. Local taxes in force, in particular the real estate tax, the agricultural tax and the forestry tax, have been criticized for many years. The real estate tax is believed to be outdated, due to its so-called 'area construction'[19]. The efforts initiated fifteen years ago and aimed at the introduction of a cadastral tax need to be completed.

[18] The Act on the Lump-Sum Income Tax on Certain Revenues Generated by Natural Entities (1998)
[19] M. Miszczuk (2008), p.143

3. The role of tax sources of income for territorial self-government units in Poland

The presented evaluation of the importance of taxes in supplying territorial self-government units with financial resources covers the years of 2004-2010, i.e. the first seven years of Poland's EU membership. The analysis was based on the data from the Ministry of Finance[20], which divides territorial self-government units into communes, poviats, towns with poviat status ('2 in 1' – a commune and a poviat at the same time) and voivodeships. The term *tax revenues* covers the income from all taxes which constitute, in part or in whole, budgetary income of territorial self-government units (i.e. also their share in personal and corporate income taxes) as well as the income from charges: stamp charges, service charges and market dues.

The analysis of the structure of the total tax income for territorial self-government units (Table 1) leads to a conclusion that the main beneficiaries of tax revenues in all the subsequent years were communes and towns with poviat status, which received approx. 83-85% of this income. An interesting thing here is quite evenly distributed participation of these units in tax revenues, i.e. approx. 40-43% for communes and approx. 42.5 – 43.5% for towns with poviat status. The remaining territorial self-government units obtained respectively: 4-5.5% of the overall tax revenues for poviats and 10-11.5% for voivodeships.

In order to evaluate taxes as sources of budgetary income for territorial self-government units, we need to see their participation in total income earned by these units (Table 2). In the period surveyed, this participation was significantly high and stable and ranged from 33% to 39%, with a clear downward trend, however, which started in 2008. Considerable differences can be seen between the specific types of territorial self-government units. Poviats had the lowest share in total tax revenues in all the subsequent years of 2004-2010.

In order to conduct a more in-depth evaluation of the role of tax revenues in supplying territorial self-government units, the participation of such revenues in the total income obtained by the units in question was determined (Table 3). During the first seven years of Poland's EU membership, tax revenues accounted for a significant part of the total income. In all types of units, this figure ranged from 67.92% (2010) to 74.51% (2004), with a noticeable fall in 2010. This indicator reached its lowest level in all the years surveyed for poviats and the highest level for voivodeships. In the period of time surveyed, the participation of tax revenues in territorial self-government units' own income remained relatively stable. This was also true in case of communes and towns with poviat status. The biggest fluctuations in the values of the indicator could be seen in case of poviats and voivodeships.

[20] Budget execution reports issued by territorial self-government units for specific years (www.mofnet.gov.pl)

The research findings concern both the distribution of tax revenues obtained by territorial self-government units and the participation of such income in these units' own income and total income. They show that towns with poviat status are in the most favourable situation and poviats in the worst one, in terms of the supply of tax revenues and other income.

Tax revenues are not single-off payments, therefore in order to evaluate this type of income, in terms of financial resources supplying budgets of territorial self-government units, the roles of specific tax instruments need to be identified. Therefore, the structure of tax revenues in the years of 2004-2010 was analysed (Table 4).

Taking into account the value of the resources collected throughout the entire period, most of tax revenues obtained by territorial self-government units were derived from, starting from the biggest one: their share in the personal income tax, the real estate tax and their share in the corporate income tax. These sources combined accounted for approx. 90% of total tax revenues. It should be noted that the two former sources, i.e. the share in the personal income tax and the real estate tax, made up about three quarters of total tax revenues. The third biggest source, i.e. the share in the corporate income tax, provided several per cent of tax revenues. The source number four, in terms of fiscal importance, was the tax on civil law transactions, followed by the agricultural tax and the vehicle tax. When looking at the other sources, only the income derived from stamp charges exceeded one per cent of total tax revenues. The other instruments generated the income that did not exceed 0.7% of total tax revenues in any of the years surveyed.

The conclusions about the fiscal importance of the individual tax instruments are confirmed by the analysis of their contribution to total income of territorial self-government units and their own income (Table 5).

When determining the participation of specific taxes in total income of territorial self-government units and their own income, only these taxes that supplied more than one per cent of total tax revenues in the period of time surveyed were taken into account. The ranking of such instruments, in terms of their participation in total income, was, of course, the same as the one resulting from the analysis of the tax revenue structure. In order to draw deeper conclusions, the analysed tax revenues were divided into two groups: group one, comprising the share in personal and corporate income taxes (items 1-2 in Table 5), and group two, comprising the selected local taxes (items 3-7 in Table 5). In the period of time surveyed, the share of the income derived from group one exceeded the share of the income derived from group two, both in the units' total income and their own income. In some of the years, the income obtained from this participation (group one) accounted for twice as much as the income from the analysed local taxes, both in the units' total income and their own income.

4. Relations between tax revenues of territorial self-government units and corporate finance

When dealing with the relations between tax revenues of territorial self-government units and corporate finance, attention should be drawn to the fact that companies in Poland are subject to a number of taxes, which supply the state budget and budgets of territorial self-government units. Taxes charged on companies may be divided into three basic groups, i.e. taxes that are costs of activities, taxes on revenues and taxes on income.

The cost-related taxes comprise, first of all, the real estate tax and the vehicle tax. The burden of these taxes depends on the type and size of assets (land, buildings, structures, vehicles) used by a given company to conduct economic activities. These taxes are cost items for companies and, as a consequence, affect prices. It should be emphasized that these taxes are related to profits generated by a company or sale transactions carried out by them. They are connected the simple fact that a company conducts its economic activities and uses its assets, which are subject to taxation, in such activities. Both the real estate tax and the vehicle tax are local taxes and the real estate tax, in particular, has a very important fiscal role. The income from these taxes depends on the level of a given commune's economic development, including the number of companies that operate there and their profiles, in terms of assets that are involved in their operations. They are less dependent, however, on a company's current financial standing. A commune council is equipped with the specific fiscal power, with respect to these taxes, and may decide about e.g. tax rates, reliefs and exemptions. The communal authorities, therefore, have a certain capacity to pursue a tax policy that is expected to contribute to a local economic growth[21].

Another group of taxes imposed on companies are revenue-related taxes (on sales, turnover). These are the goods and services tax (VAT) and the excise tax. These taxes, just like cost-related ones, are not connected with income generated by companies and, as a consequence, even non-profitable entities have to pay them. They represent the fiscal participation in corporate revenue. Traditionally, these taxes show high fiscal efficiency. In Poland, VAT and the excise tax supply the state budget and, therefore, should be regarded as not connected with income generated by territorial self-government units.

The third group of taxes analysed here are taxes chargeable on income (profits) earned by companies. Basically, such taxes may be corporate and personal income taxes. The CIT tax applies, first of all, to joint stock companies, limited companies and state-owned enterprises. The PIT tax, in turn, applies to small and medium-sized businesses, run by natural persons. Income from CIT and PIT taxes supplies the state budget but also, as mentioned before, a share of these taxes is allocated to territorial

[21] M. Miszczuk (2009), p.60

self-government units. It should be underlined that local authorities do not have any fiscal power with respect to CIT and PIT taxes. The analysis shows that the participation in CIT and PIT taxes is a highly significant source of income for territorial self-government units of all levels and, in particular, their share in PIT taxes is vital. The income derived from CIT and PIT taxes is directly connected with companies' financial situations and, as a result, they are largely dependent on the economic situation. This is clearly confirmed by the previously conducted analysis of empirical data[22]. The years of 2004-2008 were a period of an economic upturn in Poland, although in 2008 the economic situation started to deteriorate. This was reflected by the income earned by territorial self-government units from their participation in PIT taxes. In the years of 2004-2008, that income grew regularly but in 2008 the growth became much slower and in the years of 2009-2010 there was a downturn. The connection with the economic situation can also be seen in the income earned by territorial self-government units from their participation in CIT taxes, which grew until 2007 but went down in the subsequent years. Therefore, a conclusion may be drawn that the financial standing of territorial self-government units is largely affected by the financial condition of companies. The participation of territorial self-government units in CIT and PIT taxes is an effective source of budgetary income in the period of a sound economic situation but it declines in crisis times[23].

5. Summary

The evaluation and detailed conclusions presented above justify a general observation that the system that supplies territorial self-government units in Poland with tax revenue needs improvement. Some specific taxes, especially the real estate tax, and fiscal power of territorial self-government need to be reconsidered. A strong dependence of tax revenues obtained by territorial self-government units on the financial condition of companies can easily be noticed. From among tax revenues, the leading role is played by the participation in income taxes, which depend on the economic situation. On the other hand, territorial self-government units, using fiscal instruments, have only limited influence on the situation of companies, including corporate finance. Only communes are entitled to pursue their own fiscal policy, although within a clearly specified scope. Another argument to support the need to review the currently applied solutions, especially regarding poviats and voivodeships, is the unequal provision of territorial self-government units with effective sources of their own income, including tax revenues, to ensure adequate resources, commensurate with the tasks they have to fulfil.

[22] T. Famulska (2010), p.70
[23] E. Ruśkowski (2011), p.349

Table 1: Percentage distribution of tax revenues among territorial self-government units in Poland in the years of 2004-2010

Specification	2004	2005	2006	2007	2008	2009	2010
Communes	42,58	42,31	41,13	40,07	41,48	42,28	43,11
Towns with poviat status	42,37	42,64	43,02	43,26	42,67	42,72	42,32
Poviats	3,94	4,89	5,08	5,31	5,66	5,46	5,49
Voivodeships	11,11	10,16	10,77	11,36	10,19	9,54	9,08
Territorial self-government units in total	100,00	100,00	100,00	100,00	100,00	100,00	100,00

Source: author's own elaboration, based on budget execution reports issued by territorial self-government units for specific years (www.mofnet.gov.pl).

Table 2: Percentage share of tax revenues in total income obtained by territorial self-government units in Poland in the years of 2004-2010

Specification	2004	2005	2006	2007	2008	2009	2010
Territorial self-government units in total	38,34	37,64	37,13	39,50	38,91	34,30	32,79
Communes	37,06	35,76	34,55	36,49	36,94	34,61	31,82
Towns with poviat status	46,81	45,53	45,61	47,90	47,88	45,01	41,92
Poviats	11,09	13,77	14,88	17,08	17,31	14,44	13,00
Voivodeships	55,89	55,71	49,33	52,01	44,65	25,92	34,38

Source: author's own elaboration, based on budget execution reports issued by territorial self-government units for specific years (www.mofnet.gov.pl).

Table 3: Percentage share of tax revenues in territorial self-government units' own income in Poland in the years of 2004-2010

Specification	2004	2005	2006	2007	2008	2009	2010
Territorial self-government units in total	74,51	70,56	69,10	70,00	70,82	70,54	67,92
Communes	76,82	73,48	72,91	73,71	74,99	74,79	71,32
Towns with poviat status	72,84	68,86	67,36	68,07	68,88	68,22	65,88
Poviats	44,51	47,18	48,34	53,00	53,48	50,91	46,17
Voivodeships	94,54	85,82	77,27	76,17	76,29	80,23	85,04

Source: author's own elaboration, based on budget execution reports issued by territorial self-government units for specific years (www.mofnet.gov.pl).

Table 4: Structure of tax revenues obtained by territorial self-government units in Polandin the years of 2004-2010

Specification	2004	2005	2006	2007	2008	2009	2010
Share in CIT	14.0	13.0	13.8	14.7	13.5	12.5	11.5
Share in PIT	43.0	45.9	47.3	49.3	51.4	50.8	50.4
Real estate tax	31.2	30.1	28.0	24.5	24.2	26.7	28.3
Agricultural tax	2.6	2.5	1.9	1.8	2.2	2.3	1.8
Forestry tax	0.3	0.4	0.3	0.3	0.3	0.3	0.3
Vehicle tax	1.8	1.7	1.7	1.6	1.5	1.6	1.6
a lump-sum income tax on economic activities carried out by individuals, payable under a tax book	0.4	0.3	0.3	0.2	0.2	0.2	0.2
Inheritance tax	0.6	0.6	0.6	0.6	0.6	0.6	0.6
Tax on civil law transactions	0.3	3.1	3.7	5.0	4.1	3.2	3.5
Stamp charge	1.6	1.3	1.4	1.2	1.1	1.0	1.0
Service charge	0.7	0.5	0.5	0.4	0.4	0.4	0.4
Market dues	0.7	0.6	0.5	0.4	0.4	0.4	0.4
Total*	100.0	100.0	100.0	100.0	100.0	100.00	100.00

Source: author's own elaboration, based on budget execution reports issued by territorial self-government units for specific years (www.mofnet.gov.pl).

Table 5: Percentage share of selected types of tax revenues in total income of territorial self-government units in Poland and their own income in the years of 2004-2010

No	Forms of revenues	Total share in revenues							Share in own revenues						
		2004	2005	2006	2007	2008	2009	2010	2004	2005	2006	2007	2008	2009	2010
1.	Share in CIT	5.4	4.9	5.1	5.8	5.2	4.3	3.7	10.5	9.2	9.6	10.3	9.5	8.8	7.8
2.	Share in PIT	16.5	17.3	17.6	19.5	20.0	17.4	16.5	32.0	32.4	32.7	34.5	36.4	35.8	34.2
3.	Real estate tax	12.0	11.3	10.4	9.7	9.4	9.2	9.3	23.2	21.3	19.3	17.1	17.2	18.8	19.2
4.	Agricultural tax	1.0	0.9	0.7	0.7	0.9	0.8	0.6	2.0	1.8	1.3	1.3	1.6	1.6	1.3
5.	Vehicle tax	0.7	0.6	0.6	0.6	0.6	0.5	0.5	1.3	1.2	1.2	1.1	1.1	1.1	1.1
6.	Tax on civil law	1.2	1.2	1.4	1.6	1.6	1.1	1.2	2.2	2.2	2.5	3.5	2.9	2.3	2.4
7.	Stamp charge	0.6	0.5	0.5	0.5	0.4	0.3	0.3	1.2	0.9	1.0	0.8	0.8	0.7	0.6
8.	Total of 1 and 2	21.9	22.2	22.7	25.3	25.2	21.7	20.2	42.5	41.6	42.3	44.8	45.9	44.6	42.0
9.	3-7 total	15.5	14.5	13.6	13.1	12.9	11.9	11.9	29.9	27.4	25.3	23.8	23.6	24.5	24.6

Source: author's own elaboration, based on budget execution reports issued by territorial self-government units for specific years (www.mofnet.gov.pl).

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The Autonomy of a Democratic European State in Shaping the Law on the Public Financing of Political Parties in the Light of the Council of Europe Standards - Case of Poland

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Abstract: The Council of Europe has standardized the regulations referring to the publicfinancing of political partiesinits Member States. These solutions exert significant impact onthe content ofnational law. Obligatory Europeanizationof financial lawcauses lots of legal controversy. The consequences of adaptation of Polish law to the European standards exceed the question of state financial sovereignty. A propermechanism offinancing political parties is necessary for their appropriate functioning. Political parties play an important role in the democratic state of law and are an essential component both of civil society and human rights protection system. The European standards have played a decisive role in the introduction of the public financing of Polish political parties and its current evolution. Also they resulted in limiting the scope of financial sovereignty of Poland. A legal barrier occurs that hinders the optimization of managing state budget resources allocated for supporting the activity of political parties.

Keywords: financial sovereignty, state budget, political parties, public funding, the Council of Europe recommendations, budget expenditure.

1. Introduction

Financial sovereignty is an indispensable feature of an independent state[1]. In classical terms, it is considered regarding both international relations and domestic ones. In external relations its passive consequences are emphasized, manifesting in the need of other states or supranational structures torefrain from interfering in the

[1] Sometimes it is even regarded as the most important manifestation of state sovereignty. T. Dębowska – Romanowska, P*ojecie i znaczenie konstytucjonalizacji ustroju i systemu finansowego państwa, w: Konstytucyjne uwarunkowania tworzenia i stosowania prawa finansowego i podatkowego,* red. P.J. Lewkowicz, J. Stankiewicz, Temida 2, Białystok 2010, s. 21.

functioning of the national system of public finance[2]. Linked to this is the obligation to avoid activities that cause such interference and to terminate their continuation. In internal relations, however, the positive aspect of financial sovereignty is dominant, commonly defined as the exclusive competence of the state to regulate and plan public financial activities.

Financial sovereignty of the state is not absolute, and its scope and content are variable depending upon different political, social and economic conditions[3]. This results mainly from the interactions between the state and other entities. Limitation of sovereignty may be the result of a voluntary decision of the sovereign himself or be forced by the behaviour of other entities. It is worth noting that self-limitation of the state is the consequence of failing to perform its functions or results from entrusting other entities with state tasks. At the international level particular attributes of the state may be affected by other states and supranational structures under bilateral or multilateral agreements. Membership in international organizations is connected with the obligation to respect their statutes and to carry out the decisions of their bodies. From a national viewpoint, self-limitation of the state is mainly due to the process of decentralization of its competences and taking over the tasks by local government authorities.

Nowadays, state sovereignty is perceived primarily in functional terms i.e. in the context of a proper performance of its functions. Assigning the attributes of financial sovereignty to other entities does not constitute its limitation if it contributes to the proper performance of public tasks[4]. Also no reservations arise about such impact of international structures, which aims to eliminate the glaring pathologies in public activity, which are contrary to the heritage of mankind. This at least applies to financial sanctions imposed on a war aggressor, the state conducting a policy of genocide or violating human rights.

Poland is a Member State of the Council of Europe, which is an international organization grouping the majority of European countries. Undoubtedly, the recommendations of this organization have so far been a major factor in the introduction of the public financing of political parties in Poland. Regulations of the Council of Europe and the mechanism of their implementation constitute a glaring example of limiting the financial sovereignty of European countries in a field important

[2] On the essence of state sovereignty, see R. Kwiecień, *Suwerenność państwa w Unii Europejskiej: aspekty prawnomiędzynarodowe*, „Państwo i Prawo" z 2003 r., Nr 2, s. 27–28.

[3] As rightly noted in the literature, the actual model of sovereignty, understood as the actual independence of the state decision-making centers from the external factors, contemporary do not exist in practice, as it would be possible only in conditions of extreme autarky and isolation of the state from the international environment. See W. Anioł, *Między odzyskaną suwerennością a oczekiwaną integracją*, w: *Bariery w drodze do EWG*,red. J. Stefanowicz,Warszawa1992, s. 15.

[4] In the literature the opinion that financial sovereignty of the Polish state is its inalienable feature has been formulated. See T. Dębowska – Romanowska, P*ojecie i znaczenie…, op. cit.,* s. 21.

both for the proper functioning of the democratic state of law, civil society and human rights. In all these areas political parties play a crucial role.

The European standards of the public financing of political activity set limits to the autonomy of the Member State. One of practical indications of the autonomy is the freedom of shaping the content of the national financial law. The implementation of the Council of Europe recommendations takes place within a framework of obligatory Europeanization of Polish law. The standardization of legal solutions related to the public financing of political parties is justified by essential universal values and aims to combat corruption and promote democratic forms of governance, rule of law and human rights protection. Adjusting national law to European requirements stirs controversy. This relates to the applied method of compulsory Europeanization, the content of the recommendations, the scope of standardization, its purpose and justification. But the main reason for these doubts are radically different assessments of the consequences of the public funding of political parties, which are considered to be either merits or demerits, depending upon the political preferences of the evaluator[5].

Undoubtedly, the European standards can serve as a reference point in constructing the new financial laws and in evaluating the regulations already being in force. The implementation of the Council of Europe recommendations may contribute to the improvement of national law. On the other hand, an uncritical transplantation of foreign legal solutions poses a risk to the integrity of Polish legal system, in particular to its axiological justification. Imposing certain instruments and procedures irrespective of specific national conditions may cause legal barriers to the optimization of managing state budget resources used to support political activity. In consequence, instruments, rules and procedures of the public financing of Polish political parties become fixed, which limits the financial sovereignty of the state.

2. Constitutional determinants of public financing of Polish political parties

Poland belongs to those European countries which in their constitutions regulate the issues of the financing of political parties. The system's principle is the freedom of creating and functioning of political parties[6]. The Polish Constitution also guarantees the transparency of political party financing[7]. Thus it appears that there still has not been the constitutionalisation of public financing of political parties. This matter is substantial on that account, that there is no legal compulsion to grant the backing from the state budget for political groups. However a number of restrictions arise from

[5] For more on this see A. Gorgol, Prawne aspekty publicznego finansowania partii politycznych w Polsce i na poziomie europejskim, Wydawnictwo UMCS, Lublin 2011, s. 62- 74.
[6] See art. 11 ust.1 Konstytucji Rzeczypospolitej Polskiej z dnia 2.04.1997 r., Dz. U. z 1997 r. Nr 78, poz. 483 ze zm., appointed further as Konstytucja RP.
[7] See art.. 11 ust.2 Konstytucji RP.

the Polish Constitution in interfering by the state in the sphere of the freedom of creating and of the functioning of political parties.

First of all, public financing may not lead to violations of political rule of the equality before the law[8]. Neither discriminating, nor privileging any political group in the access to budgetary resources are acceptable[9]. This means that entities being characterized by the same significant feature (relevant) should have an identical legal position. By analogy, the political parties deprived of this common characteristic have diversified entitlements and duties. At present the issue of equality and justice in the access to the public funding of party activity is perceived in the context of ensuring the equality of opportunity in political rivalry. It manifests itself above all in diversifying the financial importance of electoral votes and the regressive method of calculating the amount of the subventions for political parties[10]. For them the greater the electoral success in parliamentary elections, the smaller the amount transferred from the state budget to the winning political group. Relatively the vote devoted to the elector is bringing the biggest financial benefits for these authorized political parties to receive subventions which are being included in the first threshold of the statutory algorithm[11]. These parties are pleased with a smaller election support, but are being represented in the parliament or crossed the statutory threshold authorizing to obtain financing from the state budget. Undoubtedly, demand of ensuring the equality of opportunity has its source in the formula of the democratic state of law functioning in conditions of the political pluralism and parliamentary democracy[12].

The freedom of action and functioning of political parties means that the state can interfere in political party activity only in exceptional situations. The Polish Constitution demands that this interference has fastening only in statutory provisions[13]. And so direct applying of the recommendations of the Council of Europe referring to financing Polish political parties is ruled out. They are not universally binding law in Poland[14]. The implementation of the statutory duties of the Council of Europe requires the adaptation of contents of the national laws to European requirements. Recommended legal solutions referring to the public funding of Polish political parties are implemented as a result of modifying statutory provisions. This is done by derogation of the norms incompatible with the European standards, change of the

[8] See art. 32 ust.1 Konstytucji RP.
[9] See art. 32 ust.2 Konstytucji RP.
[10] A. Gorgol, *Prawne aspekty ..., op. cit.,* s. 248 -252.
[11] See art. 29 ust.1 ustawy z dnia 27.06.1997 r. o partiach politycznych, t. jedn. Dz. U. z 2011 r. Nr 155, poz. 924, appointed farther as upp.
[12] In Poland the freedom and the equality of political parties result from the constitutionally protected principle of the political pluralism. Compare art. 11 i art. 32 Konstytucji RP. For more on This see M. Granat, *Zasada pluralizmu politycznego*, w:W. Skrzydło(red.), *Polskie prawo konstytucyjne*,Lublin 1998, s. 147; W. Gulczyński, *Demokratyczna reguła pluralizmu politycznego*, w:W. Sokolewicz (red.), *Zasady podstawowe polskiej konstytucji*,Warszawa 1998, s. 174.
[13] See art. 31 ust. 3 Konstytucji RP.
[14] Sources of the Polish law are normalized in the chapter III Polish Constitution.

contents of applicable regulations or by constituting new regulations in the scope so far not-provided with legislation. It is worth noticing that Poland applied the separate model of the statutory regulation of party funds[15]. The public funding of party activity is regulated namely both in comprehensive acts referring to political parties, to their election activity, as well as in regulations of financial law, in particular of the public finance law[16] and in tax acts imposing tax obligations on legal persons.

The Constitutional directives limit state interference in the freedom of establishment and functioning of political parties to cases where it is justified by the public interest[17] whose importance is greater than the individual interest of a political group[18]. The list of values justifying exceptions to this freedom contains as follows: state security, public order, environmental protection, health and public morality, freedoms and rights of others. These restrictions shall be necessary to eliminate threats to the values protected by the Polish Constitution and shall not violate the essence of freedom of establishment and functioning of political parties[19]. Thus the exceptional feature of state interference and the requirement of adequacy of the actions taken in the public interest (common good)have undoubtedly been highlighted**.**

The Polish Constitution regulates the issue of self-limitation of state sovereignty in external relations[20]. Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of state authority in relation to certain matters. However, the succession resulting in the loss of all the attributes of financial sovereignty remains legally impermissible. It is worth emphasising that the Constitution does not explicitly formulate in a positive or negative manner a list of issues that can be delegated to international organizational structures.

Undoubtedly, the Council of Europe has not been entrusted with legislative competences to issue legislation on the public financing of national political parties. There was, therefore, no loss by the Polish state authorities of those powers, which constitute attributes of state financial sovereignty. Nevertheless, the membership of the Council of Europe causes significant constraints in the exercise of that power. Poland has undertaken to comply with the European standards of political

[15] A. Gorgol, *Prawne aspekty ..., op. cit.,* s. 61, 196 - 197.
[16] Ustawa z dnia 27.08.2009 r. o finansach publicznych, Dz. U. z 2009 r. Nr 157, poz. 1240 ze zm.
[17] The concept of the common wealth of citizens is being identified sometimes with the public interest. See M. Zdyb, *Interes publiczny w orzecznictwie Trybunału Konstytucyjnego*,w: *Pojęcie interesu w naukach prawnych, prawie stanowionym i orzecznictwie sądowym Polski i Ukrainy*,red. naukowaA. Korybski, M. W. Kostyckij, L. Leszczyński, Wydawnictwo UMCS, Lublin 2006, s. 205−207.
[18] The nature of the public interest and confronting it with the private business arise frequent doctrinal controversies. More widely look at this subject: J. Nowacki, *Prawo publiczne – prawo prywatne*,wyd. UŚ, Katowice 1992, s. 9−18, 173−186; E. Jarra, *Ogólna teoria prawa*,wyd. II, Warszawa1992, s. 383−383; H. Groszyk, A. Korybski, *Konflikt interesów i prawo*,wyd. COM SNP, Warszawa 1990, s. 31−32; S. Ehrlich, *Oblicza pluralizmów*, PWN, Warszawa 1985, s. 25; J. P. Suwaj, *Konflikt interesów w administracji publicznej*,Oficyna Wolters Kluwer Biznes 2009, s. 36−62.
[19] See art. 31 ust. 3 Konstytucji RP.
[20] See . art. 90 Konstytucji RP.

party financing, adapt national legislation to these requirements and to monitor the practice of their application.

3. The European standards of the public financing of national political parties

The Council of Europe is not a direct regulator of the funding of political parties operating at a national level. In Polish conditions, the Council is not legitimated by constitutional standards to issue regulations which impose on political groupings theobligation of a particular behaviour. It formulates recommendations to its Member States. They constitute suggestions of the European community as an expression of its knowledge about the mechanisms of functioning of modern parliamentary democracy and as a will to strive to achieve the expected results[21].

The public funding of political parties is generally justified on the grounds of anti-corruption measures. There is no doubt that the recommendations of the Council of Europe should be seen as instruments of overcoming the pathological phenomena of corruption in politics. Corruption occurrences endanger the foundations of those values and are detrimental to the practices of good governance, fairness, social justice, competition and economic development, the stability of democratic institutions and the moral foundations of the society[22]. The Council uses diverse, interrelated instruments to combat corruption which include: the establishment of European norms and standards, the monitoring of their application in Member States and providing support to individual countries and regions in appropriate modifications of their internal solutions. These instruments aim at improving the capacity of countries to counter corruption at both national and international level[23].

It should be underlined that fighting corruption is a top priority, but still not the only objective of the Council of Europe. The purpose behind creating this international organization was to increase unity among its members in order to safeguard and realize the ideals and principles belonging to the common heritage of European peoples and facilitate their economic and social progress[24]. Signatories to the agreement acknowledged that the preservation of human society and civilization is subject to the pursuit of peace based upon justice and international cooperation. They declared their

[21] J. Jaskiernia, *Partie polityczne w systemie demokratycznym w świetle standardów Rady Europy*, w: Prawne aspekty funkcjonowania partii politycznych w państwach Europy Środkowej i Wschodniej, red. A. Domańska, K. Skotnicki, Łódź 2003, s. 56.

[22] Preamble to the Preamble to the Legal-criminal convention on the corruption drafted in Strasbourg 27 January 1999, ratified by Poland with act from 5 June 2002, published in Dz. U. z 2002 r., Nr 126, poz. 1066.

[23] *The Fight against Corruption: a Priority for the Council of Europe*, http://www.coe.int/t/dghl /monitoring/greco/general/1.%20The%20Fight%20against%20Corruption%20-20A%20Priority%20 for%20the% 20CoE_en.asp.

[24] See art. 1 let. a Statute of The Council of Europe, adopted in London 5.05.1949 r., Polish version was published in Dz. U. z 1994 r. nr 119, poz. 565, appointed farther as Statute of The Council of Europe

commitment to spiritual and moral values which constitute the common heritage of their peoples and the source of individual freedoms, political liberties and the rule of law - therefore the basis of any true democracy[25]. Statutory duty of every member of the Council of Europe is to follow the rule of law and the principle that all persons within its jurisdiction shall enjoy human rights and fundamental freedoms[26]**.** Statutory objectives are realized as a result of discussing questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realization of human rights and fundamental freedoms[27].

The development of model solutions for the operation of political parties in the system of parliamentary democracy does not go beyond the competences of the Council of Europe[28]. It can be seen as the performance of statutory duties by organizational structure of this international body. It is worth underlining that these duties do not refer directly to the issue of political party financing, nor corruption itself. In 1949, the year of signing the Statute of the Council of Europe[29], the issue of settlement of the status of political parties and the question of eliminating irregularities in their financing was not a significant problem for the society. During the Cold War and the expansion of communist ideology however, there occurred a real threat to peace, human rights and freedoms and the functioning of pluralist parliamentary democracy[30]**.**

The Standardization of party finances is not a mandatory goal for the Council of Europe, nor is it necessary to fulfil its system of values. A similar system of values is the backbone of the European Union. EU law does not impose specific solutions on Member States in the area of supporting political groupings with public funds. However the Council of Europe not only created such standards, but also is standing out amongst other European organizations in terms of the mechanism of accustoming them into force[31]. The Council exerts strong pressure on Member States that is characterized by high efficiency in shaping the legislative solutions at the national level and in practice of their application. Doubts arise around the justification of such far-reaching external interference in domestic social relationships that traditionally are subject to the sphere of state sovereignty.

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[25] See preamble to Statute of The Council of Europe.
[26] See art. 3 Statute of The Council of Europe.
[27] See art. 1 let. b Statute of The Council of Europe.
[28] Z. M. Klepacki, *Rada Europy 1949–1991*,Białystok 1991, s. 51.
[29] It is the oldest European international organization.
[30] Still the original values incorporated in Statute of The Council of Europe remain actual.. The fall of totalitarian regimes was not equivalent to a universal and complete acceptance of the axiological system of the Council of Europe. See for example W. Sokolewicz, *The Influence of external Factors on Consolidation of Liberal Democracy In Poland. The Constitutional Dimension*,in: *Democratic Consolidation − The International Dimension: Hungary, Poland and Spain,* G. Mangott (ed.), H. Waldrauch, S. Day, Baden-Baden 2000, p. 73.
[31] J. Jaskiernia, *Partie polityczne ..., op.cit.,*, s. 52.

When formulating recommendations to its Member States the Council of Europe does not limit itself to achieve statutory objectives only[32]. Pluralist parliamentary democracy in connection with the rule of law and human rights merely constitute foundations to construct a standard solution in political party financing that is substantially broader in essence, more precise and more practical in the application[33]. This specificregulatory constructivism is expressed in the pursuit of such forming of internal relations in Member States so that the political parties are able to carry out their functions properly[34]. After successfully establishing a model solution, the Council of Europe no longer formulates alternative solutions for Member State to choose from, nor does it indicate their advantages and disadvantages. The Council promotes the only one standard that is perceived as optimal from the standpoint of the international community and enforces its piratical implementation in the national law. Forced Europeanization thus causes a gradual unification of different values (principles) of legal systems in different European countries and measures for their implementation[35]. This is done without understanding the importance of internal determinants of national law which require individualized adaptation processes of international organizations output.

Exerting anti-corruption pressure on European countries has an institutional dimension. Seventeen European countries represented in the Committee of Ministers of the Council of Europe found it important to bring to life the Group of States against Corruption (GRECO) as a necessary organizational structure for the integration of European countries, including those having no formal member status of the Council, in order to effectively prevent and combat corruption. The founders acknowledged that thanks to peer evaluation and mutual pressure by signatories to the agreement the new organization will be able to monitor in a flexible and efficient manner the observation of the goals and implementation of international instruments against corruption adopted by the Council of Europe. They made a reservation, however, that full membership of

[32] J. Jaskiernia, *Partie polityczne …, op.cit.,*, s. 55.
[33] H. Klebes, D. Chatzivassiliou, *Problemes d'ordere constitutionnel dans le processus l'adhesion d'Etats de l'Europe cantrale et orientale au Conseil de l'Europe*„„Revue Universelle Des Droits de'homme" 1996, No. 8−9, s. 296; D. Huber, *A decade which made history. The Council o Europe 1989−1999*,Strasbourg 1999, p. 61.
[34] J. Jaskiernia, *Partie polityczne…, op. cit.*,s. 54.
[35] R. Harmsen noticed that the EU operated on the principle of the standardization of regulations and the practice of their application. Certain solutions become Community standards and are applied in the same way in all Member States. See Harmsen, *Europeanization and governance: a New institutionalist perspective*, in: *Europeanization: Institutions, Identities and Citizenship*„„Yearbook of European Studies" 2000, No. 14,p.72. Undoubtedly such standardization includes also the relation between the Council of Europe and its Member States. In this context W. Walecki is using wordings "homogenization", "standardization" for emphasising the influence of this organization on domestic regulation. See W. Walecki, *The europeanization of Political Parties: Influencing the Regulations on Political Parties.*, European University Program "EUI Working Papers MWP, 2007, No. 29, p. 4.

the GRECO may be received only by those countries, which without any reservation will participate in joint assessment procedures and in mutual acceptance of its results[36].

GRECO'S statutory objective is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field[37].This objective is achieved by monitoring the observance of the Guiding Principles for the Fight against Corruption and the implementation of international legal instruments to be adopted in pursuance of the Programme of Action against Corruption[38]. Each member of the GRECO is assessed according to uniform criteria described in the questionnaire, which is held in separate evaluation rounds[39]. Appointed teams of experts examine the replies given to the questionnaire. They may also request additional information from the member undergoing the evaluation, to be submitted either orally or in writing[40]. It is worth noting that subject to evaluation is not only the legislation of a Member State, but also the practice of its application[41]. Evaluation reports from the monitoring process are made accessible in compliance with the rule of confidentiality and the group of entities having access to these documents is restricted to members of the expert group, the evaluated state, other Member States and the statutory bodies of the GRECO[42]. However, in practice, with the agreement of the evaluated state reports are made public, including via the Internet.

The advantages of the evaluation procedures are the detailed regulation of their course formulated in the Statute of GRECO, the general scope of application involving all Member States and a wide range of research, which extends over the use of legal instruments to prevent or combat corruption. From a formal point of view, the evaluation procedures take into account the interests of the evaluated state, which must be informed beforehand about the time of the visit of expert group, arranges the programme of evaluation work, receives a preliminary draft evaluation report, has the right to comment on this document, may participate in the vote on the adoption of the evaluation report[43]. In practice, however, GRECO member undergoing evaluation may be outvoted. In such situation, evaluation report adopted in a version unaccepted by the outvoted member becomes binding for him. What is more, it may include recommendations for specific actions to improve the domestic law or practices[44]. These recommendations are binding for the Member State which may be called on to submit

[36] Resolution (99)5 Committee of Ministers Council od Europe establishing The "Group of states against corruption – GRECO", adopted on 1 may 1999, http://conventions.coe.int/ Treaty/ EN/ PartialAgr/ Html/ Greco9905.htm, appointed farther as Resolution (99)5.
[37] See art. 1 Statute of GRECO attached to the Resolution (99)5.
[38] See art. 2 Statute of GRECO.
[39]Compare art. 10 i art. 11 Statute of GRECO.
[40] Compare art. 12 i art. 113 Statute of GRECO.
[41] See art. 14 Statute of GRECO.
[42] See art. 15 ust. 5 Statute of GRECO.
[43] Compare art. 13 ust. 2 i 3, art. 14 ust. 2 , art. 15 ust. 2 i 4 Statute of GRECO.
[44] See art. 14 ust. 6 Statute of GRECO.

reports on their implementation. Passiveness in their implementation may result in condemnation of the Member State through the issuance of a critical public statement by the Statutory Committee[45].

The disadvantage of the evaluation procedures is the imposing on Member States od the coercive use of specific anti-corruption measures. Consequently, the Europeanisation of political party financing via the GRECO is compulsory in the sense that a member of this organization is forced to accept external solutions and changes in domestic law and practice. This solution means a loss of typical prerogatives of the sovereign, which are transferred from nation state to international organization. Moreover, focusing merely on the aspects of fighting corruption while omitting other aspects of the appropriate functioning of political parties can lead to the incorporation of instruments and solutions unadjusted systemically to the national legal system, which is non-functional, useless or even harmful.

The funding systems of political parties of GRECO Member States have been subject to assessment in the third round of the evaluation process on their compliance with the European standards. The monitoring aims to determine whether national regulations and their application provide transparency of party finances. Poland was in the first group of 22 countries out of 47 Member States, which received their evaluation reports before the end of 2009. The analysis of this information helps to determine that in some cases national solutions are even more far-reaching than the recommended standards. Also the large discrepancy between the letter of the law and its practice is noticeable. Political systems of individual countries may differ significantly, but all should take into account the European standards, which reflect the universal and the same democratic values. Acknowledging the existence of problems and weaknesses in the financing of party activities in different countries can be an impulse for the acquisition of good legislation and practices from abroad and for implementing them in a Member State[46].

The European standards determine the scope of the evaluation[47]. In general terms the scope is determined by the 15th guiding principle[48], calling up the European countries to adopt the codes of conduct and promote those principles of the financing of political parties and election campaigns which can stop corruption. The principle is detailed in the recommendation of the Committee of Ministers of the Council of Europe on common rules applied to combat corruption in political party funding[49]. It has been

[45] See art. 16 Statute of GRECO.
[46] J. M. Doublet, *Political financing: GRECO's first 22 evaluations, Third evaluation round.*, http://www.coe.int/t/dghl/monitoring/greco/documents/2010/Greco(2010)8_RapportYVDoublet_EN.pdf, p.11.
[47] See point 2 Evaluation Report.
[48]Resolution (97) 24 on the twenty guiding principles for the fight against corruption, adopted by the Committee of Ministers on 6 November 1997 at the 101st session of Committee of Ministres,, http://www.coe.int/t/dg1/greco/documents/resolution(97)24_EN.pdf,
[49] See art. 8, 11, 12, 13b, 14 i 16 Recommendation Rec (2003)4.

recommended to use effective, proportionate and dissuasive sanctions against political parties violating the regulations on the financing of political parties and electoral campaigns. It has been also considered that the principles of political parties financing should also apply respectively to the funding of election campaigns and the financing of political activity of the elected representatives. In particular, Member States should enforce the maintenance of registers including all direct and indirect election expenses incurred by any political party, lists of candidates or individual candidates. Political parties and associated entities are obliged to keep the books of account reliably and prepare consolidated financial reports. They should also identify donors from whom they receive increments in amounts exceeding the value of a single donation established in the legal regulations, as well as register the donors in the accounting documents. Moreover, it has been recommended that the parties draw up regularly, at least once a year, financial reports and information about the donations received, submit these documents to the supervisory bodies, and make public the financial data included in these documents. Member States should implement an independent monitoring of the funding of political parties and election campaigns, which also includes the supervision of the accounts of political parties and their expenditure. Finally, the publication of the audit findings has been recommended.

The evaluation is focused on three crucial issues: transparency in the funding policy,monitoring its compliance with legal regulations and punishing entities violating these rules[50]. Different conclusions arise when analysing the structure the catalogue of common principles for the fight against corruption in financing political parties included in European regulations[51]. The European standards are in fact grouped in six main categories covering: external sources of political party financing, sources of financing of candidatesin elections and elected officials, campaign expenditure, transparency, supervision and sanctions. Therefore, from the very fact of the specific grouping of standards in the evaluation reports follows that the assessment of national resolutions is aimed at fighting corruption, rather than at a comprehensive description of the mechanisms of political parties financing. Typically enough, the subject of the monitoring process is described in a way which marginalizes public funding and focuses on private financing[52]. A relatively large part of the Evaluation Report regards

[50] Y. M. Doublet, *Political financing: GRECO's first…, op. cit.*,p. 4.

[51] See Appendix to Recommendation Rec (2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns,Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers' Deputies, http://www.coe.int/document-library/default.asp?urlwcd=https://wcd.coe.int/ViewDoc.jsp?id=2183, appointed farther as Recommendation Rec (2003)4.

[52] It concernes not only not distinguishing of the financing with public means amongst key issues, but also three times lower number of points (only 3) devoted to this form, whereas as many as 10 points of the Evaluation Protocol regard discussing private financing. See points 28- 40 *Third Evaluation Round, Evaluation Report on Poland on Transparency of party funding (Theme II),* adopted by GRECO at its 40th Plenary Meeting (Strasbourg, 1-5 December 2008),

the financing of election campaigns, including those which need not be associated with the activity of political parties[53]. Despite its name, this document contains a broader range of problems, going beyond the scope of financing activities of the party, but still referring to the financing of the politics in the Member State.

The first common principle of fighting the corruption in financing refers directly to the public financing of political parties [54]. The very fact of being mentioned in the first place among all the 16 rules shows the importance of this European standard. It determines the relation between public and private funding of political groups, analyzed in the context of external sources of their financial powering.Both citizens and Member States are entitled to support the party, also in a financial way. State aid should be limited to a reasonable size. The Council of Europe also recommends that objective, fair and reasonable criteria should be applied when allocating this funding. Member States should apply these solutionsso that any support from the state or citizens does not collide with the independence of political parties.

Although the first common principle of fighting corruption was not named amongst declared standards provided with the monitoring in Poland, it was subject to an accurate analysis in the Evaluation Report[55]. The dominance of public means in financing party activity does not have any exceptional nature, but is a permanent feature of the system of party finances in Poland. It has been established, that on average about the 80% of the income of the party is transferred in form of state support.This results in significant state dependence of political parties, which violates the European standards. Therefore it cannot berecognized as a solution limited to reasonable contributions. Furthermore, it has been accurately noticed that such an exaggerated role of public means in financing party activity improves the impact force of financial sanctions.

The model of political parties financing in Poland has a strongly disjunctive character, of which signs are separate regulations referring to the election activity of political groups and their core activity[56]. The evaluation of these legal solutions is unfavourable for Poland. The regulations are namely very complex, contain inaccuracies and too many repeated references to the contents of other enactments

The rating ending the evaluation procedure is beneficial to Poland[57]. GRECOacknowledged that domestic regulations of financing the national politics were at a good level and to a large extent were compliant with the European standards. Legislative changes in recent years have led to positive consequences in the pursuit of transparency in the activities of political groups.

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http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2008)2_Poland_One_EN.pdf, appointed farther as Evaluation Report.

[53] In particular it regarded the elections to the local government authorities and representative bodies

[54] See art. 1 Recommendation Rec (2003)4.

[55] See points 29 and pt 77 Evaluation Report.

[56] See point 78, 79, 88 and 89 Evaluation Report.

[57] See point 89 Evaluation Report.

4. Summary

The nature of financial sovereignty of contemporary European states is being redefined as a result of the progressing integration within the framework of the European Union, as well as their membership of the Council of Europe. This is the effect of a complex process of Europeanization,manifesting itself inter alia in the permeation of European solutions to the national law and practice.

The European standards of the public funding of national political parties constitute an instrument of compulsion exerted by the Council of Europe on her Member States. The EU law does not regulate this matter. Poland has not transferred its entitlements as the regulator of the finances of national political groups to the Council of Europe. From a formal-legal view, the financial sovereignty of the state has not been reduced. The Polish Constitution does not authorize the Council of Europe to exert such a great pressure on the contents of provisions governing political parties financing, neither does it include their recommendations to the universally binding law in Poland. The large role of European standards in the shaping of the public funding of national political parties results from ceasing by the state to execute some of its attributes of financial sovereignty and from fulfilling the membership duty of complying to decisions of the statutory bodies of the Council of Europe and its auxiliary organizational structure GRECO appointed to fight corruption occurrences.

Therecommendations of the Council of Europe are a sign of the concept of legal constructivism. They are formulated as exclusive instruments, principles and procedures of financing party activity, which are accepted by the European community, rather than being alternative solutions. They reflect the statutory values of this international organization and are not always in accordance with axiological justification of the Polish law system. In practice, the European standards set limits to permissible modifications of the national regulations of political activity financing. On one hand, the Europeanization of the Polish law means the implementation of proven and advantageous external solutions. On the other hand, it leads to stiffening legal solutions and hampers their adaptation to new social, political and economicconditions. The recommendations of the Council of Europe constitute primarily anticorruptioninstruments, although their application is also justified by the needs of parliamentary democracy, the rule of law and human rights protection. The recommendations however do not consider the fiscal determinants of the public financing of political parties, which are particularly important in the global financial crisis. This hinders the amendments to the Polish law on political party financing and impedes the optimization of the expenses from the state budget incurred by political groupings. Therefore it shall be recognised that an uncritical adoption of external solutions within the compulsory Europeanization of the domestic law is not an appropriate solution. This refers especially to the situation when the constitutional

determinants of the Europeanization and the specificity of economic, political and social relations in particular European countries are not taken into consideration.

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Социальная сущность банковской деятельности – основа системы региональных банков в России.

(Social Main of Banking Activity as Fundament the System of Regional Banks in Russia)

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Аннотация: Статья представляет собой теоретический и правовой анализ проблем в регулировании банковской деятельности и в банковской системе России после финансового кризиса. В работе показаны наиболее важныенаправления деятельности банков в условиях экономического кризиса и развитие системы региональных банков в России. Автор статьи попытались проанализировать правовые акты о государственнойпомощи банкам, корпорациям, предприятиям и другим участникамрыночной экономики.

Ключевые слова: банковская система, кредитные организации, банковский кризис, рыночная экономика, банковская деятельность,региональные банки, федеральные банки, местные банки.

Abstract: This article presents a complex theoretical and legal analysis of the problems in regulation of banking activity and in the Russian banking system past financial crisis. The paper shows the most important activity of banks in conditions of the economic crisis and development the system of regional banks in Russia. The author of the article has tried to analyze legal acts about help of state for banks, corporations, enterprises, employers and other participant of real economic.

Keywords: banking system, credit organization, banking crisis, market economies, banking activity, regional banks, federal bank,community bank.

Раскрывая роль коммерческого банка с позиций современного финансового права, мы определяем его как основной институт второго уровня банковской системы и субъект банковской деятельности, аккумулирующий, перераспределяющий и использующий денежные средства всех денежных фондов национальной финансовой системы, а также как представителя

публичных интересов государства. Все это в равной степени относим к региональным и местным банкам.

Банковские отношения, возникающие в системе региональных банков, имеют множественную природу: одновременно они объединяют правовые, экономические, публичные и частные начала возникновения и развития этого вида общественных отношений. Деятельность регионального и местного банка при осуществлении банковских операций и сделок направлена как на получение прибыли, так и укрепление своей финансовой устойчивости на региональном рынке банковских услуг. Финансовая устойчивость регионального и местного банка, в силу его территориальной принадлежности, приобретает, на наш взгляд, некоторый социально-этический аспект. Быть созданным в конкретной местности, регионе, знать клиентов в лицо, и при этом собрать свободные денежные средства и уйти с рынка, ему значительно сложнее, нежели филиалу или иному подразделению нерегионального банка, поскольку его участников клиенты тоже знают в лицо. То есть возникает момент социальной ответственности за ведение банковского бизнеса в пределах определенной территории.

Таким образом, деятельности региональных и местных банков присущ публичным характер.

Региональный банк наряду с другими банковскими кредитными организациями аккумулирует в форме кредитного ресурса денежные средства различной формы собственности, формируя при этом собственный капитал для дальнейшего перераспределения и использования. В отличие от федеральных банков региональный банк свой кредитный ресурс может вкладывать только в региональную экономику.

Этот банковский денежный фонд, функционирующий в условиях рыночной экономики как совокупность государственных и частных денежных средств, взаимопроникающих друг в друга, порождает ответственность определенного круга лиц, ограниченного территориально.

Дополнительно региональные банки обладают рядом преимуществ, важных для развития экономики. Они лучше интегрированы в экономическую среду регионов, ближе взаимодействуют с ассоциативными организациями товаропроизводителей, активнее развивают свою сеть. Для России, страны с большой по площади территорией, очень важно иметь развитую банковскую систему, в том числе и в малых населенных пунктах. Региональные банки приобретают приоритет за счет оперативного принятия решения, к примеру, кредитным комитетом, а федеральный, системообразующий банк вынужден ждать решения из Москвы.

С позиций современного финансового права региональный банковский капитал как денежно-кредитный ресурс одновременно рассматривается в

качестве, как составляющей финансовой системы Российской Федерации, так и фонда денежных средств хозяйствующих субъектов и организаций определенного региона.

Важным методологическим вопросом остается вопрос о допустимости в российскую банковскую систему региональных и местных банков одновременно в качестве дополнительных источников финансовой информации и носителей административной правосубъектности.

Банки как основные участники банковской деятельности и обязательные субъекты банковских правоотношений обладают уникальной информацией о многих процессах в жизнедеятельности общества. Кредитные организации, осуществляя самостоятельную банковскую деятельность путем совершения банковских операций и функционирования кредитно-банковской системы, оказывают различное регулирующее воздействие на общественно-экономические процессы.

Административная правосубъектность банков проявляется через их значение как организационно-правовых институтов в государственном управлении, обусловленное тем, что банковская деятельность и возникающие в связи с ней правоотношения опосредуют всю финансовую деятельность государства и общества, все связи и взаимозависимости, проявляющиеся и происходящие в денежной форме.

По мысли В.Ф.Яковлева, «… государство в России должно прийти в экономику, но не в прежней роли собственника и управленца, а в новой роли, в качестве силы, способной установить цивилизованные правила в рыночной экономике и обеспечить их соблюдение»[1].

Государство должно не подменять собой бизнес, а создавать условия для его развития, прежде всего, в банковской сфере экономики. На наш взгляд, это весьма важное правило, касающееся вопроса формирования сети региональных банков. Будущее России во многом зависит от регионов, и региональные банки представляют собой опорную базу для стимулирования процессов в региональной экономике. Без системы региональных банков невозможно кредитование малого и среднего бизнеса. Международные институты выделили денежные средства на поддержание малого и среднего бизнеса, однако их передача в реальную экономику при отсутствии организационно-правового механизма значительно затруднена. С точки зрения экономической теории происходит трансформация публичных финансов в частные посредством их перераспределения. Этот процесс нуждается в глубоком теоретическом осмыслении норм финансового права в связи с необходимостью установления пределов и форм его регулирования.

[1] Яковлев В.Ф. Россия. Экономика, гражданское право. – М., 2000. С.153.

В науке финансового права формируется новая тенденция разделения финансов и соответственно финансового права на государственные и публичные. Так, М.Ф. Ивлиева отмечает, что «частные финансы подчиняются законам рыночной экономики, публичные находятся под воздействием публичной власти, порождаются актами данной власти»[2].

На наш взгляд, публичный характер банковской деятельности раскрывается посредством концентрации в банковском денежном ресурсе и частных, и публичных финансов, что формирует объективную необходимость финансово-правового или публично-правового регулирования банковских отношений и банковской деятельности.

При этом очевидно, что приоритет гражданско-правового метода регулирования банковской деятельности объективно нельзя сохранить, поскольку он не обеспечивает полноценное, всестороннее правовое регулирование банковских отношений.

Банковская деятельность от других видов предпринимательской деятельности отличается тем, что как вид финансовой деятельности государства и общества она оказывает системное влияние и на экономическую, и на общественную жизнь общества. Кризис в банковской сфере влечет за собой системный сбой в экономике государства, оказывающий синергетический эффект, связанный в том числе со снижением уровня жизни населения, нарастанием духовного кризиса, психологическихдевиаций.

Концентрация денежного ресурса в системе региональных банков – во многих случаях единственно возможный путь решения соответствующей экономической или социальной задачи.

Феномен банковской деятельности, в равной степени свойственный и региональному банковскому капиталу, обусловлен высокой экономической, политической и социальной активностью этого вида человеческой жизнедеятельности, данного денежного ресурса. Глубоко проникая в производственную и непроизводственную сферы экономики, общество и государство заинтересованы в созидательном влиянии на их состояние и развитие.

Противопоставление при государственном регулировании публично-правовых начал и частноправовых форм в условиях современного социально-экономического развития неэффективно. В этой связи уместно вспомнить точку зрения В.Ф.Яковлева, полагающего, что использование публичного права для регулирования частноправовых отношений возможно и необходимо как в явной, открытой форме, так и путем вмешательства в регулирование этих отношений с

[2] Ивлиева М.Ф. Пределы и механизмы правового регулирования государственных и частных финансов/ В кн.: Финансово-правовая доктрина постсоциалистического государства. – Черновцы, 2003. С.58.

использованием приемов и механизмов публичного права (запретов, санкций, иных мер принуждения)[3].

Публичные аспекты банковской деятельности и роль банка как субъекта финансовой деятельности государства обусловливают возникновение у него публичных обязанностей по возвратности и сохранности стоимостной ценности денежных средств кредиторов, а также обеспечению в процессе организации и функционирования своей собственной финансовой устойчивости и стабильности. С точки зрения финансового права, данное положение позволяет рассматривать коммерческий банк полноценным субъектом финансового права, а публичные аспекты банковской деятельности формируют потребность финансово-правового регулирования.

Региональные банковские кредитные организации как основные субъекты и системы региональных банков, и банковских правоотношений, выполняющие функцию обеспечения публичных интересов, непосредственную связь между распределительной и производственной сферами региональных экономик реализуют в воспроизводственном процессе. Осуществляя депозитные, кредитные и расчетные операции, банки в рамках банковских правоотношений опосредуют движение денежных средств всех звеньев финансовой системы. В этой связи региональные банки справедливо определить в качестве финансово-экономических агентов государства в управлении общественно-экономическими процессами.

Раскрывая публичную сущность деятельности регионального банка, представляется важным в экономической и правовой теории установить, что в целом содержание банковской деятельности не ограничивается экономическими мотивами и предпринимательской целью получения прибыли. Современные условия развития государства и общества обуславливают усиленное проявление в банковской деятельности иной по природе, но равноценной по своему значению, общественной задачи этой деятельности, состоящей в обслуживании национальной экономики, гарантирующей ее эволюционное, стабильное и инновационное развитие.

Исходя из принципа публичности, в региональной банковской деятельности важное значение приобретает принцип стимулирующего воздействия банковской деятельности на экономические отношения и процессы.

Анализ норм Конституции РФ, Закона о банках (в ред. Федерального закона от 03.02.1996 № 17-ФЗ)[4], Закона о Центральном банке Российской Федерации (в ред. Федерального закона от 26.04.2007 № 63-ФЗ)[5], иных законодательных актов, регулирующих отношения, связанные с банковской

[3] Яковлев В.Ф. Россия: экономика, гражданское право. – М., 2000. С.175.
[4] Собрание законодательства РФ. 05.02.1996. № 6. Ст. 492.
[5] Собрание законодательства РФ. 15.07.2002. № 28. Ст. 2790.

деятельностью, позволяет утверждать, что на законодательном уровне принцип публичности в банковской деятельности не закреплен. Статья 43 Закона о банках, обязывающая кредитную организацию публиковать в открытой печати годовой отчет (включая бухгалтерский баланс и отчет о прибылях и убытках), лишь частично гарантируют соблюдение начал открытости и гласности при осуществлении банковской деятельности.

В связи с мировым финансовым кризисом дополнительную актуальность приобретает вопрос о необходимости закрепления в законе принципа публичности в банковской деятельности.

Предпринимаемые правительствами различных государств антикризисные меры в основном состоят в поддержании своих экономик путем перераспределения через банковскую систему публичных денежных фондов.

В отношении системы региональных банков этот принцип приобретает особое значение в связи с одновременным существованием нескольких доводов, позволяющих ставить вопрос о необходимости его закрепления в законе и введения в правовое регулирование банковской деятельности.

Бюджет любого государства, представляя в общем виде основной денежный фонд государства, включая бюджеты субъектов и муниципальных образований, обеспечивается, как правило, средствами налогоплательщиков, которые аккумулируются, перераспределяться и используются через банковскую систему. Взаимозависимость и взаимосвязь финансовой деятельности государства и банковской деятельности, финансовой системы государства и банковской как ее составной части очевидна.

В отношении системы региональных банков такая деятельность приобретает характер локализованной ответственности кредитной организации за свою деятельность. С одной стороны, вкладчики и кредиторы в регионе знают друг друга и должника в лицо. С другой, финансовая деятельность исполнительных органов субъекта или муниципального образования, осуществляемая через банки, придает банковской деятельности публичный характер. Банки становятся ответственными за своевременное поступление денежных средств из публичных фондов в реальный сектор экономики, их целевое использование хозяйствующими субъектами. Кредитные организации, и в первую очередь банки, при трансформации государственных или муниципальных денежных средств в денежный фонд хозяйствующих субъектов выступают финансовыми представителями государства или муниципального образования. Традиционная роль банка как финансового посредника в рыночной экономике дополняется функцией представителя публичных интересов государства и муниципального образования.

Указанные процессы одновременно повышают ответственность государства и муниципальных образований перед налогоплательщиками за

эффективное использование финансовых ресурсов, что формирует потребность совершенно специфического правового регулирования. При этом принцип публичности как принцип правового регулирования банковской деятельности способен, на наш взгляд, гарантировать недопустимость развития тоталитарных элементов в государственном регулировании банковской деятельности.

Структурируя на основе принципа субординации российскую банковскую систему в два уровня, нижний, из которых включает кредитные организации, выполняющие свою функцию по предоставлению банковских услуг, система одновременно может подразделяться на звенья на основе принципа территориального регулирования и функционального назначения. При этом во втором, нижнем уровне кредитные организации могут подразделяться на звенья, например федеральные банки, региональные банки, местные банки.

Для регулирования в системе региональных банков также имеет значение принцип эффективности или результативности.

Учитывая изложенное, попытаемся сформулировать отдельные понятия, на наш взгляд имеющие важное значение для развития теории финансового права и банковского законодательства.

Понятие «региональная банковская система» в действующем российском банковском законодательстве отсутствует. В банковской практике данное понятие определяется как совокупность кредитных организаций, действующих на определенной территории. При этом, регион обычно противопоставляется столице. Таким образом, под этим термином подразумевается банковская система Российской Федерации, за исключением кредитных организаций, расположенных в столице.

Следует отличать региональную банковскую систему от системы региональных банков. Первая (региональная банковская система) включает в себя кредитные организации, зарегистрированные на территории того или иного региона, за исключением их подразделений, действующих в других регионах, а также филиалы, представительства, операционные и кредитно-кассовые офисы столичных банков, функционирующие на соответствующей территории. Вторая же (система региональных банков) состоит из кредитных организаций, зарегистрированных в том или ином регионе, и включает все их подразделения, независимо от территории их функционирования.

Центральный банк РФ в своих публикациях под региональными банками понимает банки, зарегистрированные вне Московского региона, то есть вне города Москвы и Московской области[6].

[6] См., например: сноска 2 Отчета о развитии банковского сектора и банковского надзора в 2006 году – ЦБ РФ, 2007, с.13; сноска 6 Отчета о развитии банковского сектора ибанковского надзора в 2007

Отдельным вопросом является система столичных региональных банков. Москва также является субъектом федерации, как и любой другой регион. При этом Московская область также является самостоятельным субъектом федерации. Тем не менее, в банковской практике в понятие московского региона включается 2 субъекта федерации: город Москва и Московская область. Эта практика нашла свое закрепление и в действиях регулятора: надзор за банками, функционирующими на территории Москвы и области, осуществляет единое Московское главное территориальное управление Банка России.

По нашему мнению, банки можно подразделять на общефедеральные и региональные. Кстати, подобная градация нашла свое отражение в Законе СССР от 11.12.1990 «О банках и банковской деятельности»[7], в пункте 2 статьи 6 «Коммерческие банки и их виды» которого «коммерческие банки различаются … по территории деятельности – общесоюзные, республиканские, региональные».

К федеральным банкам следует отнести крупные банки, действующие на территории всей страны. При этом совсем не обязательно, чтобы это были столичные банки. Самым безусловным примером такого общефедерального банка, головной офис которого находится не в Москве, с недавних пор является «Банк ВТБ», перерегистрированный в Санкт-Петербурге; уставный капитал этого практически государственного[8] банка составляет почти 105 млрд.руб. Другим примером общефедерального банка, головной офис которого расположен в регионе, является «МДМ Банк». Его головной офис расположен в Новосибирске, при этом в Москве находится 1 из 38 филиалов этого банка; уставный капитал этого одного из крупнейших частных банков страны составляет почти 4 млрд.руб., при этом он является крупнейшим частным немосковским банком.

Одновременно возможно банки подразделять на федеральные, региональные и муниципальные.

Федеральные, или общенациональные, банки действуют на территории всей страны.

Федеральные банки вправе создавать филиалы и представительства, а также кредитно-кассовые офисы и обменные пункты во всех населённых пунктах на территории всех субъектов федерации. Федеральные банки также вправе в установленном порядке создавать филиалы и представительства за рубежом. Федеральный банк вправе также открывать операционные офисы в населённых пунктах на территории субъектов федерации, входящих в федеральный округ, в котором такой банк имеет головную контору или филиал. Федеральный банк вправе открывать дополнительные офисы и операционные кассы в населённых

году – ЦБ РФ, 2008, с.14; сноска 7 Отчета о развитии банковского сектора и банковского надзора в 2008 году – ЦБ РФ, 2009, с.12.

[7] "Ведомости СНД и ВС СССР", 1990, N 52, ст.1155.

[8] Основным акционером «Банка ВТБ» с долей 85,5% является Правительство РФ.

пунктах на территории субъектов федерации, подведомственных территориальному управлению Банка России, осуществляющему надзор за головной конторой или филиалом этого федерального банка.

Минимальный размер собственных средств (капитала) для федерального банка устанавливается федеральным законом и не может составлять менее 180 миллионов рублей.

Региональные банки действуют на территории одного региона (субъекта федерации или федерального округа).

Региональные банки не вправе создавать филиалы и представительства за рубежом. Региональный банк также не вправе открывать филиалы на территории других федеральных округов (то есть за пределами того федерального округа, на территории которого зарегистрирована его головная контора); тем не менее, он вправе открывать филиалы, операционные офисы, кредитно-кассовые офисы и обменные пункты в населённых пунктах на территории субъектов федерации своего федерального округа. Региональный банк вправе открывать дополнительные офисы и операционные кассы в населённых пунктах на территории субъектов федерации (в пределах своего федерального округа), подведомственных территориальному управлению Банка России, осуществляющему надзор за головным офисом или филиалом этого регионального банка. Для представительских целей региональные банки вправе открывать представительства на территории всех субъектов федерации.

Региональные банки не вправе создавать дочерние банки за рубежом и не могут участвовать в капитале других зарубежных кредитных организаций.

В формировании уставного капитала регионального банка могут быть использованы средства бюджетов субъекта или субъектов федерации, государственных учреждений и предприятий соответствующих субъектов федерации. Минимальный размер собственных средств (капитала) для регионального банка устанавливается федеральным законом и не может составлять менее 90 миллионов рублей.

В наименовании регионального банка должно содержаться указание на регион (федеральный округ) или субъект федерации, на территории которого он осуществляет свою деятельность, например: Северо-Кавказский региональный банк, Пермский краевой расчетный банк, Ярославский областной банк сбережений.

Местные (муниципальные) банки действуют на территории одного поселения (города, поселка, сельского поселения) или муниципального района.

Местный банк не вправе создавать филиалы за рубежом, а также вне поселения или муниципального района, на территории которого расположен головной офис такого банка. В целях решения задач по представлению интересов в органах власти и управления, а также в судебных органах, местный банк вправе

открывать представительства в административном центре района и/или субъекта федерации, на территории которого находится его головной офис. Местный банк вправе создавать свои филиалы, операционные, дополнительные и кредитно-кассовые офисы, операционные кассы и обменные пункты только на территории своего поселения или муниципального района.

Местные банки не могут иметь генеральную лицензию. Местные банки не вправе открывать корреспондентские счета за рубежом, а также не могут открывать и вести счета как банков-нерезидентов, так и банков-резидентов (корсчета типа «ЛОРО»). Они также не вправе выдавать кредиты физическим и юридическим лицам, не зарегистрированным на территории соответствующего поселения или муниципального района. Местные банки не вправе создавать дочерние банки и участвовать в капитале других кредитных организаций. Местные банки не могут являться головными кредитными организациями в составе банковской группы.

В формировании уставного капитала местного банка могут быть использованы средства местного бюджета, муниципальных учреждений и предприятий. Минимальный размер собственных средств (капитала) для местного банка устанавливается законом субъекта федерации в пределах, установленных федеральным законом.

В наименовании местного банка должно содержаться указание на поселение или муниципальный район, на территорию которого он осуществляет свою деятельность, например: Рязанский городской коммерческий банк, Новопокровский районный земельный банк.

Раскрытие в содержании банковской деятельности социальной составляющей или социального компонента аспект в научно-правовой и экономической теории, а также и практике банковского дела не новый. В своем исследовании мы исходим из позиции, выработанной в теории финансового права, согласно которой банковская деятельность, является достаточно специфичной в силу своего функционального назначения в экономике. Общесоциальный характер банковской деятельности обусловлен функциями банковской системы, в рамках которой она реализуется, а именно:

- обеспечение легального финансового посредничества в народном хозяйстве;
- стимулирование экономического роста и повышение уровня жизни населения в ходе кредитования;
- обеспечение расчетов со средствами государственных денежных фондов (бюджетные, налоговые платежи).

В современных условиях общественно-экономического развития России, банковская деятельность приобретает особые, не свойственными другим видам предпринимательской деятельности характеристики – социальности и

публичности. В банковскую деятельность помимо хозяйствующих субъектов вовлечены граждане, как пользователи банковских услуг и продуктов. И проблемы, возникающие в ходе осуществления банковской деятельности незамедлительно отражаются на уровне их жизни и благосостояния. Как общественно-значимый вид человеческой деятельности она имеет в своем содержании три устойчивых и равноценных составляющих: социальную, правовую и экономическую[9].

На наш взгляд, в содержании банковской деятельности, с учетом развития ее регионального направления, социальная составляющая в условиях XXI века объективно трансформируется в публичную характеристику.

[9] См.: Гейвандов Я.А. Социальные и правовые основы банковской системы Российской Федерации.. М.: Аванта+. 2003. С.33-52.;*Коган А.М.* Макрорегулирование высокоразвитого рынка: «невидимая рука», конкуренция, потребности системы. М., 2006. С. 10.;
Тосунян Г.А, Викулин А.Ю., Экмалян А.М. Указ. соч. С.48-49.; Черникова Е.В. Публично-правовое регулирование банковской деятельности в Российской Федерации (финансово-правовые аспекты). – Автореф. Дис. …д-ра юрид. наук. М., 2009. С.15.

Limitations of the Coordination Function of the Minister of Finance in Relation to Internal Audit Carried out in Units of Local Government in Poland

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Keywords: internal audit, added value, public finances, local government units, the Supreme Chamber of Control.

The current legal status for the coordination of internal audit units of public finance sector in Poland is regulated in Chapter VI of the Act of 27th August, 2009 on public finances[1]. For the local government sub-sector the duty to conduct an internal audit into the use of Article 274 Paragraph 3 ufp is provided for the units in which the budget resolution included in the amount of income and expenditures or the amount of revenue and expenditures exceeded the amount of 40,000 thousand zlotys. Realistically, therefore, the legislator of the above obligation slowed only the smaller municipalities. However, it must be stressed that under Article 274 Paragraph 4 ufp such governments may also employ or use services of auditors if the managers (village-mayors, mayors of towns, board of directors) decide to run the internal audit. In most cases, internal auditors manage both the community offices (the city and the county) and its subordinate offices (communal institutions, schools, kindergartens, etc.). In large local government units (LGU's) audit units lead their functions only in the parent offices and the service of subordinate units is managed by the auditors already employed there. Just like in the case of units of government administration all managers of government subjects are entitled to inform the Minister of Finance in writing about keeping internal audit (Article 274 paragraph 7 ufp). This stems from entrusting tasks of internal audit in all public finance sector by the legislator of the Minister of Finance. The coordinating role of the Minister of Finance in accordance with Article 292 ufp concerns in particular: order an audit, assessment of internal audit, internal audit dissemination standards, issue guidelines, co-operation with national and international organizations and co-operation with audit committees. Within the confines of local government sub-sector the Finance Minister's powers are limited. First and foremost, managers of LGU do not have the end of January each year to provide the Minister of Finance with the

[1] Act of 27 August 2009 on public finances (Journal of Laws of 2009, No. 157, item. 1240 as amended.) Hereinafter referred to as "ufp"

information on the implementation of tasks related to internal audit in the previous year (Article 295 Paragraph 1 ufp) whereas the internal audit managers in local governments at the request of the Minister of Finance, at any time, information and documents relating to the conduct of internal audit (Article 296 ufp). Interestingly enough, there is some inconsistency of the legislator here since if the local government organizational unit (municipal, district, provincial) conducts internal audits on the basis of Article 274 Paragraph 4 ufp (based on the decision of the head unit, not a statutory duty) then it is its obligation to provide information on the above range. Generally, the structures contained in the provisions relating to local governments are very vague and, without doubt, a large risk of lack of desired standardization was left. It is, therefore, worth to trace how, in practice, individual tasks are carried out under the co-ordination function of the Minister of Finance and what the limits mentioned in the case of LGU's are about.

1. Dissemination standards

In accordance with Article 292 Paragraph 1.3 ufp the coordinating function of the Minister of Finance includes the dissemination of internal auditing standards (in accordance with universally recognized standards) which should be guided by the internal auditors conducting operations. In its statement dated on 20th May, 2011 the Minister of Finance as the standards for internal audit in the public finance sector units recognized International Standards for the Professional Practice of Internal Auditing established by the Institute of Internal Auditors[2]. In these standards, among others, there was indicated that their use is a fundamental duty of the auditors and the use of other standards is acceptable only when they are more restrictive. The purpose of standards is primarily set out the basic principles of internal auditing practices and contribute to the improvement of the processes and the operations of the organization. Within the standards one may distinguish standards of attributes (defining characteristics of organizations and individuals who provide audit services), performance standards (specifying the nature of the internal audit activities and quality criteria for their evaluation) and implementation standards (which are the development of the two previously mentioned categories). The general principles of operation of the audit should be included in the so-called internal audit card which should adapt the audit organization to the specific tasks and conditions for the functioning of the unit. Internal audit standards require a periodic verification (inspection) and, if necessary, an update of the Internal Audit Card, as well as organizational independence, objectivity, proficiency, and professional diligence, and constant professional development of auditors (internal audit standards 1100–1230). In addition, the process of developing

[2] Communication No. 4 of the Minister of Finance dated 20th May, 2011 on internal audit standards for public sector entities (Official Gazette. MF 2011, item No. 5. 23), hereinafter referred to as "internal audit standards"

audit plans should be based on the professionally conducted risk analysis. The basis for audit conclusions should be only information which is documented and the quality of the tasks (accuracy, objectivity, clarity, brevity, constructiveness, completeness, and timeliness) ought to be achieved through appropriate supervision (internal audit standards 2010–2340). The decision on the acceptance of a certain level of risk is left to the discretion of the management unit (internal audit standard 2600). In practice, the dissemination of internal audit standards was brought to issue the aforementioned ministerial statement and to promote solutions included in the standards of internal audit during the audit assessments. There remains a controvertible question whether the accepted standards for internal audit should be based solely on the standards of an international organization of auditors, or as in the case of the management, they should control standards based on several sources[3].

2. Publishing guidelines

Another task of the Minister of Finance in the co-ordination of internal audit is to issue guidelines (Article 292 paragraph 1.4 ufp). Ministry of Finance until this day publishes guidelines on the website for self-assessment of internal audit, by reserving the right that they refer to the legal status of the previous rules outlined by the Public Finance Act[4]. At the same time it has been stated that in assessing the Audit Department of Public Finance Sector, the content of publication ceased to be valid and it can serve as an aid in making a cell self-assessment of internal audit unit of the public finance sector. From their content, the guidelines are a collection of self-assessment questions (presented in the form of questions) that internal auditors who carry out self-assessment should take into account. The guidelines have no binding force (their use is not mandatory) but a tool that can be helpful in identifying the areas or items that do require improvement. The guidelines should be considered as a base which can and should be modified or supplemented in order to adapt them to specific objectives and tasks of the individual and the conditions in which it operates. The modification of questions also concerns the situations where the self-evaluation is carried out again. The questions were collected in three groups that relate to: creation of

[3] Statement No. 23 of the Minister of Finance dated on 16th December, 2009 on standards for management control of public finance sector (Official Journal. MF from 2009 No. 15 pos. 84), hereinafter referred to as "management control standards". In the above standards indicated that in their preparation includes the following international standards:
"Internal Control - Integrated Framework concept" and "Risk management in the company" - reports prepared by the Committee of Sponsoring Organizations Treadway Commission (Committee of Sponsoring Organizations of the Treadway Commission - COSO),
"Guidelines on internal control standards in the public sector" - adopted in 2004 by the International Organization of Supreme Audit (International Organization of Supreme Audit Institutions - INTOSAI),
"Amended Internal Control Standards for effective management" of the European Commission adopted in 2007 [The Revised Internal Control Standard for Effective Management SEC (2007) 1341 appendix 1].
[4] Act of 30th June, 2005 on public finances (Journal of Laws of 2005 No. 249, item. 2104 as amended)

audit unit, management audit unit, and internal audit implementation. It is difficult to explain the reasons why the ministry did not harmonize the guidelines with the current state law, despite having sufficient material and the obligation resulting from Article 292 Paragraph 1.4 ufp. From a practical point of view it is of such importance that officials in the current work often rely on electronic legal databases that contain only the currently applicable standards. Moreover, in the present situation it is difficult to determine whether the lack of use of the above guidelines for some units is due to their further underlined character, or the lack of awareness of officials of the availability of the guidance contained in them.

UFP was issued pursuant to the guidelines that concern self-management control for public sector entities[5]. It was foreseen in them that such internal audit can participate in the process of self-assessment within the advisory function but the contribution cannot affect the implementation of the basic tasks nor can it affect the loss of independence and objectivity. The results of self-assessment should also constitute important source of information for the auditor about the risks and mechanism controls. These guidelines fulfill the obligation under Article 69 Paragraph 4 ufp in conjunction with Article 71 Paragraph 2 ufp. It should be stressed that the structured guidelines clarify announced management control standards and should address areas of greatest awakening doubts. Yet until today in Poland there has not been any guidance on risk management, issues that are extremely important, due to lack of proper preparation of the practical units of administration.

You can also get the impression that the Ministry of Finance in the implementation of the obligation under Article 292 Paragraph 1.4 ufp adopted the solution involving the publishing on the webpage numerous interpretations (explanations) relating to auditors' inquiries. Among the published interpretations there are, among others, the local government units for instance:

- appointment of work area of auditors district counties in the context of the functioning of district administration complex services, inspections, and guards,
- obligation to conduct an internal audit at district and provincial labor offices,
- information obligation under Article 295 Paragraph 1 ufp that rests on the government agencies of supervisors who decided to conduct an internal audit on the basis of Article 274 Paragraph 4 ufp.

Releasing current guidelines for internal audit by the Minister of Finance would undoubtedly increase the importance of such interpretations and could significantly accelerate the introduction of proper functional solutions in the audit for smaller cells.

[5] Message No. 3 of the Minister of Finance dated 16th February, 2011 on detailed guidelines for self-management control for the public finance sector units (Official Gazette. MF 2011, item No. 2. 11)

3. Cooperation with national and international organizations

In accordance with Article 292 Paragraph 1.5 to the Minister of Finance in the coordination of internal audit should also include collaboration with national and international organizations. Ministry encouraged auditors through its website organized in associations for cooperation in organizing meetings to exchange and dissemination of the so-called good practice. By mid-2011, twelve meetings had been held on a monthly basis which included the following issues: management control, risk management, internal audit methodology, assessment of the work of internal audit and audit committees. The meetings attracted considerable interest of auditors as the participation of some of the auditors was evidenced at least several times. On the other hand, it was pointed that the meetings involved mostly people from Warsaw while the auditors of smaller centers rarely appeared[6].

The fact of cooperation with the auditorial organizations also changed the rules of the professional qualifications required to fulfill tasks of an auditor. The catalogue of entitlements was expanded to international certification of which obtainment individual associations want to be a name sponsor to particular auditorial associations[7]. Moreover, in 2007, the Finance Ministry's website provided links (direct connections) to the websites of three auditorial associations. As for the Association of Internal Auditors IIA Poland, the Association of Audit and Control Information Systems (ISACA) and the Association of Certified Fraud Economic Affairs (ACFE Poland). Failure to update the website of the Ministry in the promotion of other industry associations can show a low level of activity in establishing cooperation with national and international organizations.

4. Evaluation of the audit and audits commissioned

The Audit Department of Public Finance Sector of Ministry of Finance has released on its website the framework of the assessment of the functioning of the internal audit carried out under the obligation of Article 292 Paragraph 1.2 ufp. This range refers to the five thematic blocks: organization and management, planning, reporting, implementation, and execution of tasks in ensuring the advisory function. The organization and management studies provided verification inter alia: extract the audit organization with the principle of the direct sub-ordination to the head unit, timeliness and content of the audit of internal control, systematic quality improvement, including the training process as well as the management unit audit. The overview of

[6] Information Audit of Public Sector Finance, the Ministry of Finance, Mon. Summary of survey on regular meetings of internal auditors in the Ministry of Finance published on the website on 4th July, 2011

[7] Certified Internal Auditor (CIA), Certified Government Auditing Professional (CGAP), Certified Information Systems Auditor (CISA), Association of Chartered Certified Accountants (ACCA), Certified Fraud Examiner (CFE), Certification in Control Self Assessment (CCSA), Certified Financial Services Auditor (CFSA) or Chartered Financial Analyst (CFA)

the planning issues are primarily the accuracy of risk analysis carried out which is the basis to develop a audit plan. The area of reporting concerns verification of the audit plan for a particular year, developing and distribution reports on the implementation of the audit plan as well as an efficient use of resources. Implementation tasks include providing and consulting general processes related to auditing tasks carried out since them being planned until their ending examinations. According to the declaration of the Ministry of Finance the choice of units for 2011 was made taking into account the objective selection criteria (e.g. significance units, the degree of Internal Audit Plan) and the use of aggregated data[8]. Among the selected individuals were: four regional offices, two ministries, two chambers of the customs, the two funds, a state agency, independent public health care facilities as well as Department of Retirement – Disability Ministry.

According to collecting data made public by the Ministry of Finance in 2009, it was during this period that included seventeen activities of public sector entities, and their primary objective was to strengthen and streamline the audit function, particularly in terms of increased efficiency[9]. The activities conducted at the premises of units each lasting 5 working days were usually performed by double teams. In three cases the operations executed triple team. Frequently reported misconduct and irregularities related to: violations of the independence of auditors through their involvement in the operational activities of individuals, not to develop or not to update the quality assurance and improvement, and strategic audit plan, and not taking into account in the process of risk analysis in all areas of activities. It is assumed that the relatively short period of carrying out the verification on the spot did not give the possibility to fully attain its objectives and focused only on the evaluation of rightful determinants.

Introducing the possibility to delegate the audit in the public finance sector units was on 29th December, 2006 under previous law on public finances[10]. Audit commissioned to carry out the internal auditor of the parent unit in accordance with the assumptions or program submitted by the Minister of Finance. After completing the above tasks the report is forwarded to the minister as the rule specifies "other information relevant to the objective of internal audit commissioned"[11]. In the years 2008 to 2010 the tasks were carried out assigned to the correctness of the process of describing and estimating jobs in the civil service and preparation for the Polish Presidency in the Council of European Union. In the first half of 2011 another task was launched regarding process for the evaluation of control procedures in the offices of tax control.

[8] Documents of the Ministry of Finance, Mon. "The plan of the assessment of internal audit in the first half of 2011" and "The plan of the assessment of internal audit in the second half 2011"
[9] The document of the Ministry of Finance, Mon. "Verifying the correctness of execution and evaluation of internal audit in 2009"
[10] Act of 30th June, 2005 on public finances (Journal of Laws 2005 No. 249, item. 2104 as amended.)
[11] § 35 - 39 of the Minister of Finance on 1st February, 2010 on the conduct and documentation of internal audit (Journal of Laws from 2010 No. 21 pos. 108)

It should be noted that in accordance with Article 292 Paragraph 292 1.1-2 ufp legislator explicitly excluded the possibility of carrying out both the assessment and the audit commission in case of local government units.

5. Cooperation with the audit committees

A completely new institution in the public sector in Poland are audit committees. Pursuant to Article 288 ufp their aim is counselling provided to the minister who directs a branch, in ensuring the adequate functioning, effective and efficient management control and effective internal audit. The audit committee appointed by the Minister in an order directing the sector, the provision does not apply to government sectors where there are no units in the sector. For the sectors headed by one minister the possibility for the establishment of separate audit committees but in accordance with the recommendations of the Ministry of Finance in the first years of activity, it is recommended to create a single committee for all the sectors managed by a particular minister. In accordance with Article 289 ufp the tasks of the audit committee are in particular: signaling significant risks and material management control weaknesses (proposing the improvements), setting priorities for strategic plans and annual internal audit review of the relevant results of internal audit and monitor their implementation, review of reports on implementation of audit plan, the assessment of internal and management control, monitoring the effectiveness of the audit work, including reviewing the results of internal and external assessments of internal audit work, agreeing to termination of employment and change wages and working conditions of heads of internal audit. In addition, the end of February each year provided that the audit committee shall report on the implementation of tasks in the previous year. The audit committee should consist of not fewer than three members, including: the person designated by the minister with the rank of secretary or undersecretary of state as the chairman and at least two persons who are not employees of ministries or agencies in the section called “independent members”.

Audit Committees in the assumptions have, therefore, mainly an advisory role. At the same time the authorities in the future will at least partially fulfill the functions of internal audit oversight under the heading. At the moment, they are at a very early stage of development and it is difficult to expect real results of their work. The legislator did not foresee the creation of audit committees for local government sub-sector.

6. The realities of internal audit in local government

In the absence of legal grounds for the assessment of internal audit in local government units by the inspection teams of the Ministry of Finance only legitimate public authority to review these processes remains the Supreme Chamber of Control

(NIK). At the end of 2009 the NIK conducted a pilot monitoring activities in the six selected offices of municipalities from the Province of Pomerania[12]. Their aim was to evaluate the organization and operation of management control (exercised at such offices), including in respect of internal audit. Despite the irregularities, the organization and operation of management control and the implementation of the tasks internal audit audited municipalities rated positively. It has been found, however, that the internal audit function, although formally introduced, did not contribute significantly to improving control processes, risk management and governance of organizational units. It was found that limited effectiveness audit function was associated with relatively low expenditure (personal and financial) incurred by the audited units. According to the NIK tasks in the management control and internal audit are not an end in itself, but rather serve strengthening the capacity of public institutions for efficient and effective implementation of the tasks, and increase institutional efficiency may occur including by modernizing management processes in public administration (including the widespread implementation of management by objectives and results) and management control and internal audit can provide instruments to meet these expectations. Meanwhile, the control results in the evaluation of the NIK suggests that issues of management control and internal audit managers were perceived by the audited units work more in terms of inspection aimed at detecting and prosecuting irregularities, rather than as a tool for management unit organization. The NIK-up speeches total of 44 proposals were formulated to improve targeting mayors. With the reconnaissance operations for 2011 was planned in this topic to carry out checks throughout the country.

Conclusion

Although quite broad powers of the Minister of Finance in the co-ordination of internal audit in the case of the above units of local government subsector coordination, in principle, is limited to the issue of more or less general guidance on the conduct of internal audit (in the form of standards and guidelines). While the exclusion of the possibility of commissioning audits seems an obvious solution, there may be some doubts about the impossibility of assessing the work of internal audit in local government. The realities of the local government sub-sector in the meantime come down to the practice of internal audit in a way that often has nothing to do with international standards in this area. This is not always the fault of auditors themselves – often it is lack the maturity and understanding throughout the organization from the head of the unit. Small range of full-time jobs, low investment in further training of auditors, and their absence results in frequent rotation of audit bring real value added to

[12] Information on the results of examination of the functioning of the management control and internal audit in selected municipalities Pomeranian (LGD-41026/09, No. 52/2010/P09/132/LGD) Gdańsk, 2010

local government units. Yet, it is this element that should be the need for the audit function. Another problem is the lack of consultation environments employed in local government audit. It seems that the greatest usefulness of audit committees is precisely in the case of LGU's. Of course, subject for discussion would require the shape and character of this body as well as its position in the different regions but with resignation by the legislature of the evaluations carried out by employees of the Ministry of Finance this audit committee would assist the auditors to work in small units of local government. Responsible for coordinating functions the Ministry of Finance should not only establish co-operation with international organizations to audit but also the wider use of eminent representatives of the scientific achievements of financial law in Poland. The latter themselves show that their participation in the work of advisory and consulting authorities was more like camouflage than real work[13].

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[13] C. Kosikowski: Repair of public finances in Poland (causes, methodology, guidelines and suggestions), Bialystok, 2011

Principles of Good Administration and the Property of Territorial Self-government

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Abstract: The article deals with the questions of good public administration principles conceptions in the context of the public property proper management principle, focusing on the property of the territorial self-government units. On the basis of a short critical analysis of the Czech legal regulation of property of territorial self-government, based on a brief historical excursion, it is concluded, that the recent situation is not satisfactory. Among others it is said that it is on principle impossible to comply with the principle of proper management concerning territorial self-government property. It is noticed that due to the absence of needed legislative changes public administration is performed via civil law means more often which influence its content. Public property is to be endangered. The article repeatedly emphasizes the importance of the good public administration principles perceived as duties - a necessary antipole to the right to good public administration.

Keywords: good public administration principles, territorial self-government, property, responsibility.

1. Introduction

Despite of the fact that the good public administration concept comes from Anglo-Saxon legal sphere, the question of good public administration principles is becoming discussed in the Czech Republic more frequently in recent days. For an example, Karel Černín notices, that the concept in question as an aggregate of requirements posed on the administration of public affairs beyond the requirements of law occurs in a wide range of The Council of Europe and EU documents[1].

In the conditions of the Czech Republic the concept of good public administration has became a legal term in the last years. First the term occurred in the Act No. 349/1999 Coll., on Public Defender of Rights (hereafter "ZVOP"), further in the new Code of administrative procedures - Act No. 500/2004 Coll. (hereafter "SŘ").

[1] Černín, K. Principy dobré správy definované veřejným ochráncem práv. In Principy dobré správy. Sborník příspěvků přednesených na pracovní konferenci. Brno : Masarykova univerzita, 2006, p. 11.

The concept of "good administration", probably because of the definition of the powers of the Public Defender of Rights done by the section 1 of ZVOP, is in the Czech Republic usually associated just with the performance of the public powers. Wider conception of the good administration principles which would comply with the English term "good governance" is in the conditions of the Czech Republic still rather exceptional - regardless of the fact that the second of the above mentioned legal acts, the new Code of administration procedures, uses the term in question in its wider sense [see its section 8 (2)][2]. The quoted section of the new Code of administrative procedures, if taking in account the diction of its section 177 (1), provides a definition of a general principle of all public administration activities[3], including the activities not based on promotion of public power. Jiří Grospič[4] with reference to Klaus König madea remark on conception of good administration principles saying: "Good governance...is in its wider sense perceived as performance of political powers to administer national affairs. In this sense the public administration presents a part (taking in account its practical aspect we have to say a very important part) of the wider conception of good governance (administration)". For an example UN Office of the High Commissioner for Human Rights defines[5] the concept of good administration in its wider sense as "the process whereby public institutions conduct public affairs, **manage public resources** (highlighted by the authors) and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law"[6].

Considering the above mentioned, it is not surprise that the principle of public property proper management is mentioned in context with the principles of good public administration even less commonly[7]. Indicative of the just mentioned fact is the Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration of 20th June 2007 which mentioned public property only in connection with a brief note that good public administration is an aspect of good governance and must maintain, uphold and safeguard, among others, „public property and other public interests". The Code of good administration itself [Appendix to Recommendation CM/Rec(2007)7] mentions in its Section I such principles as the principle of lawfulness, the principle of impartiality, the principle of proporcionality, the principle of legal certainty, the principle of taking action within a reasonable time limit, the principle of participation, the principle of respect for privacy or the principle

[2] The provision in question is: "The administrative bodies cooperate in order of good administration".
[3] Skulová, S. Právní principy dobré správy? In Principy dobré správy. Sborník příspěvků přednesených na pracovní konferenci. Brno : Masarykova univerzita, 2006, p. 63. In the context with public property management see Havlan, P. Patří zásada řádného hospodaření s veřejným majetkem k principům dobré veřejné správy? In Sborník Rada Európy a verejná správa. 1. vydání. Trnava : PrF TU, 2009, p. 42-46.
[4] Grospič, J. K principům dobré správy a jejich koncepci. In Principy dobré správy. Sborník příspěvků přednesených na pracovní konferenci. Brno : Masarykova univerzita, 2006, p. 209.
[5] In the conditions of the Czech Republic the institute of the good administration is not legally defined.
[6] http://www2.ohchr.org/english/issues/development/governance/
[7] The literature mentions the questions of proper public property management in context with the principles of good public administration rather sporadically (the author spotted just one or two cases).

of transparency - it means the principles in fact defining *the fundamental right to good public administration*[8].

As it has been already noticed[9], such a conception of discussed principles eliminates the fact that good public administration has to be perceived as an obligation (duty) - concerning also the addressees of public administration. Shortly, fulfilment of the obligations (duties) by the public bodies as well as fulfilment of the obligations (duties) by the addressees of public power activities is fundamental for good functioning of public administration[10].

Considering the above mentioned,the principle of good management of territorial self-government property (or public property in general) is undoubtedly connected with the principles of good public administration and as it will be explain on the fallowing pages, the proprietary fundamental of the territorial self-government subsequently influences the quality of public administration activities.

[8] Obviously also these principles are applicable to property management of territorial self-government. Requirement of acting in accordance with law is obvious and generally applied in a legally consisted state irrespective of the addressee and its current position. In connection with the discussed topic it is possible to interpret the principle in question as an obligation of anyone who participates on the territorial self-government property management to act in accordance with law so that the property management is as effective and economical as possible and leads to fulfilment of the tasks of the territorial self-government. Concrete legislative form gets the principle for an example in the case of vow of the member of the municipal/regional council mentioning interest of the municipality/region as well as the obligation to promote in accordance with the Constitution and laws of the Czech Republic. The powers delegated by the law to the councils of territorial self-government should be performed just for the set purpose, it means for the benefit of inhabitants of the territory in question (if possible for the benefit of all of them). The same obligation (concerning its content) of the clerks of the territorial self-government is explicitly expressed by the section 14 (1) (a) to (c) of the Act No. 312/2002 Coll., on clerks of the territorial self-government units, as amended. Applicable in the connection with the property management of the territorial self-government might be also the principle of impartiality. Of course it is impossible in the discussed circumstances to think of any "parts" in the sense of parts of administrative procedures where the state power is performed towards the citizens. However impartiality can be in our case perceived as non-discriminatory and on principle equal treatment of any subjects touched by the property management of the territorial self-government while achieving the interests of the self-government. It might be the case of deciding on public procurement, provision of information on on-coming proprietary operations, equal treating of all the proposal made towards the self-government connected with its property - for an example deciding on the basis of the same criteria in the same cases. The final decision on acceptance or non-acceptance of any offer should be always sustained (taking in account its forcibility) and supervised by the public. Specific legislative form gets the discussed principle in the recent legal regulation of public procurement or also in the obligation of the bodies of the territorial self-government to hear and decide proposals of its inhabitants in defined time. It is possible to derive from the principle of impartiality that beyond the legal obligation it is necessary to hear and decide all the proposals irrespective of who made them.

[9] Havlan, P. Patří zásada řádného hospodaření s veřejným majetkem k principům dobré veřejné správy? In Sborník Rada Európy a verejná správa. 1. vydání. Trnava : PrF TU, 2009, p. 42-46.

[10] For more on the question of necessary "proportions" between rights and obligations (the need to have a list of human obligations in parallel with the list of human rights) see the end of the article.

2. Historical experience and recent situation

First of all it is necessary to mention that full-fledged public administration (and thus fulfilment of the above mentioned principles of good public administration) is *existentially connected* with the public property. Our historical experience provides clear evidence to the just mentioned facts.

It is commonly known in the Czech Republic that the end of peculiar property of territorial self-government, let us say by 1st January 1950[11], meant also the end of territorial self-government units or territorial self-government itself. The fact that public administration reduced just to the state administration has nothing to do with modern public administration does not need to be stressed out. What has to be stress out is the fact that the consequences of the interruption of "self-government continuity" were hard to overcome later on. Symptomatic in this sense are the first attempts to revive communal ownership which occurred before the November 1989. At that time the conception (let us say "in accordance with Perestroika") of communal ownership as an integral part of state ownership was prepared. Chosen constituents of national property were designed to be the object of the above mentioned ownership and territorial bodies of state power and administration the subjects of the ownership in question. Such a conception was conformable with the system of national committees (in Czech "národní výbor") and similar to the regulations provided by the 1948 Constitution[12]. Real impletion of such conception would naturally meant just an illusion of territorial self-government; peculiar property, "independent" on the state, as a fundamental attribute of any self-government, real self-government can not exist without, would be missing. A bit paradoxically, we would have here a complex legal regulation governing public property management and disposing of the property (be formally state property)[13], nevertheless fulfilling its role in the territory somehow.

Toilsome overcoming of the self-government deficit in the Czech public administration can be recognised also in the 90th of the 20th century. Just mentioned fact is valid although the period brought fundamental change - creation of real communal self-government based on the own peculiar (it means "independent" on the state) municipal property (acquired first of all from the state and subsequently via own activity or other ways). The "toisomeness" can be recognised, among others, in just hardly understandable resignation on complex legal regulation of the rules governing

[11] See the Act No. 279/1949 Coll., on financial management of national committees. For more details see for an example: Havlan, P. Veřejné vlastnictví v právu a společnosti. 1. vydání. Praha : C. H. Beck, 2008, p. 79 a 80.

[12] The section 35 of the Act No. 69/1967 Coll., on national committees, as amended by the Act No. 115/1988 Coll. can be perceived as a kind of inkling of legislative formulation of the conception in question. For more see ibidem, especially p. 93.

[13] It would be the property subjected on principle (with some exceptions) to the regulation of the Economic Code and its implementary regulations (see No.119/1988 Coll., on property management of the national committees).

management and disposing of public property of self-governmental type[14]. Fumble continued at the beginning of the 21st century when real regional self-government was formed and established regions acquired, in similar way as the municipalities (from the state and subsequently via own activity or other ways)[15], their own peculiar property ("independent" on the state), nevertheless complex legal regulation of rules governing management and disposing of public property of self-governmental type became even more distant. Just mentioned facts can be unambiguously labelled as missed historical chance[16].

The handicap of the Czech territorial self-government (in the discussed context we do not mention vocational self-government where the situation is even worse[17]) as non existing legal act similar to the act on the state property[18] results in confused, inconsistent and incomplete (and so difficult to apply) general legal regulation of proprietary questions of territorial self-government provided by some provisions of the recent Act No. 128/2000n Coll., on municipalities, Act. No. 129/2000 Coll., on regions, Act No. 131/2000 Coll., on the capital city Prague and also (in some sense first of all) in the Act No. 250/2000 Coll., on budgetary rules of territorial budges.

If general unsatisfactory state of the legal regulation of public property in the Czech Republic concerns first of all its "self-governmental" part and due to the act on state property the situation on the "state" level can be labelled (at least) as satisfactory (thought the quality of the regulation is still not reaching the level it should be reaching), then dismal situation of legal regulation of "**performers**" of ownership and other proprietary rights of the subjects of public administration is in fact the same in the case of the state, territorial self-government or other public-law corporations; it means on the state administration level as well as on the self-government administration level.

On the level of self-government it is first of all the situation of allowance organizations ("příspěvková organizace" in Czech). Unlike in the case of state allowance organizations, recent legal regulation of allowance organizations of territorial self-government units, which allows the territorial self-government units to establish the allowance organizations as "legal subject usually not generating profit", does not indicate transitoriness of these subjects. The fact that the allowance organization of territorial self-government unit is a legal subject *sui generis* shows in its case in fact

[14] For more see *Havlan, P.* Veřejné vlastnictví v právu a společnosti. 1. vydání. Praha : C. H. Beck, 2008, p. 126 and 127.
[15] For more see ibidem, p. 202-204. See also *Havlan, P. a kol.* Majetek obcí a krajů v platné právní úpravě. 2. vydání. Praha : Linde Praha, a. s., 2008, p. 67 and the following.
[16] Planned "Act on the property of territorial self- government" was not passed and no more attempts were undertaken after the first attempt of The Ministry of finance was unsuccessful. For more see *Havlan, P.* Veřejné vlastnictví v právu a společnosti. 1. vydání. Praha : C. H. Beck, p. 191 and the literature quoted there.
[17] It does not mean that there is nothing to mention. See ibidem, especially p. 221-233.
[18] The Act No 219/2000 Coll., on the property of the Czech Republic and its acting in the legal relations, as amended.

inthe same way as in the case of state allowance organization; also it is on principle "incapable to own".

However, the only important point today is the fact that the allowance organizations of territorial self-government unit as well as the state allowance organizations do not have any foundation (justification, reason) in the word of today. It is all about the fact that as a type of legal subject on principle unable to own - though any legal act would make an attempt (necessarily „nonsensically" or entirely in incompetent way) to allow it [as for an example the last "large" amendment of the Act No. 250/2000 Coll., on budgetary rules of territorial budges (hereafter "RPÚR")] under certain conditions "partly" to own[19] [see the section 27(5) of the legal act mentioned above] - allowance organization of territorial self-government unit is as a type of legal subject still hard to understand for the other legal subjects and what more it collides with a number of special legal regulation provisions which do not take such a type of legal subject already in account or are unable to take it in account although they mention it[20].

The section 39b (2) of RPÚR may serve as an example of "hardly understandable" position of the allowance organizations of territorial self-government. It states that the approval of the establisher of an allowance organization can be invalidated by the establisher on the condition when after its granting some serious reasons appear which, if they appeared in the time of granting of the approval, would led to denial of approval granting. The act in law of the allowance organization then becomes post facto invalid. In similar way the legislator set up the legal regulation of "capacity to own property" for the allowance organization. The amendatory act provides closed list of ways in which the allowance organization may acquire property as its own ownership (in all the cases just for the purposes for which it was established). In brief it is possible to say that the allowance organization may acquire some property to its ownership just from its establisher, via donation or succession if the establisher gives its previous approval to such an acquisition, or in other way, if the establisher allows it in the deed of establishment of the organization [see the section 27(5) RPÚR]. This a bit unusual construction (making the capacity of the allowance organization to own relative) is further expanded by the amendatory act. It is set that in the situation when the property acquired by the allowance organization from its establisher without any payment becomes useless for the organization, the organization is obliged to ask its establisher to take the property back. Only if the establisher does not take the property back, the organization is entitled to transfer it to another subject. To perform the transfer the organization needs to obtain the previous approval of the establisher. In the

[19] *Janeček, J.*Některá úskalí nové úpravy pravidel územních rozpočtů. Moderní obec, Praha : Economia, a. s., 2009, 2, p. 8-9.
[20] *Havlan, P. a kol.* Majetek obcí a krajů v platné právní úpravě. 2. vydání. Praha : Linde Praha, a. s., 2008, p. 49-51 and the literature quoted there.

case of property acquired by the organization in other way, even if the previous approval of the establisher was demanded, such a procedure will not apply. It is clear that such a legal regulation can not rebound to "apprehensibility" of the allowance organizations. In other words, the transformation of the allowance organizations is one of the urgent tasks of today. Unfortunately, general, universal (not restricted just to one section of public administration) legal regulation of independent public institution as a full-fledged subject of ownership and other proprietary rights of their establisher (even if they would be still very close or dependent on their establishers concerning their proprietary role) is still missing. We think that only such a "non-profit making subject" is able to fulfil its role (especially stabilization and development) in the society.

3. Threat to the proprietary fundamental of the territorial self-government in the Czech Republic?

As it was already mentioned, recent state of legal regulation of territorial self-government property management in the Czech Republic, as it was described briefly above, leads on principle to impossibility of effective fulfilment of the public property proper management principle, which was labelled as one of the duties belonging to the principles of good public administration.

Firstly it is hard to doubt that proper and effective public property management and disposing of the property in question would get along without modern public forms of legal subjects. It is a problem when leading a theoretical and practical discussion with those who strive for "privatization" of public forms of legal subjects, it means their replacement by civil-law forms (typically by companies)[21] that we can only argue for justness of the forms firstly mentioned. Such an argumentation is usually refused (though just for ideological reasons). Thus the theoretical concepts of new, progressive public legal subjects (public institution type) do not appear and subsequently (which is logical) proposals of new legislation do not appear either.

Disconsoled state of the Czech legal regulation of public property, especially of the property of self-governments where the concept of separate legal "act on the property of territorial self-government" presents necessary but not the only condition of improvement[22], leads to, among others, goal-directed attacks of compact special-interest groups focused especially on the economical basis of the territorial self-government. It means for an example that the property of the unit in questions becomes quite often the "prey" of speculative private capital. The praxis has proven (in a few isolated cases yet)

[21] Recently it was an attempt to transform Czech faculty hospitals (section 93 of the Act No. 111/1998 Coll., on universities) - state allowance organizations established by the Ministry of health - to "university hospitals", or to share-stock company. No one was considering their transformation to full-fledged (capable to own) independent public institute (even though this form would be appropriate considering the nature of the question).

[22] *See Havlan*, P. Veřejné vlastnictví v právu a společnosti. 1. vydání. Praha : C. H. Beck, especially p. 268 and here and there.

that “transformation” of public to private (even if “only” the form of the “performer” of the proprietary rights connected with a small part of public property is concerned) is much more easier under recent legal regulation than the reverse process[23]. Even just mentioned fact shows how far recent legal regulation is insufficient. It does not create conditions for active development of the territorial self-government property, but on the contrary helps due to its insufficiency to thinning of the property in question.

4. Perspective and tasks

It is possible to say with a small simplification that after the year 1989 considerable attention was paid to the questions of human rights in reaction to the previous period and the Czech society was liberalizing itself. This (as it seems) still ongoing trend can not be perceived uncritically. The liberalizing tendency pervading whole society affected considerably also the legal order which naturally belongs to a modern, in a state organized society. The changes of the legal order do affect by return the society itself and it seems that they exponentiate the liberalizing tendency which was on the beginning. At the beginning of the 90th of the last century thanks to these social movements territorial self-government was restored after being in the 40th devitalized for a half of the century by reverse movements. Recently it is beginning to be endangered what has been at the beginning of the 90th of the last century restored - now the danger comes from the reverse side than it came in the end of the 40th. If in the past the territorial self-government was stifled or on principle negated due to the socializing movements in the society, today we can be legitimately concern of negating of territorial self-government by liberalizing movements which can be recognised in the legal order as its privatisation (replacement of public-law institutes with civil-law institutes).

Recent development of the legal regulation of the territorial self-government property management in the Czech Republic and the praxis of the public administration matches to the conclusions mentioned above. Outlived public-law institutes which originated in the times before the year 1989 are not “modernized” but indirectly substituted (imperfectly concerning the nature of the matter - anyway it depends on the point of view and motive) with the institutes of private-law (see above the note on the legal regulation of “performers” of ownership and other proprietary rights of the territorial self-government). The form starts to affect the content. We are becoming the witness of private administration substituting public administration even in (indeed particularly) managing the public property. Due to the resignation (non-random?) on

[23] As a “textbook” example may serve the attempt of Hradec Králové region to reverse the course of the transformation in the case of acquiring immovable assets - the seat of the region. Recent lessee of the mentioned assets is a share-stock company which is owned by the region for 100%. The region pays a rent to the company for using the buildings and the company pays lease payments to the lessor. Risks connected with such a model of managing public property are obvious.

own property management the public property itself starts to fade and with the fading property fades also necessary prerequisite of functional territorial self-government. So it is time to pay significantly more attention to this core of the territorial self-government and subsequently to adapt the regulation of the partial questions of its functioning to it.

In the similar way, if in the recent history significant attention was paid to the questions of human rights, now it is necessary to pay corresponding attention (and concerning the fact that they were overlooked for years - so *primo loco*) to the human obligations, human responsibility.

In connection with this we can welcome, for an example, an efforts (albeit tentative) made on the ground of the UN to constitute as a kind of natural counterpoint to the "Declaration of human rights" a sort of "Declaration of human responsibilities (obligations)"[24] as well as newly visible interest of professional public in the discussed questions[25].

This is also the reason for perceiving the principles of good public administration not just as the content of the fundamental right for good public administration but also (and first of all) as the obligation of all participating subjects; this is also the point for accentuating the principle of proper public property management as a typical example of the mentioned "obligation dimension".

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[24] *Havlan,* P. Vlastnictví státu. Brno : Masarykova univerzita, 2000, p. 204, note No. 21.
[25] See for an example *Tyszkiewicz,* L. Globalizacja a problem uniwersalnych wartości. In: „Prawo w XXI wieku. Księga pamiatkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk" (*Czapliński,* W. - red.). Warszawa : 2006, p. 992 and the following.

Some General Thoughts on the Relation of Public Property and Municipalities

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Abstract: The article is dealing with the relation of public property and the decision making of municipalities. It is analyzing a few general issues concerning public property and its characteristics, the relation of public and private interests – according to territorial self-governments. In some ways it is searching for the answer on the question, whether can there be a real local self-governing autonomy without economic independence? In this regard, the article sums up the model of the strong-status city council, based on the Czech legislation.

Keywords: public property, public interests, private interests, market economy, post-socialistic countries, municipality, mayor, city council.

The change of political system in 1989 was a significant milestone in the public administration of former socialist countries. The change of political system resulted not only in the change of form of state and government but what is more important: it meant also changes in the organization of public administration. Although today we perceive it to be more natural perhaps just because of that we almost do not realize that **the functioning of modern state is unimaginable without a state apparatus – public administration.** Even a state not called modern cannot do without a state apparatus. When mentioning the old Sumerians, Egyptians, Chinese, Aztecs or even caganates – in all of them existed a formal organization ensuring the functioning of the tribe or state. This phenomenon – the preservation of the state apparatus in a functioning form – could be observed also in Czechoslovakia after the first world war. After all, the newly established Czechoslovakia left the bonds of the Austro – Hungarian Empire effective and it started gradually reshaping it, according to its own ideas. The organization of functioning of society was in every age the primary question of human coexistence. We may say it was an inevitable accompanying factor of human existence given by nature.

Although the changes in public administration related to the change of political system took place in each of the countries changing political system in a different form and time, however, one question was common : each of the countries changing political system faced the question of privatization and introducing the market economy. The introduction of market economy took place exactly according to the same basic principles from Poland up to the Soviet Union of Yeltsin times : privatization – deregulation – liberalization of man power market. In spite of that every country changing political system was applying different regulation of privatization models. However, the result was surprisingly similar practically with every country changing political system: a substantial part of state property went to foreign proprietors or gradually disappeared. Just one comment more on privatization: in its procedure the lawmaker did not consider one fundamental demand: the privatized enterprise must be forced to work. This may be achieved if the product of the given enterprise has market. If it has not, the running of the enterprise must be financed by the state. If these conditions do not exist, the enterprise becomes uncapable of producing, it goes bankrupt, gets into foreign hands /where the primary accumulation of capital did not start at the very end of the twentieth century/or there will be a complete disaster. Eventually it may happen all together. It could be observed in the recent years, concretely in Hungary, Slovakia and in the Czech Republic, in connection with the complete decomposition of sugar beet processing industry. In spite of that – from the point of view of the final result it is irrelevant whether we have not seen it or did not want to see –immediately after the change of the political system, in a miraculous way, the double character social slogans „the state is bad economist" and „the private entrepreneur manages more efficiently" became to prevail. In spite of that in both cases they are half-truths. On the one hand, the state is not bad economist, only it tries not only to create profit. For example, let us take the running of a hospital: the most economical running of the hospital is where the patient gets poison instead of medicine. In this way the state saves two items: on the one hand the price of the healing by medicine, on the other hand the expenses related to curing the patient. The funeral costs are covered by the family. This extreme aspect represents the most economical health care provision. There are no expenses with the patient but there is payment of social insurance. As a result this „business branch" is profitable. In our environment we can see that the private sector takes more and more obligations which could be regarded rather as public interest and by which the financial basis was or is provided by state property /more precisely by privatized state property/. Though the acceptance of such a role by the private sector is inevitable, it is not sure that in covering the public needs it is everywhere desirable. To say it briefly: *public interest is not identical with profit ratio.* Per analogiam the efficiency of public administration cannot be assessed automatically on the basis of the notion of profit ratio. While the primary goal of the private sector is profit, the main demand is economical, profitable functioning, in the

public sphere it does not play primary role and it cannot be always that. Being given the character of fulfilling the public tasks, it serves other aim than the private sector. It means it is necessary to form another system of conditions for assessment of used instruments and of efficiency. In our case the question is, if the patient leaves the hospital on own legs, healthy. It is unambiguous that if the primary goal of a health care institution is the professional provision of health care. Thus this primary goal must not be endangered by the question of the institution´s profit ratio what cannot be either goal or instrument in the process of managing the institution, i.e. in the process of managing state property. The aim is that the patient recovers and not that it be cheaper. On the other hand, the basic question of more efficient private management is who gets the profit. There may be a good economist with excellent results but what is the use of it if the state treasury gets very little benefit. Again the same question arises when privatizing state property*: who profits more, the private entrepreneur or the public sphere*? If it is the former, what is the sense of privatization? In this connection we may ascertain two facts: *ad 1*/ nothing is black and white, especially when we deal with social questions, *ad* 2/ there was a need or privatizing state property. It is a different issue what were the final results.

The privatization of state property was, however, not the only central question to be solved. E.g. there was the need for **forming market economy.** Again, there was no domestic formula for that, we were importing foreign ideas, /first of all the ideas of the Chicago school hallmarked by the name of Milton Friedman/. Without the demand of completeness, the issue is, in what degree should the state intervene into the individual market activities or processes, though the institutional system of public administration. Depending on the degree of state intervention– to put it in a simplified way - we can differentiate two extremes in the relation between the state and economy: ad 1/classical liberal market economy the starting point of which is the theoretical model that the market is able to react to its distortions and to correct them in dependently, without outside /i.e. state/ intervention. Historical experience shows that this economic model was not viable in the long run because the actors of economic life wanted to centralize their economic power out of the most different reasons. Thus they evoked such distortions in the market competition and in the national economy which were endangering the very fundaments of state. Ad 2/ The principal starting point of the concentrated market economy was the idea that the national economy and its individual branches are so significant that their functioning may be exclusively /just like state power branches/ ensured by state organizations, with full responsibility. Also in this case history proved that neither this „planlike model of national economy“ is viable in the long run. In this way the instruments of economic interventions in the individual models of market economy acquired the most various forms, first of all by accumulating social experience. Summarizing it, we may see that modern societies were experimenting with various models, from minimalizing state intervention up to

concentrated planlike managing. It appeared to be natural to combine the two ideas, namely the so called state supervised system of economic selfgoverning trying to influence the actors of economy, to prevent the undesirable market changes and to ensure the protection of public interest, simultaneously respecting the entrepreneurial liberty. While in most countries of the world this system works, we may declare that in the functioning of the system such undesirable phenomena may be discovered /e.g. tax paradises, the international economic power of the private sector, the capacity to influence the social classes directing the states etc./. All this indicates that influencing of economic processes is a task exceeding the power of states.

On the theoretical level the degree of economic interventions is first of all an interdependence influenced by the **mutual relation of private and public interest.** Although the degree of state interventions does not depend exclusively on the relation between public and private sphere, it makes the mastering of basic notions easier. Which social demands appear in the notion of „public interest"? It is hardly possible to make an exhausting list though it is beyond any doubt that the notion comprises e.g. the expectance of society to pay taxes, the consumer protection, the transparent character of economic competition, the demand to suppress the power of monopolies, environmental protection, the faultless provision of public services, the creation of working places. To sum it up: it is the demand that the state serves its citizens and not the other way round. On the side of private interest there are also various, multi-faceted elements. When we mention the notion of „private interest" we speak of interests of subjects of law which differ from the state or bodies of public administration. That is to say that we speak about the interests of those against which the interventions are directed. Beyond any doubt, such interests are /personal/ profit, the enhancing of the role performed in the market, the minimalization of taxes and other financial demands from the part of the state, etc. It is evident therefore that some interests are in strict contradiction with public interests. Nevertheless, we may find some layer of private interests which are parallel with the public interest.

However, it is not possible to create a unified system of criteria for the division of public and private interests. It is not simple in real life either. As a matter of fact, there is such a wide group of private interests which do not contradict to the public interests: e.g. the possibly best diversified market is the interest of all small and medium entrepreneurs, while it is less the interest of multinational enterprises. The latter tries rather to strengthen its dominance in the market of the given products. Hence it is useful to investigate the question from the aspect that in what degree can the participant of the market advance its interests and how far are the interests advanced in this way in harmony with public interest. The ideal state of the market – it is the theoretical market construction in the books on economy. They define the ideal state of market as a situation where the curves of demand and offer meet each other and result in an ideal price what is a hypothetical state. A certain given product market gets

distorted in some degree. The distortion of certain product market may acquire especially large dimensions (as an example we may quote the electric energy market where up to the liberalization of market just one electric energy supplier existed). There may be various reasons of this above average market distortions. Whether they are of natural origin or were created by the actors of economic life, from the point of the state they are undesirable.

The transformation of state property influenced also the self-governing municipalities. These self-governing bodies have special significance in the organizational system of public administration because exactly this is that level of public administration with which we are in daily contact without realizing it. The relation of responsibilities of state administration and self-governing tasks that is the major factor influencing the questions of managing the property, its system in practice and its influence on the independence of self-governance or on the right to have self-governance. We speak here about such systems of relations like e.g. the division of tasks between state administration and municipalities (in other words the mutual relation between the state administration and self–governance tasks and responsibilities) as well as the question of decentralization of related financial instruments. Apart from that, the division of tasks and responsibilities of state administration and municipalities evokes several theoretical questions. For the local self- governing bodies it is first of all an important practical question bearing in mind the fact that without suitable financial and economic basis the self-governing public administration (as activity) cannot exist. In relation to the income of self-governing bodies it is valid that **the major part of their income is still the reliance on central budget.**

Perhaps the most important basic principle of a self-governing system is its constitutional specification as well as the fact that its main aim is the fulfillment of tasks in the sphere of public services. In relation to self-governing bodies the fundamental question remains: **can there be a real local self-governing autonomy without economic independence?** Apart from the question of basic rights and constitutional guaranties which serve as the formal guaranties of self-governing autonomy, the basic condition of any self-governing activity is the factual, existing self-governing property. After the change of political system – apart from almost classical forms of property management of self-governing bodies and self-governing property administration – their various modalities appeared in the countries which changed their political system. Such a new legal economic system of relations came into being which in its partial rules was underregulated or not regulated at all. It is typical also nowadays. To mention just a few: the participation of municipalities in economic societies; the entrepreneurial liberty and responsibility of municipalities; the relation between the municipalities bodies and the bodies of established economic societies; the responsibilities of municipalities and their potential delegation in relation to property

management or business; preparation of decisions and alternatives in the sphere of property management; the question of factual directing of self-governing businesses.

The legal regulation of self-governing property is important from various aspects. It has also some historical links. To mention the most important ones: in the Czech Republic and in Slovakia, similarly also in Hungary, the basis of municipality's property is actually state property transformed after the change of political system. In other words it makes the backbone of municipality's property. However, the questions of managing the self-governance property exceed the framework of positive legal regulation. Quite often legal holes have to be filled, sometimes they do not cover the whole spectrum of human inventiveness. Therefore it is necessary to create such a theoretical framework that could serve as an index for the person applying law, concretely in interpreting the questions of property management. The first step should be to clarify the notion of „public property" which is perhaps the most important element of united theoretical approaching of the property management of self-governing bodies. In general terms, public property is such property, the subject of which is a person of public law character (state, local self-governance, functional self-governance, other public law corporation, independent public institution, public property basis etc.) To put it in other words it is a public administration subject as a public law legal person where matters of public interest are in foreground[1]. Similarly to other assessments, this definition of the notion conveys much and at the same time little. It has two main elements which add public law dimension to the simple relation of property. **The first** and perhaps most important element of definition is the **subject** itself. It is the assessment of the public law subject that significantly changes the traditional definition, it interprets the notion wider and unambiguously ranks also– from property management aspects – the economic societies (established by a public administration body or participation of a public administration body) into the sphere of public law subjects[2]. **The second** element of this definition is the notion of **public aims.** Quite often it had and has different contents (depending on the definition of public affair) and which often adds public property dimension to such objects of property which do not serve public aims (e.g. sun energy, wind energy). Independently from the scope of the above mentioned definitions, it seems unambiguous that independently from possible groupings, the notion of public property comprises at least the following contents :

- Financial property or fiscal property which may be capital or be of dividend character.
- Administrative property, first of all inevitable financial and material conditions necessary for functioning of public administration

[1] Havlan, P. Veřejný majetek, Masarykova univerzita, 2008, Brno, p. 10
[2] More on notions of public law subjects, see: Havlan P.: Veřejné vlastnictví v právu a společnosti, 1. Vydání, Praha, C.H. Beck, 2008, p. 28-46 or Havlan P. Majetek státu, 2. Vydání, Linde Praha, a.s., Praha, 2006, p. 25-29.

- Property objects in public use as public property (e.g. public roads, public spaces)[3].

In the relation of self-governing bodies it means that their property management, depending on the character of public property, may be the following: **Ad 1/ direct property management -** the property rights are practiced directly on behalf of the self-governance and it is its responsibility, typically through the city council orcity council. **Ad 2/ property management mediated organization** where there are individual property authorizations in their summary or partial authorization, on the responsibility of the self-governance exerted activity in relation to some organizational unit. To put it more precisely: on its behalf, in relation to the maintaining administration, in case of organizational units not disposing of legal subjectivity. **Ad 3/ legally mediated property management (**when though property management concerns self-governance property but on behalf and with the responsibility of an economic society or organization disposing of special legal subjectivity)[4].

It means that in relation to public property management **it is important to elaboratesuch a principal system of rules which makes the decisions of self-governances in thesphere of property right foreseeable and transparent**. As a matter of fact, the public property or matters related to public affairs are wider or narrower notions, depending on the ideology of a given social system. In the Czech society of today there are evident hyperliberalization tendencies. In former socialist countries „free looting" is taking place mocked as „democracy". All this leads to dead end in the long run, without minimal social justice[5].

Nonetheless, practice shows sometimes a different picture and the creation of a complex theoretical framework would many consider being a hindering factor. To mention a concrete example, one of the unsolved questions of legal practice in the recent years is the establishment of enterprises managing a municipality's property, in Slovak legal relations. The primary reason for establishing such enterprises has financial character: the economic societies may redeem the VAT from goods or services ordered by them. In practice it may mean a 20% saving for the given self-governance. Actually the municipalities are not authorized to redeem the VAT. However, the practice proved in many cases that this model conceals several dangerous situations which, in the long run, cast doubt on the demand of economical spending, efficiency but first of all on rational and transparent property management. An example directly from everyday life is the case of a municipality, where it became the task of property managing enterprise to ensure the supply of hot water and heating services in educational edifices maintained by the municipality. In the preceding period these

[3] Havlan P. Veřejný majetek, Masarykova univerzita, 2008, Brno, p. 12
[4] Havlan P. Veřejný majetek, Masarykova univerzita, 2008, Brno, p.28 or more in detail pp. 114-130
[5] Havlan, P. Veřejný majetek, Masarykova univerzita, 2008, Brno, p.11.

institutions ensured the hot water supply and heating services themselves. The property managing enterprise rented this task to a private enterprise and now the municipality ensures the heat supply in its edifices indirectly, through a private enterprise. All this happens under the slogan of saving expenses. Moreover, the new service supplier was chosen without any regular competition. Of course, this could not be done by a public administration body without organizing regular competition, but the public property managing enterprise cannot be considered to be public administration body in stricto sensu (in spite of that it manages municipality property). The situation is all the more worrying that the services became more expensive. These services were so far ensured by the educational edifices themselves, practically on the basis of own costs. As a result, the heat supply became more expensive by 5% for the maintained edifices. In other words, instead of planned saving there were surplus costs.

A further example is the case of another property managing enterprise where it was managed by the mayor as the general assembly, without resolutions of the city council. It was a one person Ltd. established by the municipality (the mayor sold the immovable property entered into the firm which was the property of the municipality before). Followingly, the city council made an appeal to court quoting defalcation cause. The court refused the appeal arguing that an economic firm and the municipality represent two legal subjects or that the economic society being in property of municipality is not guided by the system of rules of property management of municipalities. In practical life it mainly means that the mayor as the general assembly of the firm may often act independently, without the consent of council, decide in questions of property rights. The experience of recent years shows that not only in questions of property managing the corresponding theoretical fundaments in a great degree contribute to proper application and interpretation of law. It is regrettable that the recent years rather show that the management of many municipalities often tries to pass through „the escape gates“ of laws and it prefers it to unambiguous and lawful solutions. In spite of the fact that the trasnsformation of state or municipality property was the decisive factor of the change of political system, the property management of self-governances cannot be ranked among the preferred topics of specialized literature (with the exception of some authors).

Another fundamental question of property management of self-governances is the procedural framework of decisions related to property management. In the case of municipalities it is determined by the relation between the mayor and the city council. Generally speaking it is typical that the municipalities are public administration bodies organized in collegial form. In practice, however, they often resemble bodies organized in office form and they are subordinated to one boss. The system of relations between the mayor and the city council depends often on political factors. The regulation also differs from country to country. In this relation, though seemingly the city council is in a stronger position, it happens quite often that the other side prevails. The reasons are of political character on the one side, but on the other side they are in connection with the

decision-making mechanism of municipalities. It means they undergo a longer or shorter decision preparing process where at the point of taking the decision the process of preparing the decision is more important - namely the elaboration of alternatives. With some exaggeration we may say that the body preparing the decision is more important than the city council approving the decision, namely the office of the mayor or the mayor himself. The position of the mayor is significantly strengthened by the fact that the office of the mayor is directed by one person, that is he himself controls and directs the whole procedure of decision preparation. The status of the head of the office (though in many countries the status of the head of office is characterized by certain relative autonomy) in practice depends totally on the mayor.

In this substantially unequal relation, where the mayor´s power prevails, the Czech regulation may serve as an example. This regulation minimalizes the mayor´s authorization to take decisions. The legal position of the mayor is essentially based on the principle of shared responsibility. In its sense it is some body of deputies responsible for principal decisions. It means that the power of decision rests with the democratically elected council. In this way the self-governance responsibilities are unequally distributed between the city council and the mayor. In other words, it is the council which has the exclusive responsibility in the most important decisions. In June 2001 the Czech Constitutional court emphasized that „the mayor of the locality, in the sense of former and present regulation, could not and cannot form the will of the locality´s people. The only thing he can do is to mediate and present this will." Thus the mayor is only the interpreter of the will of the locality represented by the city council.

This narrowed legal position of the mayor manifests itself also in the responsibilities and tasks of the mayor. It is limited to questions of presenting proposals and organizatory questions following the principle that those responsibilities which are specifically connected with some self-governance body are always the responsibility of the city council. In more details the responsibilities and tasks of the mayor are the following ones:

- names the secretary of the mayor's office with the preceding approval of the director of regional office,
- is responsible for ensuring the control of the locality´s management,
- determines the working agenda of the secretary (if the secretary is not elected),
- determines the working agenda of his office staff members,
- with the consent of the regional office director, he may authorize the municipalities committee to fulfill tasks of state administration,
- is responsible for informing the public about the current matters of the locality,
- is responsible for the execution of the transformed agenda where no secretary was elected,
- is responsible for the organization of elections,

- is responsible for rescue operations and following damage liquidation (in connection with disasters),
- other tasks related to protection against disaster,
- is chairing the meetings of the city council and council (he is also its member),
- if he considers incorrect the resolution of the locality council belonging to its independent authority (if it is not lawful or it is disadvantageous economically), suspends the resolution after which he presents it to the city council for re-approval or refusal,
- it is the obligation of the mayor to send the documentation of all municipality decisions to the director of the regional office or based upon the request of the Ministry of the interior affairs,
- in order to ensure the fulfillment of a state administration task, he may set up a special body.

Apart from the above mentioned distribution of responsibilities and tasks, the strong model of the city council is special also in the rules of electing the mayor (the mayor is elected by the council itself). One of the main reasons of this lies in the theoretical construction of the Czech municipality's law. It means that the self-governance creates its internal structure around the city council and not around the mayor. However, there is also a practical reason for electing the mayor by the council, namely, to prevent that the territorial self-governance becomes non-functional due to permanently hindering actions of the mayor and the city council.

In this way the election of the mayor by the city council supposes the necessary understanding for directing the municipality. This may create a good starting point for the cooperation between the mayor and the council. On the other hand, due to the fact that he is elected by the city council, the mayor may be recalled from his post by the council, what would not be the case of a directly elected mayor.

To sum it up: according to the valid Czech regulation the mayor is elected from among the members of the municipality's council what means his legitimity is weaker, the council may recall him from his post. In harmony with the philosophy of the mayor with small competences, the mayor, as the lawful legal representative of the self-governance has small acting freedom also in matters of property management. Almost in every case the preceding approval of a deputy body is necessary for applying a legal case. In the opposite case the legal act is according to law void (absolutely invalid). The signature of mayors (the right of signature) is from the aspect of legal affairs of the self-governance interesting because on behalf of the self-governance (as a legal person) it is always a natural person, the legal representative who acts (similarly, on behalf of an economic society it is the person in charge). In case of self-governances, apart from the declaration of the legal representative a legal case always needs the approval of a council. If it was not approved before, the legal case is incorrect in a degree that the Czech regulation qualifies it as one of the most serious shortcoming and as a result the

legal affair must be considered to be void (absolutely invalid) without being able to cause any legal effect – as mentioned above. This way, the legal affair without previous approval is, apart from the mayor´s legal (penal, civil rights, labour law) and political responsibilities may have its impact also on third persons.

At first sight the moderate character of Czech regulation seems to be a rather balanced system though there are also critical remarks regarding the model of indirect election of the mayor. This criticism concentrates on the following main insufficiencies of the present system:

- The public does not know the mechanisms of decision making and also in decisions on more important matters cannot succeed with their opinion. In practice it was the case of closing some elementary schools. With their proposals, initiatives and criticism the parents addressed as a rule the wrong forum.
- The public shows little or no interest in decisions of the self-governance. E.g. there is typical disinterest in taking decisions on territorial planning of the locality, its approval, approval of budget, dispositions of the municipality's property (purchase, selling, renting).
- The average citizen identifies the decisions of the city boar or of the council with the person of the mayor. This is why he has social responsibility also in matters where it was not his decision or can hardly influence it.
- In the countryside, in small settlements the city council most often has only formal sessions. The real decisions and their execution always rests with the mayor or his closest staff members.
- As for the election of the mayor, as a rule it should be a person acceptable for all political factors represented, on the basis of an agreement among the coalition parties. Quite often it is not a person who enjoys respect and recognition in the town or as deputy eventually got most votes in the elections.
- As for councils of big cities where the councillors are responsible for specialized fields, often politicians take the respective posts without disposing of deeper expert knowledge. As a result, the real decision making is with the heads of departments.

In the light of the above mentioned there is a demand for a systematic revision of the whole regulation, at least in the following questions: 1/ The direct election of the mayor – who by this gets a strong political mandate, may materialize his political program. On the other hand, his political responsibility, the fulfillment of his electoral promises (or non fulfillment) - all this has unambiguous character. If a strong, well known personality may become the mayor, so the taking of this post is not a question of political consensus. 2/ The changing of the naming of counselors/board members in the city board[6]. The board (and thus also its members) should do high level specialized work. In reality the members only assist to

[6] In Czech: „obecní rada".

heads of departments. This may be explained by the fact that also the counselors reached their posts through political agreement, without expert knowledge. Therefore it would be more suitable to give the mayor exclusive rights to name his counselors. 3/ The mayor should be the real boss of the office. He should decide on whom to employ, he should carry out the personnel policy (and not his secretary or director). It should be his right to choose and dismiss his employees. On the one hand, the mayor is responsible for the materialization of all independent responsibilities and for the procedural part of state administration, on the other hand he has no powers to choose the executive personnel 4/ The changing of the respective responsibilities. It would be desirable to separate the strategic, long-term, principal and control decision (delegated to the council) and the operative, everyday decision making (delegated to the mayor). In this way, the council would be responsible for strategic planning and the mayor for execution. 5/ Change the form of elections – implement direct election for the mayor too, while he would be not a member of the council. 6/The chairman of the council – on the head of the council should be one of the council members but his function should be formal, responsible for procedural issues. 7/ Change the rules of recalling the mayor – to recall the mayor it would be necessary a penal sanction or other serious violation of law. The Czech regulation is naturally only one example of many, however in this way it can be a starting point in our theoretical study – which is also a basis for layman debates as well. The reason for this is the simple fact, that the public administration and through it the administrative law has probably the most connections/relations to the people themselves. It is applied in great measures: it makes the administrative law a (quasi)living entity – but this also means a greater possibility and attraction to mistakes. This stands twice for the post socialistic countries, where most of the basic legal definitions are not crystallized yet. What are the questions, we are trying to answer more than 20 years now? These questions are primary social and not legal. After the changing of the regime the quality of the laws, the legal framework – which was the basis for the social and political changes – was rather poor. But it was not the real reason for irresponsible political behavior, which led our societies in the current state, where public interest and welfare are always on the last spot – the real issue was that our leading (political) elites had only a very little thought on the fundamental principles of democratic functioning – and sometimes it seems, that maybe we have to wait for this at least another twenty years.

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The (super) Natural Aspects of Public Financies

The current economic crisis and the collective subconsciousness

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Abstract: From the common entity of morality, law and religion emerged independent entities of morality, law and religion. Trivial as this statemernt may seem it is very important to be aware of it when investigating public finances. The historical development reached a position where the meta-structure itself seems to be a matter of course. However, it was not always like that. The origin of this common entity is bound with the existence of moral intuitions. In the sense of a system ensuring the fulfilment of functions of public finances as such, this regulation system may be considered to be a system independent of the will of people. Apart from man it is characteristic also for other animate being species on the earth. This regulation system was probably existing already with the forebears of man.

Keywords: morality, financial law, religion, collective subconsciousness, public financies, economic crisis, moral intuitions, origin, sociology, anthropology, psychology.

1. Introduction

1.1. The common entity

From the common entity of morality, law and religion emerged independent entities of morality, law and religion. Trivial as this statemernt may seem it is very important to be aware of it when investigating public finances. The historical development reached a position where the meta structure itself seems to be a matter of course. However, it was not always like that. The aim of this paper is to highlight the moral and spiritual level of the economic and social category of public finances.

We may note that people were „longing for“ the existence of public finances so that their functions could be fulfilled. Without these prerequisites it would not be possible to create a state or to survive an infertile period as a horde. In this connection it is remarkable to compare the material reasons of the origin of writing and counting as such[1].

[1] Writing and counting have the same origin. The character by which things were fixed and the number which gave their quantity belong together. Nontheless it means that the beginnings of all culture originated in economic thinking. This sentence will not sound well in the ears of those who prefer to describe the materiality to be the enemy of all culture. The Sumerian earthen tablets prove the opposite. Numerous very early texts are purchase/sale contracts, delivery notes and accounts.“ Uhlig Helmut: Die Sumerer, C. Bertelsmann Verlag, Munchen 1976

Economic thinking was most probably necessary for survival during infertile or disadvantageous periods. These seasons were repeated in various parts of the globe, in various intervals, in various lengths and probability but always with repetitiveness typical for nature (or movement of planets). The observation of these repetitive rules of nature represented the first step of mankind to colonization of territories which are not equally advantageous for human beings throughout the whole year.

The knowledge of the length of the infertile period (winter) and the quantifiability of stocks enabled people to economize with stocks (goods) in a way to guarantee the survival of the group to the next fertile period.

1.2. The concept of moral intuitons

Another proof of primary importance of public finances is the existence of moral intuitions. According to a recent study on the subject of social and biological communication the theoretical basis for further examination of the matter has been laid down by the tandem Haidt and Bjorklund[2]. Haidt and Bjorklund hold the view supported by a number of research studies that in spite of the evident cultural variability of standards and practices there is a small group of moral intuitions to be easily found in every society, even with some animate being species.

More concretely, they are the emotional reactions or answers which are activated in situations connected with:

Ad 1) causing harm to or taking care of - e.g. sensitivity or disinclination to the manifestation of pain and suffering of others especially with the young and vulnerable persons,

Ad 2) fair approach/reciprocity- e.g. negative reactions towards those not reciprocating kindness,

Ad 3) authority and respect- e.g. anger to- wards those not manifesting due attributes of regard and respect.

Apart from these three universal intuitions there are quoted two generally known ones related to cleanness/sanctity - e.g. disgust towards spoiled food, towards some manifestations of sex, menstruation and *interest/fear* about its group[3].

[2] Haidt, J., & Bjorklund, F. (2008). Social intuitionists answer six questions about moral psychology. In W. Sinnott-Armstrong (Ed.), Moral Psychology, Volume 2: The Cognitive Science of Morality: Intuition and Diversity. Cambridge, MA: MIT Press. (pp. 181-217)

[3] Processed according to:Polarized discourses related to current social topics. Popper Miroslav, Section of research of social and biological communication – Centre of excellency for research of citizenship and participation, Slovak Academy of Sciences, Bratislava, Sociology 42, 2010, No. 5.

The research of moral intuitions resulted in numerous ascertainments significant for public finances as such. In the spirit of these ascertain-ments, in the sense of the system ensuring the fulfilment of functions of public finances, they may be considered to be a system independent of the will of people. Apart from man it is characteristic also for other animate being species on the earth. This regulation system was probably existing already with the forebears of man.

In the spirit of these ascertainments, in the sense of the contemporary system ensuring the fulfilment of functions of public finances, they may be considered to be the fundamental social structure on the basis of which the social existence of human societies was formed.

Through sociology, anthropology and psychology, the mentioned conception could be connected with the superstructure of collective subconscious mind elaborated by Carl Gustav Jung. The quoted synthesis would be especially necessary in order to understand the reasons of contemporary world financial, moral, technological, human and value crisis.

2. Body

2.1. Social values

„The concept of values is able to weld together (even under normal circumstances) evidently different interests of scientific disciplines dealing with hu man behaviour.“[4].

Man as a being, from the beginning of recorded history remains unchanged. It means our genetic structure is in principle all the time the same as was the ge-netic structure of people in Neolithic or before the Neolithic revolution. To our physical well being we need relatively little food and we endure and need badly extreme amount of physical exercise to keep fit.

Throughout history most probably not even psychical needs of well being were changing significantly, though the opposite may seem to be true. Though we witness idelogical fights, the basic psychical values characteristic for people re- main more or less unchanged. Schwartz mentions the concept „universal conditions of human existence“ by which he means :

Ad a) the needs of individuals as biological organisms

Ad b) inevitable requirements for coordinated social interaction

Ad c) survival and well being of the society.

[4] The quotation comes from Rokeach /1973/. This idea proclaims the central character of value conceptions. Resource : Values and value orientations in the mirror of history / a summary study/. Ištvániková Lucia, Čižmárik Martin. Institute of social studies, Slovak Academy of sciences, VEGA 2/6190/6.

Schwartz was deducing ten, as for motivation different types of values, from three universal conditions of human existence. In this connection it is necessary to mention ten motivation types of values according to the following segmentation[5]:

1) Power: social status and prestige, control and dominance over people and resources /representative values: social power, authority,wealth/.
2) Success: personal success through demonstration of competence according to social standards /representative values: success, capability, ambition, influence/.
3) Hedonism: own delight and sensual pleasures /representative values: pleasure, enjoying life/.
4) Stimulation: excitement, changes and challenges in life /representative values: courage, changeable life, exciting life/.
5) Selfdetermination: independent thinking and selection of activities, creativity, exploration /representative values: creativity, freedom, independence, curiosity, own choice of goals/.
6) Universalism: understanding, effort, tolerance, protection of prosperity of all people and protection of nature /representative values: magnanimity, wisdom, social justice, equality, peaceful world, the world of beauty, unity with nature, environmental protection/.
7) Benevolence: protection, emphasis on the well being of people with whom the individual is in frequent personal touch / representative values: readiness to help,honestness, forgiving, loyalty, responsabiliry/.
8) Tradition: respect, commitment, acceptance of habits and ideas provided to the individual by traditional culture or religion /representative values: modesty, taking share in life, devotedness, respecting tradition, moderation.
9) Conformity: preferring self-control in behaviour, inclinationsto violating social expectations and standards and to disappointing someone or doing harm to someone /representative values: politeness, obedience, self-discipline, respecting one´s parents, respecting elderly people/.
10) Safety: safety, harmony and stability for the society, relations of the individual /representative values: safety of family, national security, social order, cleanness, mutual kindness and support/[6].

[5] Schwartz, S. H.: Are there universal aspects in the content and structure of values? Journal of Social Issues, year. 50, 1994, č. 4, s. 19 – 45.
[6] Compare to: Kavalíř, P.: K problematice výzkumu hodnot a hodnotových preferencí. Československá psychologie, roč. 49, 2005, č. 4, s. 333 – 341.

2.1.1. The universal conditions of human existence and the functions of public finances

However, it is evident that the three basic prerequisites of human existence correspond with the functions of public finances.

The allocation function represents the effort to ensure the material needs for survival of individuals in the society. The redistribution function represents the effort to reduce social inequality and enhancing cohesion within the society. The stabilization function represents the effort to preserve the state of society, the effort to maintain status quo, in other words to maintain society as such.

Therefore it is possible that apart from the unchanged physical (physiological) needs man has also more or less unchanged psychical needs. In order to ensure systematic development of society it is necessary to ensure that not only economic property be subordinated to the system of public finances but also spiritual values accentuated by the psychological expert public.

2.2. The theoretical context of public finances

The concept of public finances covers two basic meanings. On the one hand, the concept of public finances means the practical activity of public administration and on the other hand, it is the theory[7]. The Hamerníková-Kubátová team elaborated a definition that can serve as a theoretical basis:

„Under the concept of ´public finances´ we understand specific financial relations and operations taking place within the economic system between the bodies and institutions of public administration on the one hand and other subjects on the other hand (i.e. cititzens, households, firms, non- profit orga nizations, etc.)“[8].

The quoted definition presupposes to be aware of concepts like public administration, financial relations, economic system. At first glance it seems to be clear it is an abstract complex concept created artificially - as a theoretical instrument or scientific discipline. The opposite is true.

Nowadays we define public finances as a system that was, in a certain sense, the prerequisite of the formation of society together with the rules for relations beyond it. These rules function with iron logics and are subordinated to rules similar to physical rules.

[7] Compare: Hamerníková,Bojka and Kubátová, Květa: Public finances: text- book. 2nd edition. Eurolex, Bohemia, 2004.
[8] Hamerníková, Bojka and Kubátová, Květa : Public finances : text-book. 2nd edition. Eurolex, Bohemia, 2004.

2.2.1. Theoretical context of public administration

Public administration represents an activity comprising the managing of society, the administration of state as well as its parts or the administration of public affairs in society organized on state level. It is the manifestation of executive power in the state. The concept of public administration itself is used as the expression of public power in the organizatory sense. In that case they are the bodies of public administration, the administrative bodies. The concept of public administration is being used also in the functional aspect when it deno- tes the performance of public administration in the form of executing underle- gal and commanding activity of these bodies. In a certain sense it comprises also the specific position of statutory self-governing power[9].

In other words, public administratiion may be defined, on the one hand as the administration of public affairs being ensured primarily by the bodies of public administration and on the other hand it may be perceived as a complex of administrative activities in connection with executing public power in the state[10].

In this way we defined the concept of power and in a narrower sense the concept of public power. The state served first of all for strengthening of public power within the society. The public power on the general level is characterized by conceptual signs typical for power as such. Power is actually the capability to oblige someone to behave in a certain way and in the case when this way of behaviour is violated, to compel the demanded way of behaviour or to punish the person who had violated it.

It shows that substantially every individual disposes of power. Public power is characterized by the fact that all the so called subjects of public power performing and ensuring it in public interest dispose of it[11].

2.2.2. The public sector and the economic system

According to Tomášková the sense of public finances is to search the most efficient way of allocating resources, in other words, to achieve maximally possible benefit with limited means. However, so far no economic system was able to efficiently allocate resources in a way that the benefit from these re- sources be maximal for all the subjects[12].

The quoted author also supports the conception of research, emphasizes the allocation function of public finances and stresses the economic system of society. She divides the economic systems according to the basic forms into: a/ customary, b/ command, c/ market, d/ mixed. She also points out the fact that practicly all the states of the world dispose of the mixed economic system.

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[9] Compare: Prucha,P.: Administration Law – general part, p.48, ISBN 978-80-210-426-6.
[10] Compare: Horzinková,E.-Novotný,V.: Procedural administrative law. /uni- versity textbook/. 2nd edition. Prague, Leges 2008. ISBN 978-80-87212–01.
[11] Compare : Prucha, P. : Administrative law, general part, p.36, ISBN 978-80-210-4276-6.
[12] Compare: Tomášková, Eva : Public finances, p.6. Brno . Masaryk University 2006. 115 pages ISBN 80-210-4177-3.

When speaking of public finances it is necessary to define the milieu where they manifest themselves, i.e. the public sector.The public sector as a part of economy is characterized by the following particularities[13]:

Ad 1) institutions included in it deal with production or providing certain properties which are not interesting for the private sector or redistribution of properties. In this connection it is necessary to mention that the pub- lic sector is not subordinated to public control from the part of the state control bodies nor from the part of citizens.

Ad 2) institutions included in it are completely or partly financed from public means

Ad 3) institutions included in it are connected with the fiscal system and budget system.

Further on, public sector may be characterized by its tasks. The first task of public sector is to create adequate conditions for the functioning of the pri- vate sector. The second task of the public sector is to ensure sufficient amount of a certain property. One should not forget that the activity of the public sec- tor limits the income freedom of the private sector.

In this context it is necessary to mention the public properties representing, on the one hand, properties as such and on the other hand, they represent a spe- cific category of properties – public properties.[14] As to the character of pro- perties, we divide them between free and economic. Free properties are cha- racterized by the fact that they are freely at disposal, they need not be produced , redistributed, their market value is zero. On the other hand, economic properties are created from limited resources and their offer is limited.

3. Conclusion

„There is a God about whom you know nothing, because men have forgotten him. We call him by his name: Abraxas. He is less definite than God or Devil... Abraxas is activity: nothing can resist him but the unreal... Abraxas stands above the sun[-god] and above the devil If the Pleroma were capable of having a being, Abraxas would be its manifestation.“[15]

—2nd Sermon

Carl Gustav Jung practically whole his life was facing attacks from the part of modern science which was permanently contesting the empirical nature of his ascertainments. He was also often accused of esotericism. From the other side he was

[13] Processed according to: Tomášková, Eva : Public finances, p.15. Brno. Masaryk University 2006. 115 pages ISBN 80-210-4177-3.
[14] Compare : Tomášková, Eva : Public finances,p.6. Brno. Masaryk University 2006. 115 pages. ISBN 80-210-4177-3.
[15] The Seven Sermons to the Dead. Septem Sermones ad Mortuos by Carl Gustav Jung, 1916 (Translation by H. G. Baynes)

criticized by theologians and spiritual philo- sophers who were unable to accept the criticism of their idealized ideas. He was reproached mainly because of his too psychological perception of God who as an autonomous psychical contents has no reality beyond hu- man psyche.

In spite of that he is the author who was investigating the original anci- ent entity law – morality – religion by means of psychology as well as of the attempt to create a coherent system by means of faith, science and truth. It is remarkable that state structures without a belief in some su- perhuman being /spiritual being/ originated nowhere. Worshipping of God and the formation of a state has some mutual connection so far not known. Nevertheless, it is sure that the temple was the first state body and that the social acceptance of the regulation system always had to be achieved in some way. In antiquity rulers did not have the possibility toapply coercive measures due to the level of soil cultivating technologyat that time.

The teachings on gods/god and different spiritual beings proved to be a cheap and efficient alternative to maintaining army or applying coercive measures.

Every disobedient member of society was in case of sin- ful behaviour punished by the god/gods/ in an inscrutable way. Thusit is evident that worshipping of God and divine power has common roots with the formation of states.

As it was mentioned in the beginning, economic thinking concentrated on survival of a group of people and it already disposed of that powerwhich was the prerequisite of the formation of states. Jung called this power Pleroma (i.e. divine power). So far we call it public order the loadbearing structure of which are the public finances.

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The Delimitation of the Fee for Using the Public Ground in the Czech Republic and in Poland

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Abstract: The main aim of the paper is to explain and to compare the approaches of the two different countries in charging the usage of the public ground. In the Czech Republic the problem still seems to be very topical because the legal regulation provides only the vague platform for solving arising disputes about imposing the fee.In Poland the general delimitation of the public ground fee is missing and only the fee for very specific grounds could be imposed, for examples the fairground fee. The question of the paper is find the correct measure how to regulate and consequently how to impose these type of fee and in what extent, because in some cases the legal regulation on public ground fee could interfere into the other rights.

Keywords: fee, tax, tax duty, public ground, fairground, imposing the fee.

Generally about the public grounds

In the Czech regulation the legal definition is implemented in the Act. No 128/2000 Coll, on municipalities, as amended, concretely in the article 34, where "*the public ground means every square, street, fairground, pavements, public verdure, parks and other spaces accessible to everyone with no limitation, tm. designated to public using, no matter who is the owner of the space.*

The definition contains the demonstrative enumeration of the spaces that could be classified as a public ground, and it also establishes other cumulative prerequisites to subsume the concrete ground to the public ground group.

The enumeration of the potential public ground spaces mentions the various types of spaces, but only in demonstrative way. According to the authors point the question is if to interpret this public ground definition restrictively or extensively, that means if the cumulative prerequisites must be fulfilled solely for the other spaces not mentioned in the enumeration or it´s also necessary to be met in case of the squares, streets etc. Especially in case of the public verdure the problem could arise very easily. The authors support the restrictive point of view with argumentation help of the Supreme Administrative Court: *"The definition of the public ground in accordance to its content delimits public ground by material criteria and it provides demonstrative list of possible public grounds. Furthermore it defines the public ground by the indication*

of public accessibility that applies for untitled type of public ground and for the titled as well."

The authors insist that the very indispensable criterion of the public ground is its accessibility without any limitation, no matter who is the owner. This opinion is also supported by the repeating argumentation of the Supreme Administrative Court, for example in its decision no. 9 Afs 86/2008-89.

The public ground is supposed to be determined by the activity of municipality – by issuing the public decrees but the municipalities are unfortunately still uncertain if the designing the municipal public ground has constitutive or declaratory character. The opinion of authors on the declaratory character is also based on the decision of Constitutional court *"rights and duties of the space owner are not touched by its indication as a public ground. The municipality decree solely declares the existing state of affairs."*[1]

This matter is also connected to the question of the ownership. There is no exact certainty about the relation between public ground owned by the private owner and the institute of the ownership. The general opinion that prevails expresses that the private relation is not affected by the public law and its limitation. The complexity of the situation could be demonstrated by the decision of Supreme Administrative court: "if the ground in possession of third party is a part of public ground, the general usage of the public ground means expropriation with no compensation. If the ground is not a part municipality property, this fact causes the gratuitous enrichment where is a fulfillment with no legal reason. Also in case there is a legal reason for using the public ground this does not establish the legal title to gain the fulfillment that is free of any charge[2].

In Poland the general delimitation of the public ground is missing and it is replaced by fragmental definitions of the concrete public grounds. Probably the most important is the fairground where the fee on using the fairground - „*opłata targowa*" is imposed.

Fee on using the public grounds

Generally about imposing the fee

The fee on using the public ground could be defined as an indirect property tax mainly in the connection to the missing consideration. In the Czech Republic the fee is concretely established by the Act. No. 565/1990 Coll., on local fees, as amended[3]. In Poland the fee on using the fairground is regulated by the Act, on local taxes and fees,

[1] Decision of Constitutional court, sp. zn. ÚS 21/02, Published under No. 211/2005 Sb.
[2] Decision of Supreme Administrative Court sp. zn. 33 Odo 1253/2005.
[3] Article 4 of the Act. No. 565/1990 Coll., on local fees, as amended.

as amended[4]. Really important to highlight in both cases the fee could be, from the point of the legal theory, considered as a tax.

In Poland this contention could be supported by the fact that „independently on the using the facilities on the fairground or using other services provided by the fairground, the subject acting in way presumed by law is bounded to pay the fee[5]. Also in case of the Czech fee, its payment for using the fairground for business does not prevent the tax subject from paying other tax duties[6,7].

In Poland the regulation of the fairground fee is set by the Act on local taxes and fees[8]. This type of local tax is implemented by par. 1 point 4 of mentioned law. Other types of local taxes and fees are property tax, transport vehicle tax, local recreation tax, spa tax and pet tax[9]. Furthermore, the local budget income is also agriculture tax[10], forest tax[11,12], tax of heritage, girt tax, tax from private law acts, budget payment (other administrative fee in behalf of the public budget).

The fee administrator and budget determination

In the Czech Republic the fee administrator is the local municipality that is entitled to collect the fee, under the condition of its proper imposing. Imposing the fee lays under the regime of the Tax Code administration[13]. The recipient of the fee income is also the municipality imposing the fee.

In Poland the fee administrator is a municipality mayor, according to the Act on local taxes and fees. The collector is usually the authorized fairground[14] and the recipient is also local municipality.

The fee subject and fee object

The fee object is represented by the material legal fact that could create, in connection to the law, the constitution of the duty to pay the fee[15]. The tax subject is natural person or legal entity that meets the fact mentioned above.

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[4] Ustawa z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych, ze zm.
[5] In Etel, L., Prawo podatkowe, 2. Wydanie, Warszawa, Difin sp. z o o., 2008, str. 450.
[6] For example income tax, consumer tax that is income of the local budgets and it is a lump sum tax payment.
[7] Viz také čl. 15 odst. 3 zákona o místních daních a poplatcích.
[8] Ustawa z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych, ze zm.
[9] Článek 1 body 1, 2, 5, 5a, 7 zákona o místních daních a poplatcích.
[10] Ustawa z dnia 15 listopada 1984 r. o podatku rolnym, ze zm.
[11] Ustawa z dnia 20 października 2002 r. o podatku leśnym, ze zm.
[12] The agricultural charakter of Poland i salso reflected in current legislative where it regulates separately agricultural tax and forest tax.
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[14] In Etel, L., Prawo podatkowe, 2. Wydanie, Warszawa, Difin sp. z o o., 2008, str. 451.
[15] In RADVAN, M., MRKÝVKA, P., PAŘÍZKOVÁ, I. et al. Finanční právo a finanční správa - berní právo. Brno: Masarykova univerzita, 2008. 509 s. ISBN 978-80-2104-732-7.

In consequence to the Czech definition of public ground is it important to highlight the fact that the using any public ground does not necessarily mean the constitution of the fee duty. This means that we could distinguish following situations

- The general usage of public ground and specific usage of public ground
- Public ground subjected to the fee duty and public ground not subjected to the fee duty

The following scheme could provide the combination of usage of public ground levied by the fee.

General usage of public ground and municipality **levied** the fee on this public ground	**Specific usage** of public ground and municipality **levied** the fee on this public ground
General usage of public ground and municipality **did not levythe fee** on this public ground	**Specific usage** of public ground and municipality **did not levythe fee** on this public ground

Scheme of authors

How the scheme demonstrates, the fee duty could be levied solely on the specific usage of the public ground and the municipality has to establish, by its decree, that the concrete public ground is subject to the fee duty by specific usage.

The determination of general and specific usage of public ground is implemented in the Act on the local fees where *"fee on the usage of public ground is collected for specific usage of public ground that means*

- Doing the digging works,
- Placement of temporary constructions and facilities serving for providing sale and services,
- Placement constructing or advertising facilities, circuses, amusement parks and similar attractions,
- Placement of disposal site,
- Reserving permanent parking lot,
- Using the public ground for cultural, sporting and advertising events[16].

[16] Article 4 Act No. 565/1990 Coll., on Local fees, as amended.

The question is how we could describe the specific usage of the public ground. Very simply general usage of the public ground is a form of using that does not exclude the same using by the third party. If it does, the usage must be considered as a specific, or potentially forbidden[17].

In accordance to the par. 14 act on the public charges and fees "the fee is implemented by the municipal decree that regulates the specifics of their collecting, mainly concrete rate of the fee, the conditions for existence of the fee duty and also the liberation from the fee duty. In case of the public ground fee the municipality decides which public grounds are liable to the fee."

The Constitutional court decided that: "the fee does need to apply to every public ground and this implies the necessity of the exact specifications of the spaces that are liable to the fee duty to prevent from the mistake. That imposes the high standard of the municipality decree and the specification in the decree has to support legal certainty of the citizens."[18]

In Poland the legal regulation implements quite different system of local fee. The regulation for the local fees is strictly limited to the taxation of the selling on the certain designated place that is fairground. The law regulates the fairground very vaguely where the fairground could be defined as a space where the sale is executed. From the 19th June 2011 the new regulation of par. 15 became effective and the fairground fee is no more collected for the sale in buildings or its parts where the new definition omitted the continuation of the definition: with exemption of the roofed fairgrounds and halls used as a fairgrounds, auctions and exposition halls.

What is really important to highlight the fairground fee could be collected not only for public fairground sale, but also for private fairground sale – on place that is administrated by private individual. Also the fee is collected on places that are not marked with the sign Fairground. For example in case of sale of newspaper on intersection could be also liable to the fairground fee under the Act on local taxes and fees.[19]

This is parallel to the regulation in the Czech Republic in vague and non concrete definition of the space liable to the fee duty. In Poland the legal regulation provides less competence to the municipality to determine the spaces liable to the fee duty. This could be derived from the law and it is mainly connected to the subject that could be considered relevant to the fee assessment.

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The tax base and tax rate

The tax base in the Czech Republic is set by the special using of the public ground. As it was mentioned above the municipality is entitled to set its own rate, generally not higher than 10 CZK per day[20].

The tax base in Poland is derived from the execution of the activity In case of legal entities and its organization body the fairground fee should be collected just once from the its executive. The tax subject is liable to the fee duty as an entity, not through its employees. The fee rate is set by the local authority and its upper rate is limited by law. The fee rate varies from 5 to 15 PLN per day[21].

Conclusion

The main aim of the article is to focus on the local fee collected in connection to the special usage of the public grounds. The authors decided to compare the regulation of the Czech Republic and Poland to find out the differences in regulation between two neighbor states with similar social and cultural background.

The regulation of public ground fee in the Czech Republic brings relatively strict regulation on the other side the regulation in Poland is limited solely on the fee for using the fairground. The authors do not agree with the competences transferred to municipalities, especially in case of the Czech regulation.

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[20] In certain cases the tax rate could be multiplied, for example in case of placement of amusement parks.
[21] In Etel, L., Prawo podatkowe, 2. Wydanie, Warszawa, Difin sp. z o o., 2008, str. 451.

Публичность и публичный интерес в банковской деятельности

(Public Law and Public Interest in Banking Activities)

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Аннотация: Статья представляет собой теоретический и правовой анализ проблем в регулировании банковской деятельности, которые началась в банковской системе России в период финансового кризиса.Авторы статьи попытался проанализировать нормативные правовые акты о государственной финансовой поддержке банков. В работе показаны важнейшие принципы банковской деятельности, публичного права и публичных интересов, выступающих основной банковской деятельности.

Ключевые слова: банковская деятельность, публичное право, банковская система, кредитные организации, банковский кризис, рыночная экономика.

Abstract: This article presents a complex theoretical and legal analysis of the problems in regulation of banking activity which began in the Russian banking system past financial crisis. The authors of the article has tried to analyze legal acts about help of state for banks. The paper shows the most important principles of banking activity, public law and public interest, its main in banking activity.

Keywords: banking activity, public law, public interest, banking system, credit organization, banking crisis, market economies.

В современных социально-экономических условиях банковское право России, как формирующаяся подотрасль финансового права, развивается как некая новая реальность. Наглядным доказательством тому являются использование в ходе финансово-правового регулирования банковских отношений совершенно нового юридического инструментария, как-то: различных форм государственно-частного партнерства, финансов государственных

корпораций, публичного фонда страхования вкладов, публичных функций кредитных организаций и.т.д. С точки зрения развития научно-правовой теории появился ряд новых финансово-правовых категорий, понятий и научных концепций. В их числе: финансовый мониторинг, публичность и социальность банковской деятельности, финансовая публичность, финансово-административная правосубъектность кредитных организаций, концепции публично-правового регулирования банковской деятельности и кредитной организации как публичного юридического лица и др. Сказанное, на наш взгляд, предполагает определенное переосмысление постулатов финансового права, в части совершенствования теоретических основ банковского права. Предлагаемые к рассмотрению вопросы избраны, исходя из потребностей развития российского банковского права как адекватного современным рыночным условиям режима финансово-правового регулирования, имеющего целью совершенствование механизма правоприменения в финансово-кредитной сфере.

Вопрос о проявлении публичного интереса в банковской деятельности представляется нам важным, поскольку, на наш взгляд, в теории банковского права категория «банковская деятельность» имеет такое же определяющее значение, как и понятие «финансовая деятельность государства» в финансовом праве.

Анализ и обобщение существующих в теории финансового права основных определений категории финансовой деятельности государства[1], позволяет определять последнюю, как организационно-управленческую деятельность публичных субъектов - государства, либо им уполномоченных органов по созданию и усовершенствованию финансовой инфраструктуры (финансовых институтов) и правовому обеспечению их надлежащего функционирования. Так, по мнению профессора Запольского С.В., ключевым признаком финансовой деятельности государства и муниципальных образований является достижение эффекта упорядоченности, урегулированности в той или иной сфере финансов посредством формирования финансовой политики и претворения ее в жизнь[2]. Саттарова Н.А., при определении «финансовой деятельности» также отмечает, что важно не забывать именно о ее цели, выраженной в покрытии затрат на социально-заказные программы[3], а также об

[1] См.:Соколова Э.Д. Теоретические аспекты правового регулирования финансовой деятельности государства и муниципальных образований. Дисс. док. юрид. наук. – М., 2008. – С. 56.; Финансовое право: Учебник / Под ред. О.Н. Горбуновой. 2-е изд., перераб. и доп. –М.: Юристъ, 2000. – С.16.; Финансовое право: Учебник / Под ред. Н.И. Химичевой. 3-е издание перераб. и доп. – М.: Юристъ, 2003. – С. 85.; Финансовое право: Учебное пособие / Отв. ред. И.В. Рукавишникова. – М.: 2007. – С. 17.; Худяков А.И. Финансовое право Республики Казахстан. Общая часть. – М., 2001. – С. 19.

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[3] См.: Саттарова Н.А. Принуждение в финансовом праве. Монография. – М.: Изд-во «Юрлитинформ», 2006. – С. 75.

организационном характере такой деятельности. Организационную природу финансовой деятельности государства отмечает Ашмарина Е.М.[4]

В банковской деятельности мы также ранее выделяли административную, или организационно-управленческую составляющую, позволяющую нам говорить о финансовой правосубъектности и механизме защите публичного финансового интереса.

Организационно-управленческая составляющая финансовой деятельности государства и муниципальных образований в лице ими уполномоченных органов, непосредственно формирует их финансовую правосубъектность, особенностью которой является определенный набор публично-властных полномочий, то есть комплекс возможностей и способностей определять и устанавливать условия участия иных субъектов в финансовых правоотношениях. Данный вывод подтверждается анализом норм Конституция Российской Федерации (главы 1-6).

Применительно к банковской деятельности, государство наделило финансовой правосубъектностью прежде всего Центральный банк Российской Федерации. Наличие у последнего публично-властных полномочий проявляется в осуществлении им функций банковского регулирования и банковского надзора, то есть реализации возможности и способности определять и устанавливать условия участия кредитных организаций в банковских отношениях.

Реализуя названные публично-властные полномочия, уполномоченные органы обеспечивают осуществление публичной финансовой деятельности и, соответственно, нуждаются в определенной правовой защите от возможных нарушений со стороны прочих субъектов финансовых отношений. Причем в данном случае речь идет не о защите функций властвующих субъектов, а о механизме защиты публичного финансового интереса в финансовом общественном отношении.

Для банковских отношений, как вида финансовых общественных отношений, обеспечение защиты публичного финансового интереса также актуально и выработка его механизма насущна. В банковской деятельности финансово-административная правосубъектность, помимо Банка России, характерна для кредитных организаций, и проявляется в наличии у них публичных функций по отношению к клиентам, потребителям банковских услуг.

Данная специфика банковской деятельности предполагает необходимость специального правового регулирования, обеспечивающего и защищающего на законодательном уровне интересы государства, общества и гражданина.

В этой связи, предлагается на основе анализа существующих в философской и правовой теории основных определений категории «публичного

[4] См.: Ашмарина Е.М. Структура финансового права Российской федерации на современном этапе // Государство и право. 2004, №9. – С. 90.

интереса» определить ее место как составляющей в финансовой и банковской деятельности.

«Публичный интерес» в правовой доктрине является категорией законодательно не закрепленной и теоретически недостаточно определенной, сущность которой невозможно раскрыть без обращения к ее философскому пониманию.

Взгляды классиков буржуазной политической экономии Т. Гоббса, Ж.Ж. Руссо, К.А. Гельвеция, П.А. Гольбаха, Д. Дидро, Г. Гегеля, позволили прийти к выводу о том, что многогранность понятия публичного интереса свидетельствует о его отнесении к разряду социологических понятий[5].

При этом в зависимости от того, чьи потребности выражает интерес, в работах названных философов он подразделяется на личный (частный) и социальный (общенациональный)[6].

Первая разновидность интересов связывается с сугубо индивидуальными потребностями, установками, планами и конкретными условиями бытия человека, вторая – касается таких сфер как политика, законодательство, торговли, науки, искусства и т.д.

Особого внимания заслуживает поставленный в ранних трудах К. Маркса и основанный на взглядах Г.Гегеля вопрос об общем интересе как отношении, проникнутом разумом, и частном интересе как отношении, проникнутом духом своекорыстия[7]. У Г.Гегеля носителем общего интереса является государство[8].

Степень соответствия частного и общественного (государственного) интересов выступает высшим критерием правильности человеческого поведения в обществе, а совпадение частного и общественного (государственного) интересов одновременно выступает высшим доказательством и основным показателем совершенства общества и государства как общественной организации.

При этом синхронность интересов должна базироваться на частном интересе[9].

Главным средством решения задачи гармоничного сочетания личных и общественных интересов является разумное законодательство, признанное стать подлинным воплощением всеобщей воли. Панацеей от всех зол они видели в законах, составленных с учетом и в строгом соответствии с естественной сущностью человека, а корень зла – в недостатке мудрости и гуманности

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[5] См.: Шершень Т.В. Частный и публичный интерес в договорном регулировании семейных отношений. Дисс. канд. юрид. Наук. – Пермь, 2002, – С.14.

[6] См.: Гольбах П. Избранные произведения в 2-х т., т.1, – М., 1963, – С. 311-315; Дидро Д. Избранные произведения. – М.-Л., 1951. – С. 352-380; Гольбах П. Система природы или о законах мира физического и мира духовного. – М., 1940. – С.185-207.

[7] См.: Маркс К., Энгельс Ф. Соч. т.1. – С.160.

[8] См.: Гегель Г.В.Ф. Соч. т.3. – М., 1956. – С.228.

[9] См.: Гельвеций К.А. Об уме. – М., 1938. – С.47.

государя, в темноте и невежестве законодателей, которые всегда частный интерес противопоставляют общему[10].

В новейшей финансово-правовой литературе практически отсутствуют разработки по вопросу о сущности интересов субъектов финансовых отношений.

Так, Соловьев В.А., в своем диссертационном исследовании, применительно к интересам субъектов налоговых правоотношений, предлагает понимать под интересом публичного субъекта (государства) общий интерес, как своего рода усреднение личных и групповых интересов, без удовлетворения которых невозможно, с одной стороны реализовать частные интересы, с другой – обеспечить целостность, устойчивость и нормальное развитие организаций, государств, наций, социальных слоев, наконец, общества в целом[11].

Одновременно в диссертационной работе Высоцкой О.С. отмечено, что главной характеристикой публичного интереса является его официальное признание, и потому публичным может считаться имеющий защиту и поддержку государства общественный интерес. Здесь же с целью более глубокого осмысления понятия «публичный интерес» сделан ретроспективный анализ вопроса разграничения категорий государственного и публичного интересов[12]. В работе отмечено, что в конце XIX столетия, изучая государственные финансы, и устанавливая первичные категории русского финансового права, ученые-юристы использовали категорию «государственные финансы»[13], подразумевая под ними и финансовые ресурсы государства, и финансовые ресурсы иных государственно-территориальных образований (в первую очередь, таких как общины, земства, округа). Это позволило заключить, что на заре формирования русского финансового права термины «публичные» и «государственные» использовались как синонимы. После 1917 года попытки разграничения данных понятий не осуществлялись, вследствие чего термин «государственное» полностью вытеснил термин «публичное», в то время как зарубежные авторы, например, Годме П.М.[14], все чаще прибегали к употреблению именно последнего термина при характеристике финансовой деятельности государства.

Публичность - слово в русском языке иностранное. В латинском переводе слово «publicus» означает общественный, гласный, открытый, аналогично переводится с английского языка и понятие «publicity», означающее публичность, гласность. Словарь русского языка В.И.Даля толкует значение производного от

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[10] См.: Шершень Т.В. Частный и публичный интерес в договорном регулировании семейных отношений. Дисс. канд. юрид. наук. – Пермь, 2002, – С.18.

[11] См.: Соловьев В.А. Частный и публичный интересы субъектов налоговых правоотношений. Дисс. канд. юрид. наук. – М, 2002. – С.12.

[12] См.:Высоцкая О.С. Финансово-правовое регулирование публичных фондов денежных средств. Дисс. канд. юрид. наук. – М, 2011. – С.35.

[13] См.: Бельский К.С. Финансовое право. – М.: Юристь, 1994. – С.29.

[14] Годме П.М. Финансовое право / Перевод и вступ. статья Р.О.Халфиной. – М.: Прогресс, 1978. – С. 10.

него прилагательного - «публичный» как всенародный, оглашенный, явный, известный[15]. Давая определение термину «публичный», как производному от латинского «pablicus» и английского «publicity» автор известного толкового словаря Ожегов С.И. акцентирует внимание на философском понимании данного термина как «общественный, не частный»[16].

Тихомиров Ю.А. новое осмысление понятия публичности видит в уходе от сведения его к обеспечению государственных интересов и трактовке публичного интереса как интереса отдельных индивидов, разного рода сообществ, объединений (в том числе, территориальных)[17], при этом вводит понятие «меры публичного интереса»[18], как условия соизмерения публичного интереса с личными и корпоративными интересами и гарантии реализации публичного интереса без подавления и ограничения последних.

Нечай А.А. применительно к финансовому праву публичный интерес представляет как выражение суммарного, усредненного социального интереса в какой-либо сфере общественной жизни – экономической, социальной и т.д.[19]

Для финансового права как отрасли публичного права такое понимание публичности означает необходимость замены категорий «государственный интерес» на более широкую категорию «публичный интерес».

Для банковского права, публичный интерес включает в себя не только исключительно государственный интерес, носителем которого является государство, в лице Центрального банка Российской Федерации, но и другие виды интересов, в том числе, общественный и территориальный. Современные условия развития государства и общества предопределили выявление особого значения этого понятия в содержании банковской деятельности и правовом регулировании банковской системы. Наличие объективных взаимосвязей и взаимозависимостей между финансовой системой государства и банковской системой, финансовой деятельностью государства и деятельностью банков, формирование устойчивой тенденции их расширения и развития в условиях текущего мирового финансового кризиса обуславливают необходимость оптимизации финансово-правового регулирования банковской деятельности и закрепления законодателем ее основополагающих начал в виде специальных правовых принципов. Обоснование идеи публичности в качестве одного из них направлено, прежде всего, на совершенствование банковского законодательства, повышение эффективности государственного регулирования банковской сферой.

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[15] Мюллер В.К. Большой англо-русский словарь.Екатеринбург:2007.С.964; Даль В.И. Толковый словарь русского языка.Современная версия.М.:2003.С.546.
[16] Ожегов С.И., Шведова Н.Ю. Толковый словарь русского языка. – М., Изд-во «Азъ», 1992. – С.185.
[17] См.: Публичное право: Учебник / Под ред. Ю.А.Тихомирова. – М., 1995. – С.3-33.
[18] Тихомиров Ю.А. Современное публичное право: учебник. – М.: Эксмо, 2008. – С.448-450.
[19] См.: Нечай А.А. Публичные фонды как категория современного финансового права // Журнал российского права. – 2004, №18. – С. 68.

Современные условия развития государства и общества предопределили выявление особого значения этого понятия в содержании банковской деятельности и правовом регулировании банковской системы. Наличие объективных взаимосвязей и взаимозависимостей между финансовой системой государства и банковской системой, финансовой деятельностью государства и деятельностью банков, формирование устойчивой тенденции их расширения и развития в условиях текущего мирового финансового кризиса обуславливают необходимость оптимизации финансово-правового регулирования банковской деятельности и закрепления законодателем ее основополагающих начал в виде специальных правовых принципов. Обоснование идеи публичности в качестве одного из них направлено, прежде всего, на совершенствование банковского законодательства, повышение эффективности государственного регулирования банковской сферой. Анализ норм Конституции Российской Федерации, Федерального закона от 2 декабря 1990 г. №395-1 «О банках и банковской деятельности» (в редакции Федерального закона от 3 февраля 1996 г.)[20], Федерального закона от 10 июля 2002 г. №86-ФЗ «О Центральном банке Российской Федерации (Банке России)» (в редакции от 26 апреля 2007)[21], иных законодательных актов, регулирующих отношения, связанные с банковской деятельностью, позволяет сделать вывод о том, что на законодательном уровне принцип публичности как принцип банковской деятельности и банковского права не закреплен. Положения ст. 43 Федерального закона от 2 декабря 1990 г. №395-1 «О банках и банковской деятельности», обязывающие кредитную организацию публиковать в открытой печати годовой отчет (включая бухгалтерский баланс и отчет о прибылях и убытках), лишь частично гарантируют соблюдение начал открытости и гласности при осуществлении банковской деятельности. Нормы гражданского права о договоре банковского вклада (см.ст.834 ГК РФ), в котором вкладчиком является гражданин, признавая его публичным договором, и обязывая тем самым кредитные организации к открытой оферте этой банковской услуги, также частично гарантируют публичность их деятельности.

Общая теория права проблемы принципов правового регулирования тесно связывает с совершенствованием законодательства. Как отмечал Л.С.Явич, от степени разработанности принципов права и правового регулирования в значительной мере зависит достижение сочетания стабильности и мобильности юридических форм[22]. Продолжая эту мысль и воплощая основные идеи и тенденции развития данных принципов, следует отметить, что, будучи закрепленными в нормах права, они укрепляют его способность формировать устойчивую правоприменительную практику и устанавливать правопорядок в

[20] Собрание законодательства РФ. 05.02.1996. №6. Ст.492.
[21] Собрание законодательства РФ. 15.07.02. №28. Ст. 2790.
[22] Явич Л.С. Право развитого социалистического общества. Сущность и принципы.М.: 1978.С.146.

регулируемых отношениях. Для банковской деятельности как особого вида финансово-экономической деятельности наличие закрепленных в законодательстве специальных принципов также усиливает присущее ей качество системности. Поскольку деятельность банков пронизывает насквозь всю социально-экономическую систему, принципиальные начала ее организации важны в равной степени и для государства, и для общества, и для его граждан. Открытость и гласность в банковской деятельности для всех них имеет высокую степень общественной ценности.

Поэтому мы полагаем, что отсутствие в действующем законодательстве нормы, закрепляющей принцип публичности банковской деятельности как принцип права и принцип правового регулирования, препятствует оптимизации государственного управления и эффективности правового регулирования, то есть снижает степень воздействия государства на общественные отношения в этой социально и экономически значимой сфере жизнедеятельности общества.

Закрепление в нормах банковского права в качестве правового принципа «публичность банковской деятельности» позволяет легализовать все публичные стороны этого вида общественной деятельности, раскрыть емкое содержание понятия «публичность», заложить основы открытости и гласности в процесс ее осуществления. Данный специальный принцип можно закрепить как в нормах действующего законодательства (например, путем внесения дополнений в Федеральный закон «О банках и банковской деятельности»), так и во вновь принятом системном законодательном акте (например, Банковском кодексе Российской Федерации или Федеральном законе о финансах). В финансово-правовой теории 1980-90-х годов уже высказывалась идея о принятии закона о финансах, разработанная О.Н.Горбуновой в докторской диссертации[23]. Однако до настоящего времени такой закон не принят, хотя в нем также могли бы быть прописаны общие принципы финансового права, и специальные банковского, в том числе принцип публичности банковской деятельности. Учитывая, что банковская деятельность - особый вид финансово-экономической деятельности, обладающий признаками публично-правового феномена (объединяет в себе предпринимательские и финансово-экономические начала), что обуславливает необходимость формирования особого финансово-правового метода ее регулирования – публично-правового. Основные принципы банковской деятельности и ее публично-правового регулирования, как доктринальные основы комплексного регулирования банковских отношений, могли бы быть

[23] Горбунова О.Н. Проблемы финансового права в условиях перестройки управления народным хозяйством.
Монография. М.: 1989. С.189. Горбунова О.Н. Социально-экономическое развитие и финансовое право.
1988. №5. С.40.

закреплены также в Банковском кодексе Российской Федерации. Принятие этого нового законодательного акта, могло бы способствовать системному изменению и структуризации банковского законодательства, развитию финансового права как инструмента государственного регулирования банковских отношений, с учетом взаимной связи между его различными подотраслями и институтами, а также взаимодействия с нормами других отраслей права. Кроме того, внедрение принципа публичности банковской деятельности в механизм ее правового регулирования предопределяет обновленное понимание самого государственного влияния на эту социально-экономическую сферу деятельности.

Дополнительно вопрос о необходимости закрепления принципа публичности банковской деятельности на законодательном уровне в качестве принципа права и правового регулирования актуализируется последствиями мирового финансового кризиса.

Антикризисные меры, предпринятые правительствами большинства государств, в основном состояли в поддержании своих экономик путем направления в них через банковскую систему государственных денежных средств, то есть целевого финансирования из государственного бюджета. В настоящее время акцент смещен напротив на резкое сокращение государственных расходов, активизацию предпринимательской инициативы, реанимацию рыночных механизмов. В связи с указанным, приведем несколько важных, на наш взгляд, доводов, позволяющих ставить вопрос о необходимости закрепления на законодательном уровне и введения в правовое регулирование банковской деятельности принципа публичности банковской деятельности.

Бюджет любого государства, представляющий в общем виде основной денежный фонд государства, обеспечивается налоговыми поступлениями, то есть в основном средствами налогоплательщиков. Аккумуляция, перераспределение и использование этих денежных средств происходит через банковскую систему. Взаимозависимость и взаимосвязь финансовой деятельности государства и банковской деятельности, финансовой системы государства и банковской, как ее составной части, ранее уже отмечалась в качестве основания публично-правового регулирования этих отношений. Осуществление финансовой деятельности государства через банки придает банковской деятельности публичный характер. В результате ответственность за своевременное поступление денежных средств из фонда государства в реальный сектор экономики страны, целевое использование хозяйствующими субъектами возлагается, в том числе и на банки. Кредитные организации, и в первую очередь банки, при трансформации государственных денежных средств в денежный фонд хозяйствующих субъектов выступают финансовыми агентами государства. Обычная роль банка как финансового посредника дополняется функцией финансового агента государства,

что требует предельной открытости этой деятельности и влечет регулирование отношений нормами публичных отраслей права, прежде всего, финансового.

Вместе с тем значительность объемов денежных вливаний в экономику повышает ответственность государства перед налогоплательщиками за эффективность используемых финансовых ресурсов, что требует от него совершенно специфического правового регулирования. При этом существует опасность усиления государственного вмешательства в экономические отношения, представляющая собой возможность возврата к их административному регулированию. Принцип публичности как принцип правового регулирования банковской деятельности способен, на наш взгляд, гарантировать недопущение развития тоталитарных элементов в государственном регулировании банковской деятельности. Правовой контроль за целевым использованием средств государственного денежного фонда как финансового ресурса, направленного на стабилизацию экономики, основываясь на прозрачности правового регулирования банковской деятельности, в ходе которой эти средства опосредуются, включает также меры взаимной ответственности всех участников этой деятельности.

Анализ законодательных актов, предусматривающих антикризисные меры, связанные с выделением в экономику денежных ресурсов из средств федерального бюджета, прежде всего Федеральных законов от 13 октября 2008 г. №173-ФЗ «О дополнительных мерах по поддержке финансовой системы Российской Федерации» и от 28 октября 2008 г. №175-ФЗ «О дополнительных мерах для укрепления стабильности банковской системы в период до 31 декабря 2001 года»[24], позволяет сделать вывод об отсутствии в них санкций.

Коммерческие банки, получившие государственную поддержку, в законодательном порядке должны быть обязанными к целевому использованию выделенных им государственных денежных средств. Весьма важным моментом, при этом является стадия отчета перед органом, выделившим данные денежные средства, об их использовании и результатах при этом достигнутых. Критерии эффективности и результативности, в этом механизме, являются значимыми, поскольку речь идет о государственных денежных фондах. В законодательный или иной нормативный акт, определяющий механизм господдержки, в том числе и банковской системы в целом либо отдельных банков, обязательно следует включать нормы-санкции, предусматривающие ответственность их исполнительных органов, а также членов Совета директоров за нецелевое либо неэффективное использование государственных денежных средств. Выделение и получение банками субординированных кредитов в период текущего финансового кризиса предполагает исключительно законодательную форму, которая позволяет в нормах права предусмотреть персональную ответственность

[24] Российская газета. 28.10.2008. №224 (4781). С.14.

руководителей банка, ходатайствующих о выделении государственных денежных средств, а также сотрудников банка, чья деятельность связана с последующим их использованием в случае допущения названными лицами соответствующих правонарушений.

Юридическая ответственность может означать штраф, лишение права заниматься профессиональной деятельностью в течение определенного срока, другие виды административной ответственности, а также уголовную ответственность в зависимости от степени общественной опасности совершенного правонарушения.

Другой публичный аспект правового регулирования банковской деятельности связан с ее двуединой природой, то есть присутствием в ней одновременно гражданско-правовых и публично-правовых начал. Современное развитие правового регулирования банковской деятельности позволяет утверждать о наличии устойчивой тенденции взаимопроникновения объектов публично-правового регулирования в частноправовые и наоборот. Проблемы обращения взыскания на предмет залога, традиционно относимые к сфере регулирования гражданского права, приобрели в условиях преодоления последствий мирового финансового кризиса публичный характер.

Право не регулирует ситуации, когда кредитные учреждения не могут реализовать изъятые у должников по ипотечным кредитам объекты залога ввиду утраты данными объектами стоимостной ценности в связи с умышленной их порчей, выселенными из них неплательщиками. В результате традиционного применения к отношениям по взысканию задолженности по ипотечным кредитам и обращению взыскания на заложенное имущество метода гражданско-правового регулирования без соблюдения публичного интереса, состоящего в восстановлении экономической и социальной стабильности, в чем, безусловно, заинтересованы государство, кредитные организации и граждане, объект залога – жилье утрачивает свою стоимостную ценность и способность к реализации. Остается не восстановленным банковский кредитный ресурс. Одновременно в обществе накапливается социальная напряженность ввиду утраты должниками жилья по ипотечным кредитам.

Данная экономическая реальность подлежит публично-правовому регулированию, прежде всего нормами финансового права с учетом гражданско-правовых аспектов регулируемых отношений. В законодательных актах, предусматривающих антикризисные меры, касающиеся банковской деятельности, принцип публичности должен быть реализован в качестве их предельной ясности, понятности и открытости для общества и его граждан. При этом государству и коммерческим банкам при выделении из бюджета денежных средств на антикризисные меры, в том числе на докапитализацию банковской системы, следует направлять их часть на погашение просроченной задолженности по

ипотечному и потребительскому кредитованию граждан. При этом, целесообразно учитывать объем имеющейся просроченной задолженности, дисконтировать ее в части неполучения банками прибыли, сформировать объем посильной задолженности для должников по своим кредитам и погасить коммерческим банкам за счет государственных средств оставшуюся часть ипотечного кредита.

На современном этапе развития банковской деятельности регулирование осуществляется в рамках банковского законодательства в области, как финансовой деятельности государства, так и движения денежных средств, связанного с гражданским оборотом. В первом случае используются нормы финансового права, во втором – гражданского права. Банковское право до настоящего времени не сформировалось в самостоятельную отрасль права, в первую очередь, в силу неоднородности подлежащих регулированию банковских отношений, возникающих в связи с осуществлением банковской деятельности. Возникающие в банковской деятельности правоотношения опосредуют движение денежных средств на стадиях создания, распределения и использования фондов денежных средств всех звеньев финансовой системы. Через банковскую систему как организационно-структурный институт финансовой системы и банки как ключевые ее компоненты осуществляется движение денежных средств государства, местного самоуправления и частных хозяйствующих субъектов. Банки, используя данные денежные средства, и связанные с гражданским оборотом, выступают субъектами публично-правовых и гражданско-правовых отношений. Кредитные организации при осуществлении своей предпринимательской деятельности привлекают и используют денежные средства субъектов различных форм собственности, вовлекая тем самым в нее большое количество участников (вкладчиков, кредиторов, органы государства и местного самоуправления) в целях достижения своего частного интереса - получения прибыли.

Именно названные выше участники банковской деятельности с позиций общества и государства формируют публичный интерес к стабильному функционированию банковской системы, что и означает публичный аспект ее деятельности. Данная специфика банковской деятельности предполагает необходимость ее специального правового регулирования, обеспечивающего на законодательном уровне интересы государства, общества и гражданина.

Кроме того, в процессе осуществления банковской деятельности проявляются горизонтальная (отношения кредитных организаций между собой и клиентами) и вертикальная (отношения между Центральным банком Российской Федерации, другими уполномоченным и государством органами в банковской сфере и банками) составляющие, обуславливающие комплексное правовое регулирование на основе сочетания диспозитивного и императивного методов.

Поэтому вопрос о нормах права, участвующих в регулировании банковских отношений, и их объединении в соответствующие институты, отрасли и подотрасли представляет научно-практический интерес. Высказанные автором в данной статье, безусловно, дискуссионные предложения не претендуют на всеобъемлющий анализ названных проблем и завершенность поиска средств оптимизации публично-правового регулирования банковской деятельности, как обновленного типа правового регулирования экономических отношений.

State Funds of the Czech Republic

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Abstract: State funds of the Czech Republic were established both under the previous arrangement of social relations and after 1989. Their establishment is generally justified by the necessity to ensure in a stable way a certain category of social interests. The state funds are constituted by the law; a managing authority and the source of income are established and specific costs are generally determined. What distinguishes a state fund from an organizational unit (branch) of the state is primarily the possibility to carry forward financial funds to the following years. The specific nature of the state funds has been attracting continuously the interest of the financial science in this category of subjects, which may be provided state budget subsidies.

Keywords: the state fund, the State Environmental Fund, the State Fund of Culture, the State Fund for the Support and Development of Cinematography, the State Agricultural Intervention Fund, the State Housing Development Fund and the State Fund for Transport Infrastructure.

Introduction

This paper[1] is an outline of current legislation regulating state funds. One of the objectives of the budget law reform in the Czech Republic after 1990 was the achievement of transparency and some streamlining of budget flows, which is necessary not only for correct assessment of the fiscal policy but also for international comparison purposes[2]. This paper describes the extent of success in the fulfilment of these objectives.

1. Funds and their Characteristics

1.1 The term "fund"

Czech law uses the terms "funds", "state fund" as well as "public fund" but does not contain their definition. For instance, the budget rules[3] use the term "state

[1] This paper has been prepared as a part of the research plan of the Faculty of Law, Charles University in Prague, registered under no. MSM 0021 620 804.
[2] Marková, H., Boháč, R. Rozpočtové právo, 1st edition, Prague: C.H.Beck, 2007, p. 161
[3] Act No. 218/2000 Coll. on budget rules and on the amendment to certain related laws (Budget Rules), as amended, (hereinafter the "Budget Rules Act").

funds" but do not define what they mean under such term. As regards the establishment of the funds, a reference is made to special laws under which these funds are formed; however, even these laws do not contain such definition. In searching for the meaning of the terms "state or public fund", one has to resort to legal literature. For instance, Slovník veřejného práva (Public Law Dictionary) defines the public fund as "an independent equity dedicated for public administration purposes"[4]. In its entry "fund", Ottův Slovník naučný (Otto's Educative Dictionary) states that "the word fund is used, in its legal meaning, to designate a legal entity comprised of certain assets dedicated to a specific purpose"[5]. Finanční slovník (the Financial Dictionary)[6] defines the fund as certain assets or values designated solely for a specific purpose. Under this concept, a fund is created either by donating certain assets whose revenue is spent for a specific purpose, or by donating regular or irregular contributions, and has usually the form of an independent legal entity. Based on such definition, a financial fund stands outside the scope of the state budget, may (or need not) be subordinated to the Parliament and enables the performance of certain public administration tasks without being affected by the budget process in the legislative assembly.

The definition of the fund is also discussed in the works of leading legal authorities on budget law. For instance, Marková and Boháč[7] conclude that funds are specific decentralized administrative units subordinated to the government or to the Parliament, or units controlled directly by the government or indirectly by government representatives in their statutory bodies. Hence, the funds have a various degree of independence resulting from their legal form and statute. The financing of the funds has the nature of specific special-purpose financing, aiming to safeguard long-term stability of certain government expenditures related to a specific income, and also to create an alternative to direct allocation of financial subsidies. Classical extra-budgetary funds manage public finances and are therefore considered as a part of public budgets (a subsector of the general government) and differ by country.

A similar definition of a fund and the funds system is also contained in textbooks of financial laws[8].

Funds may vary as to their nature and classification. According to the role of the funds in the public budget systems, they may be divided into funds established at the state level, funds established at the level of territorial self-administration units, funds established at the European Union level or international funds. The funds management is close to the management of specific entities established usually by the central government and financed in a specific form from public budgets.

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[4] Laštovka, K. Public Funds. Any entry in the Public Law Dictionary. Prague, 1927.
[5] Ottův Slovník naučný. Volume Nine. ARGO/PASEKA 1997.
[6] Finanční slovník. Prague: Svoboda, 1973.
[7] Marková, H., Boháč, R. Rozpočtové právo. 1st edition. Prague: C.H.Beck, 2007, s. 159-160.
[8] Cf. Bakeš, M., Karfíková, M., Kotáb, P., Marková, H. et al. Finanční právo. 5th amended edition. Prague: C.H.Beck, 2009, s. 115 et seq.

There are also other criteria that may be applied in order to distinguish between individual funds, such as the question whether such funds provide financing under non-market principles (this category includes special-purpose extra-budgetary funds and privatization funds) or if they are funds (government institutions) established for the purpose of support of business activities, which use their finances to create preferential terms in the provision of loans to selected business entities[9].

1.2 Development of the funds system

Pre-war Czechoslovakia had a large number of funds, which was further increased after 1945. These funds were managed by various ministries; according to the Ministry of Finance, there were 186 more significant financial funds in 1948. All those funds ceased to exist in 1949–1953 in connection with the establishment of a single state budget. The funds system was reintroduced in the 1960s. From the legal perspective, the funds system was based on Article 11(6) of the Act on the Czechoslovak Federation[10] and on Act No. 134/1970 Coll. on budget rules, which made it possible to establish, by the law, special-purpose funds, both federal and on the level of each republic. The key task of such special-purpose funds was to establish a close relation between payments of certain needs and the income designation for such purpose.

The state special-purpose funds, which were established under this law, were legal entities with a separate legal personality, which managed independently the allocated income designated for the purpose for which each such fund had been established. They were connected to the state budgets solely financially, i.e. through subsidies provided from the budget of the body managing the relevant fund.

There were four state special-purpose funds – the road fund, the water management fund, the air protection fund and the land cultivation fund. After the establishment of the federation, each of these funds was divided between the two national republics and the Road Fund was then transferred to the federal budget. These funds were established before the enactment of the above-mentioned laws and did not comply with their concept. In particular, they were not separate legal entities but mere items of receipts and expenditure in the relevant state budget. No new state special-purpose funds were to be established in future, because they represented an alien element in the budget system. In connection with their existence, some references were even made to a breach of one of the key budget principles, the principle of unit[11].

The state funds became to be reintroduced again after 1990. The oldest one is the State Environmental Fund of the Czech Republic, which was formed in 1991 by the

[9] Horčicová, M., Vašková, D.: Mimorozpočtové fondy a jejich postavení v systému veřejných rozpočtů, Finance a úvěr, 44, 1994, no. 9.
[10] Constitutional Act No. 143/1968 Coll. on the Czechoslovak Federation.
[11] Bakeš, M.: Teoretické otázky finančního práva. Praha: Univerzita Karlova, 1979, s. 66-67.

consolidation of the Air Protection Fund and the Water Protection Fund. The basic role of this fund is its stimulation role.

Two state funds were established in 1992. The first one is the State Fund of Culture of the Czech Republic, which was formed as a legal entity registered in the Commercial Register. The second of these funds is the State Fund of the Czech Republic for the Support and Development of Czech Cinematography, which is also legal entity registered in the Commercial Register.

Another state fund, the State Fund of Market Regulation in Agriculture, was formed in 1992 as a fund of the Czech Republic (until such time, it had been a federal fund). This fund was dissolved in 2000. It was considered as a state stabilization body of the contributory organization type. Its successor was the State Agricultural Intervention Fund, which was established in 2000 as a legal entity based in Prague, which is supposed to respond better to the regulatory requirements of the agricultural products market in Europe.

The last two funds were also established in 2000. The first of them, the State Housing Development Fund, was formed to provide housing construction support in accordance with the government concept. The other fund is the State Fund for Transport Infrastructure, the purpose of which is to contribute to the improvement of the quality of all forms of transport, particularly by providing contributions to the construction of new transport routes, to their repairs, etc. The assets managed by both funds are owned by the state.

Each of these state funds will be discussed in detail in clause 2.

1.3 Characteristic of the state funds

The state funds of the Czech Republic are legal entities gathering assets for a special purpose. Their objective is to systematically separate the assets originating from some committed sources, such as the Structural Funds of the European Union, or from certain special charges or revenues. The legislation relating to the state funds is included both in the Budget Rules Act and in special laws whereby these funds are established and awarded various levels of independence resulting from their legal form and statute. All state funds are established by the law as legal entities. The law also defines their purpose, sources and fields to which such sources are directed. The budget of these funds is to be prepared by same deadlines as those set out for the preparation of the state budget, and deadlines for the preparation of their closing account follow the deadlines for the preparation of the national closing account. The relations between the government, the legislative assembly and a state fund is somewhat asymmetric. Any shortage of financial means in the fund is usually made up for by the state, although it is not responsible for the fund's liabilities. On the other hand, any surplus achieved by the fund will be managed by the fund itself.

Sources of state funds are comprised mostly of:

- state budget subsidies,
- the revenue from specific budgetary sources and property rights.

The law establishing a state fund has to specify the body that has the competence over the fund, and to determine the financial sources of such state fund, methods of their use and method of financing of the fund's administrative expenses. If the administrative expenses of a state fund are financed by the state budget subsidies, the use of such finances is governed by the laws regulating the management of the state branches. Their management is subject to public control and any balances of the financial means of a state fund are carried forward to the next budget year. In case of shortage of financial funds, some state funds may enter the financial market, receive loans and issue securities. The name of a state fund has to contain the words "state fund".

Several criteria may be used for the inclusion of the funds into the state fund category:

- the state fund is a legal entity,
- the state fund is established by a law,
- the state fund is obliged to present its budget to the Parliament's Chamber of Deputies on the same date on which the state budget is presented,
- the method of acquiring own finances is stipulated by the law,
- the method of control of the fund's activities is determined by the Act on Budgetary Rules.

2. Kinds of State Funds

2.1 State Environmental Fund

This fund was established in 1991 by the Act on the State Environmental Fund of the Czech Republic[12] as another state organization. The scope of the fund's activities is determined by the statute. Its core function may be defined as stimulative. The fund is managed by the Ministry of the Environment. The fund is headed by its director, who is appointed and recalled by the Minister of the Environment. Financial means from the fund are allocated by the Minister, who establishes the Board as his advisory body. The Board assesses particularly the key issues of the generation and use of the fund's money, the annual budgets of the income and expenses of the fund, the proposed measures and their coverage by the fund's means. The Board further reviews proposals for disbursement of the fund's means and recommends to the Minister the amount to be drawn in each specific case, taking into account the principles of protection of the

[12] Act No. 388/1991 Coll. on the State Environmental Fund of the Czech Republic, as amended (hereinafter the "Act on the State Environmental Fund").

environment of the Czech Republic. The Ministry publishes the Minister's decision on the use of the fund's money.

The fund's income originates, in particular, from:

a) fees for release of waste water to surface water, i.e. a fee for the pollution by released waste water and the fee on the volume of released waste water, which are to be paid by the polluting party under Act No. 254/2001 Coll. on water and on the amendment to certain laws (the Water Act), as amended,
b) the air pollution fee[13], i.e. the fees paid by the operators of extra-large, large and medium-sized stationary sources under Act No. 86/2002 Coll. on air protection and on the amendment to certain laws (the Air Protection Act), as amended. The proceeds from fees paid by the operators of small stationary sources represent a municipal budget income,
c) fees paid under the Act on Waste, i.e. fees designated for promotion of the collection, processing, utilization and removal of selected car wrecks and waste depositing fees under Act No. 185/2001 Coll. on waste and on the amendment to certain other laws, as amended,
d) levies for withdrawal of lands from the agricultural land fund in an amount equal to 60% of their total volume determined by the agricultural land fund protection authority. Under Act No. 334/1992 Coll. on protection of the agricultural land fund, as amended, such levies are imposed in respect of permanent or temporary withdrawal of land from the agricultural land fund,
e) fees for actual consumption of ground water in the amount equal to 50% of their total volume; these are fees for the consumed ground water quantity imposed under Act No. 254/2001 Coll. on water and on the amendment to certain laws (the Water Act), as amended. The balance, i.e. 50% of the fees, represents the income of the region where the ground water is taken,
f) payments for extracted minerals made to the state budget. Under Act No. 44/1988 Coll. on protection and utilization of mineral wealth (the Mining Act), as amended, the district mining office transfers 25% of payments for extracted minerals to the state budget of the Czech Republic, where such funds shall be allocated to the removal of environmental damage caused by the extraction of reserved and non-reserved mineral deposits. The balance, i.e. 75% are transferred by the district mining office to the municipal budget,
g) fines imposed by the Ministry of the Environment and by the Czech Environmental Inspection for breach of laws and of environmental protection measures; 50% of these fines is transferred to the budget of the municipality in whose cadastre the breach of the laws occurred,

[13] The Act on the State Environmental Fund of the Czech Republic uses the term "fees for the release of harmful substances into the air".

h) monetary income from prosecution of applicants for unauthorized use or withholding of funds belonging to the State Environmental Fund of the Czech Republic,
i) state budget subsidies,
j) shares in the tax revenue; the current income of the State Environmental Fund of the Czech Republic does not include any share in the tax revenue,
k) loans provided by legal entities,
l) contributions from domestic and foreign legal entities and individuals, and
m) other income determined by generally binding laws in each environmental sector.

The fund's means may be used for:

a) support to investment and other ventures taken by legal entities and individuals in relation to the protection and improvement of the environment,
b) promotion of a programme of research, development, production and introduction of appropriate technologies and of scientific and technical development in the field of the environment,
c) support to the activities related to the environmental functions of waterways and water surfaces,
d) support to the monitoring of the environmental components and ecological processes,
e) payment of instalments and interest on loans provided to the State Environmental Fund of the Czech Republic,
f) promotion of educational events and dissemination of information about the environment,
g) payment of costs incurred in connection with the activities of State Environmental Fund of the Czech Republic, approved as a part of this fund's budget.

The term “support/promotion” means subsidies, loans, assumption of liabilities and other assistance to legal entities and individuals.

There is no legal entitlement to the provision of finances from the fund. Any finances provided by the fund that were not used in accordance with pre-determined conditions or due to the expiration of the purpose for their provision have to be returned to the fund. The balance of the finances remaining at the end of the calendar year is not forfeited.

2.2 State Fund of Culture of the Czech Republic

This fund was established in 1992 under the Act on the State Fund of Culture of the Czech Republic[14] as a legal entity registered in the Commercial Register. The fund is managed by the Ministry of Culture and headed by the Minister of Culture of the Czech Republic, who is responsible for the management of the fund's finances.

The authority that determines the method and amount of drawings of the fund's finances is its Board. The Board members are elected and recalled by the Chamber of Deputies to which the Board reports. The Board assesses, in particular, the key issues of the generation and use of the fund's finances, the proposal of the annual budget of the fund's income and expenses and the proposal of the closing account of the fund. The Board also decides on applications for provision of the fund's finances.

Most of the fund's income and expenses relate directly or indirectly to culture (with the exception of cinematography). The most part of income is comprised of income from lease of real estate, the most part of expenses is represented by non-investment support provided to various cultural projects.

The financial sources of the funds are as follows:

a) revenue from the shareholdings of the Czech Republic in business activities carried on by legal entities in culture, with the exception of the film industry,
b) yields on securities acquired by the fund from other entities,
c) loans from legal entities,
d) interest on refundable financial assistance and loans provided by the fund to applicants and interest on finances of this fund kept in the bank,
e) instalments of loans and refundable financial assistance provided by the State Fund of Culture of the Czech Republic to the applicants,
f) contractual fines paid by the applicants in cases where the finances of the State Fund of Culture of the Czech Republic were not used in accordance with the agreed terms,
g) gifts and bequests for the State Fund of Culture of the Czech Republic,
h) proceeds from public fundraising and lotteries organized by the State Fund of Culture of the Czech Republic,
i) agreed shares in income from projects to which the State Fund of Culture of the Czech Republic provided its finances,
j) a 50% share in the rentals of cultural values and movable and immovable cultural monuments with respect to which the Ministry of Culture exercises its right to manage such monuments,
k) revenue from postcards, posters and other occasional printed matter published by the Ministry of Culture,
l) state budget subsidies, and

[14]Act No. 239/1992 Coll. on the State Fund of Culture of the Czech Republic, as amended.

m) other sources determined by special laws.

The fund's finances may be provided to specific cultural projects, such as

a) support to the creation, implementation and introduction of valuable works of art,
b) editing and publishing of non-periodic and periodic publications,
c) acquisition, renewal and maintenance of cultural monuments and collection objects,
d) organization of exhibitions and lectures,
e) promotion of Czech culture abroad,
f) organization of cultural festivals, shows and similar cultural events,
g) support to cultural projects serving for the preservation and development of culture of national minorities in the Czech Republic,
h) support to non-professional artistic activities of high value,
i) protection, maintenance and supplementing the books fund.

The fund's finances are provided as special-purpose subsidies, loans or refundable financial assistance. The special-purpose subsidies may only be provided up to an amount equal to two thirds of the estimated applicant's costs, except for finances designated for rescue of cultural monuments, in respect of which up to nine tenth of the estimated costs may be provided.

Any finances provided by the fund may be used exclusively for the pre-determined purpose. If they are used for other purposes, the applicant shall pay to the fund a fine in the amount and by the method set forth in the relevant agreement and up to the total provided financial amount. This shall not prejudice the duty to return to the fund any finances used in conflict with the agreement. The balance of the finances of the fund shall be carried forward to the following calendar year.

2.3 State Fund of the Czech Republic for the Support and Development of Czech Cinematography

This fund was established in 1992 under the Act on the State Fund of the Czech Republic for the Support and Development of Czech Cinematography[15]. It is a legal entity registered in the Commercial Register pursuant to the statute and managed by the Ministry of Culture and headed by the Minister of Culture of the Czech Republic, who is responsible for the management of the fund's finances. The authority that determines the method and amount of drawings of the fund's finances is its Board. The Board members are elected and recalled by the Chamber of Deputies to which the Board reports. The Board assesses, in particular, the key issues of the generation and use of the fund's finances, the proposal of the annual budget of the fund's income and expenses and the proposal of the closing account of the fund. The Board also decides on applications for

[15]Act No. 241/1992 Coll. on the State Fund of the Czech Republic for the Support and Development of Czech Cinematography, as amended.

provision of the fund's finances. The most part of income and expenses of the State Fund of the Czech Republic for the Support and Development of Czech Cinematography relate directly or indirectly to cinematography. Like in the case of the State Fund of Culture of the Czech Republic, the income and expenses of this state fund are low in comparison with the other state funds. The highest amount of this fund's income is generated by the fund's own activities (the commercial exploitation of films under the Copyright Act, surcharges in Czech crowns, shares in the revenue from supported projects and repayment of financial assistance provided earlier). The fund's expenses consist mostly of provision of support to applicants having various legal forms.

Financial sources of the fund consist of:

a) revenue from equity participations of the Czech Republic in business activities carried on by legal entities in the film industry,
b) yields on securities acquired by the State Fund of the Czech Republic for the Support and Development of Czech Cinematography from other entities,
c) loans provided by legal entities,
d) interest on refundable financial assistance and loans provided by the State Fund of the Czech Republic for the Support and Development of Czech Cinematography and interest on this fund's finances kept in banks,
e) instalments of loans and refundable financial assistance by the State Fund of the Czech Republic for the Support and Development of Czech Cinematography to applicants,
f) contractual fines paid by the applicants in cases where the finances of the State Fund of the Czech Republic for the Support and Development of Czech Cinematography were not used in accordance with the agreed terms,
g) gifts and bequests for the State Fund of the Czech Republic for the Support and Development of Czech Cinematography,
h) proceeds from public fundraising and lotteries organized by the State Fund of the Czech Republic for the Support and Development of Czech Cinematography,
i) agreed shares in income from cinematographic works to which the State Fund of the Czech Republic for the Support and Development of Czech Cinematography provided its finances,
j) state budget subsidies,
k) a CZK 1.00 mandatory surcharge to admission fees paid together with admission fees by each participant in a public production of a cinematographic work. Such surcharge is accounted for and remitted by the organizer of such public production,
l) income from the exploitation of cinematographic works if transferred to the State Fund of the Czech Republic for the Support and Development of Czech Cinematography,

m) income from the exploitation of cinematographic works with respect to which the State Fund of the Czech Republic for the Support and Development of Czech Cinematography exercises the producer's copyright, which passed to it under a special law,
n) other sources defined by special laws.

The fund's finances may be allocated to the following projects:

a) creation of Czech cinematographic works,
b) production of Czech cinematographic works,
c) distribution of valuable cinematographic works,
d) promotion of Czech cinematography,
e) technical development and modernization of Czech cinematography,
f) production, distribution and promotion of cinematographic works of national and ethnic minorities living in the territory of the Czech Republic.

The fund's finances are provided as special-purpose subsidies, loans or refundable financial assistance and there is no legal entitlement to such finances. The special-purpose subsidies may only be provided up to one half of the estimated applicant's costs. Any finances provided by the fund may be used exclusively for the pre-determined purpose. If they are used for other purposes, the applicant shall pay to the fund a fine in the amount and by the method set forth in the relevant agreement and up to the total provided financial amount. This shall not prejudice the duty to return to the funds any finances used in conflict with the agreement. Details of the disposal of the fund's finances are specified in the fund's statute. Any balance of the finances of the fund shall be carried forward to the following calendar year.

2.4 State Agricultural Intervention Fund

This fund was established in 2000 under the Act on the State Agricultural Intervention Fund[16] as a legal entity based in Prague. Such legal entity was created to better respond to the regulatory requirements of the agricultural products market in the European Communities than the existing State Fund of Market Regulation in Agriculture. This fund falls within the competencies of the Ministry of Agriculture. The fund implements measures and introduces market policies aiming at the stabilities of markets with agricultural products and foods with the aim of minimizing price fluctuations in the domestic market, e.g. by providing various forms of financial support, by intervention purchases of agricultural products and foodstuffs for intervention prices and by ensuring the processing of such goods (if required), etc. This fund is related to the other state funds namely by the duty to have its budget volume reviewed by the Parliament’s Chamber of Deputies together with the proposal of the state budget of the Czech Republic. The financial sources of this fund include, for instance, special-purpose subsidies designated for the organization of the market with

[16]Act No. 256/2000 Coll. on the State Agricultural Intervention Fund, as amended.

agricultural products and foodstuffs and for provision of support to agriculture, income from sale of agricultural products acquired by means of intervention purchases of agricultural products and foodstuffs, etc. All support provided by the European Communities or by another foreign entity may only be used for the pre-determined purpose under the stipulated terms, which have to be also complied with.

2.5 State Housing Development Fund

This fund was established in 2000 under the Act on the State Housing Development Fund[17], with the aim of promoting housing construction. The fund is a legal entity managed by the Ministry for Regional Development and is based in Olomouc. The assets managed by the fund are owned by the state.

The fund's bodies are comprised of the fund's committee, supervisory board and the director. The committee has 7 members and is chaired by the Minister. The deputy chairman and the other 5 members are elected and recalled by the government upon the Minister's proposal.

The fund's income consists of:

a) state budget subsidies,
b) income from issued bonds,
c) yields on bonds and mortgage warrants purchased in accordance with the law,
d) instalments from provided loans, including appurtenances,
e) interest on deposits, penalties, insurance proceeds and other payments obtained in connection with the use of finances of the State Housing Development Fund,
f) proceeds from public fundraising organized by the State Housing Development Fund , gifts and bequests made in favour of this fund,
g) finances from the Structural Funds of the European Communities,
h) received loans and credit,
i) repayment of state loans provided to municipal funds for the purpose of repair, modernization and expansion of the housing fund,
j) other income if stipulated by a special law.

The fund's finances may be used for covering expenses incurred in the territory of the Czech Republic, i.e.:

a) to cover a part of expenses incurred in connection with the construction, purchase, repairs and modernization of flats, residential buildings and family homes on credit,
b) to cover a part of interest on loans provided by banks or by branches of foreign banks to individuals and legal entities for the construction, purchase, repairs and modernization of flats, residential buildings and family homes,

[17]Act No. 211/2000 Coll. on the State Housing Development Fund, as amended.

c) to cover a part of expenses incurred in connection with the construction, purchase, repairs and modernization of flats, residential buildings and family homes in the form of subsidies,
d) to guarantee a part of the outstanding principal of loans provided by banks or by branches of foreign banks to individuals and legal entities for the construction, purchase, repairs and modernization of flats, residential buildings and family homes or for the building of housing infrastructure by municipalities,
e) to cover a part of expenses incurred in connection with the purchase or acquisition of lands or their appropriate parts that are purchased or acquired together with the purchased flats, residential buildings or family homes in the form of loans or covering of a part of interest on loans,
f) to cover a part of loans taken up for the purpose of payment for the assumption of membership rights and obligations in a housing cooperative or for acquisition of a share in a legal entity if the participant becomes a tenant of or has another right of use of a flat in a residential building or a family home owned by a legal entity concerned by the assumption of such membership rights and obligations or acquisition of such share,
g) to cover a part of expenses incurred in connection with the purchase of housing furnishings on credit.

Financial means managed by the fund may not fall below CZK 6 billion. Any balance of the finances of the fund existing at the end of the year shall be carried forward to the following calendar year. There is no legal entitlement to the provision of the fund's finances.

2.6 State Fund for Transport Infrastructure

This fund was established in 2000 under the Act on the State Fund for Transport Infrastructure[18] to contribute to the improvement of the quality of all forms of transport, particularly by means of provision of contributions to the construction of new transport routes, repairs of these routes, etc. The fund is a legal entity based in Prague and subordinated to the Ministry of Transport. The assets managed by the fund are owned by the state.

The fund's bodies are comprised of the fund's committee, supervisory board and the director. The committee has nine members and is chaired by the Minister. The deputy chairman and the other seven members are elected and recalled by the government upon the Minister's proposal for the term of office of four years. The committee members may be appointed for the maximum of two consecutive office terms.

[18]Act No. 104/2000 Coll. on the State Fund for Transport Infrastructure, as amended.

The fund's income consists of:

a) transfers of revenue from privatized property, which is the income of the Czech Republic and the management whereof falls within the competence of the Ministry of Finance,
b) transfer of revenue from road tax. The entire road tax revenue is remitted to the State Fund for Transport Infrastructure,
c) transfers of a share in the revenue from excise tax on mineral oils, equal to 9.1% of the gross national receipts of excise tax on mineral oils,
d) transfer of revenue from the time charge, which has replaced, with the effect from 1 January 2007, the highway and speedway toll fee. The time charge is paid for the use of land communications subject to fee by road motor vehicles having at least four wheels and combined vehicles whose maximum permitted weight is less than 12 tons (the vehicles subject to the time charge). The time charge may be paid for the whole calendar year, for one month or for seven days and is to be paid before the use of the land communication that is subject to the charge and the payment thereof is documented by a valid two-part coupon,
e) transfers of revenue from toll fees. Effective from 1 January 2007, the toll fees represent a new legal institute and are paid for the use of land communications subject to fee by road motor vehicles having at least four wheels and combined vehicles whose maximum permitted weight is at least 12 tons (the vehicles under the electronic toll fee system). The toll fee amount is determined by means of an electronic toll system, including an electronic deck device that is to be installed in every vehicle in the electronic toll system,
f) yields on securities or public fundraising organized by the State Fund for Transport Infrastructure,
g) loans, deposit interest, penalties, insurance proceeds and other payments from individuals and legal entities,
h) transfers of revenue from income generated by the state from concession contracts for the construction, operation and maintenance of transport infrastructure. By the Concession contract executed between the state and legal entities (concessionaires) the construction, operation and maintenance of highways or 1st class roads can be financed and procured. The costs incurred by the concessionaire in the construction, operation and maintenance of highways or 1st class roads are reimbursed from the income of the State Fund for Transport Infrastructure designated for financing of the construction, modernization, repairs and maintenance of highways and 1st class roads. Such costs are reimbursed gradually, depending on the risk spreading arrangements set forth in the concession contract, after the completion of the construction of the relevant highway or 1st class road,

i) contribution provided by the European Commission via the relevant European Funds,
j) gifts and bequests, which may be accepted and used by the State Fund for Transport Infrastructure in the name of the Czech Republic solely under the conditions and for the purposes specified by the donor or the testator, provided that such terms and purposes comply with the object of the fund's activities,
k) state budget subsidies.

Any balance of the finances of the fund existing at the end of the calendar year shall be carried forward to the following calendar year.

The fund's expenses consist of expenses for the following purposes:

a) funding of the construction, modernization, repairs and maintenance of roads and highways,
b) provision of contributions to the construction and modernization of transit sections of roads and highways,
c) funding of the construction, modernization, repairs and maintenance of national and regional railways,
d) funding of the construction and modernization of inland waterways significant for transport purposes,
e) payment of instalments of loans and interest on loans and other expenses relating to debt security,
f) provision of contributions to exploration and design works, studies and expert activities focused on the construction, modernization and repairs of roads and highways, inland waterways significant for transport purposes and national and regional railway projects,
g) provision of contributions to the implementation of programmes focusing on the increase of transport safety and transport availability to persons with limited mobility and orientation ability,
h) provision of contributions to the construction and maintenance of bicycle paths,
i) financing of the costs of introduction and operation of the electronic toll system,
j) financing of payments made by concessionaries under concession contracts in respect of the construction, operation and maintenance of transport infrastructure and funding of costs incurred in relation to the execution of concession agreements,
k) covering of costs of the funds activities.

Cash funds for these purposes are transferred by the State Fund for Transport Infrastructure to the state branches, state contributory organizations or state organizations managing the state property having the nature of transport infrastructure (such as the state organization Railway Infrastructure Administration), to regions (which own 2nd and 3rd class roads), to persons to whom the state has delegated the exercise of some of its rights as the owner of such assets (the concessionaires) and other

parties involved in the construction, modernization, repairs and maintenance. The fund prepares a proposal of its budget for each budget year, which is submitted to the Chamber of Deputies of the Parliament for approval together with the proposal of the state budget. The annual financial statements of the fund have to be audited before their submission to the Chamber of Deputies.

Conclusion

Within the process of current economic changes the removal of administrative and directive interventions of the state in various areas of social relations increases the importance of economic instruments used by the state in influencing various aspects of social relations. For instance, the environment, housing, culture or transport infrastructure cannot be understood as a sector that is, apart from certain exceptions, objectively capable of independent economic existence based on funding by its own income or by non-state sources originating solely from the domestic private sector. Adequate relations between the output and costs of the relevant sector cannot exist in most of them. Moreover, the time sequence of these outputs is irregular on the year-on-year basis (due to the impossibility to repeat and to the exceptional nature of some projects). Therefore, these sectors cannot be effectively funded under the new economic circumstances by the state budget of the Czech Republic.

Therefore, the objective of the establishment of the above state funds is to create an institutional basis for financial support of a certain field. A fund represents an economic instrument that should effectively motivate various subjects to behave in a way corresponding to the current economic conditions. The effectiveness of such motivation depends on the system of the special-purpose application of the fund's finances, which relies on a detailed, specific material focus of the contributions and on their partial return. This does not and cannot represent the financing of the institutions operating in the relevant field but the financing of individual projects. The fund's finances provide a possibility of linking the finances gathered by the fund and the needs of the relevant sector of the society without interfering into the competencies of state authorities and bodies and resolve the conflict between the generation of sources and their use in time, which result from the relevant sector of the society. The fact that speaks in favour of the existence of state funds is their ability to better use the financial means allocated to them and to promote certain particular interests. In addition to subsidies, the income of the state funds is also generated by revenue from selected taxes. For instance, the income of the State Fund for Transport Infrastructure includes the entire road tax revenue and a share in the revenue from excise tax on mineral oils and since 2007 also a share in the highway toll revenue.

Since the state funds have their own guaranteed income, they can determine their own financial policies, which may differ from the financial policy promoted by the state budget.

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Public Finance and Autonomy of Territorial Self-government Units (Silesian Voivodeship) 1920 - 1939

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Abstract: The only model of financial autonomy in the history of Poland occurred in the interwar period as a part of Silesian Voivodeship's autonomy and was regulated by *ustawa konstytucyjna z dnia 15 lipca 1920 r. zawierająca statut organiczny Województwa Śląskiego* (The Constitutional Act of Parliament of 15th July 1920 comprising the organization statute of the Silesian Voivodeship)[1]. The paper concerns legal and institutional frames of this autonomy and includes the analysis of its social, economical and political background. It analyses main practical issues such as: relation between Silesian and Polish Treasury, relation between Polish – German Geneva Convention[2] concerning Upper Silesia signed on 15th May 1922 and Organization Statute, and the influence of autonomy on the unification of Polish and Silesian legal systems. The paper also contains conclusion on the background of present Silesians autonomic aspirations and compares them to those from the interwar period.

Keywords: financial, autonomy, Silesia, Upper Silesia, Voivodeship.

1. Introduction

Considering the issue of financial autonomy, it is worth to mention the model of financial autonomy which occurred in Poland in the interwar period. *Województwo* (voivodeship) is the third (regional) level of self-government[3] in *Rzeczpospolita Polska* (Republic of Poland)[4], whose status is regulated today by *ustawaz dnia 5 czerwca 1998 r. o samorządzie województwa*[5] (The Act of Parliament of 5th June 1998 on the voivodeship local self-government). The first voivodeships were formed around fourteenth century[6] as military self-assemblies led by the representatives of the king. It should be noted that the contemporary voivodeships function as the basic form of a territorial unit of central government regulated by *ustawa z dnia 23 stycznia 2009 r. o*

[1] Dz. U. No 73, item 494; The Organization Statute Act hereinafter.
[2] Dz. U. No 44, item 370. Geneva Convention hereinafter.
[3] J. Filipek, *Prawo Administracyjne – instytucje ogólne – część I*, Kraków 2003, p. 194.
[4] RP hereinafter.
[5] Dz. U. of 2001 No 142, item 1590 including the changes.
[6] D. Kalisiewicz (ed.), *Encyklopedia PWN w trzech tomach*, vol. 3, Warszawa 1999, p. 804.

wojewodzie i administracji rządowej w województwie (The Act of Parliament of 23rd January 2009 on voivod and central government administration in voivodeships)[7].

During the interwar period, the local administration was divided into local self-government administration and territorial units of central governement[8]. Subsequently, these issues were regulated by *rozporządzenie Prezydenta RP z mocą ustawy z dnia 19 stycznia 1928 r. o organizacji i zakresie działania władz administracji ogólnej* (RP President regulation with the power of an act of parliament of 19th January 1928 on organization and scope of the central administration)[9].

The important difference in the Polish interwar legal system was the only financial autonomy recorded in the modern history of Poland granted to the Silesian Voivodeship[10]. This autonomy was established by article 5 of Organization Statute Act.

The present Silesian Voivodeship[11] (pol. *Województwo Śląskie*, ger. *Wojewodschaft Schlesien*) is located in southern Poland and borders on the west with *Województwo Opolskie* (Opole Voivodeship), on the north with *Województwo Łódzkie* (Lodz Voivodeship), on the east with *Województwo Świętokrzyskie* (Świętokrzyskie Voivodeship) and *Województwo Małopolskie* (Malopolska Voivodeship). Its southern border is with The Czech Republic and the Republic of Slovakia. Geographically, the Silesian Voivodeship covers the area of: west Malopolska, south Wielkopolska, Jura Krakowsko-Częstochowska, Kotlina Oświęcimska, Beskidy, Zaglebie Dabrowskie and the area of historical and geographical Upper Silesia (pol. *Górny Śląsk*, śl. *Gůrny Ślůnsk*, ger. *Oberschlesien*)[12] and Cieszyn Silesia (pol. *Śląsk Cieszyński*).

The above mentioned area does not coincide with the area of interwar Silesian Voivodeship area, which covered a part of Upper Silesia, Zaglebie Dabrowskie and Cieszyn Silesia. During the interwar period the area of Opole Silesia and Lower Silesia formed a part of Germany.

Despite recent transformation, the area of Upper Silesia is still heavily industrialized. The process of industrialization began in the second half of nineteenth century. The main industry branches of Upper Silesia are mining and metallurgy.

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[7] Dz. U. No 31, item 36 inc. ch.
[8] J. Filipek, *Prawo Administracyjne*... op. cit., pp. 117-124.
[9] Dz. U. No 11, item 86.
[10] The concept of autonomy should be distinguished from the concept of decentralization. M. Kruk [in:] *Wielka Encyklopedia Prawa,* Warszawa 2000, p. 61; T. Dębowska-Romanowska, *Komentarz do prawa budżetowego państwa i samorządu terytorialnego wraz z częścią ogólną prawa finansowego,* Warszawa 1995, pp. 17-18.
[11] SV hereinafter.
[12] D. Kalisiewicz (ed.) *Encyklopedia PWN*… op. cit., p. 512.

2. The grounds of Silesian autonomy

The financial autonomy of SV was associated with separatist aspirations of the Polish and German Upper Silesian population, and was aimed at avoiding the division of Upper Silesia between Germany, Poland and Czechoslovakia[13]. It was, among others, a way to securing the holdings of German industrial magnates[14]. An interesting separatist concept was represented by centrist-catholic activist Adam Napieralski. He has proposed the establishment for the period of 25 years of an independent Upper Silesian state under the aegis of The League of Nations, after which a fair plebiscite would have been organised among Poles and Germans[15].

Through the framework of The League of Nations, France sought to merge Silesia with Poland (which was rewarded by Polish and Silesian authorities with shares in "Skarbofem" company)[16]. On the contrary, the United Kingdom sought to keep Silesia in Germany. As a curiosity, the controversial words of the contemporary British prime minister Lloyd George can by quoted: "Giving Silesia to the Poles is like giving a watch to a monkey"[17]. Therefore, it should be noted that an important reason of establishing Silesian autonomy was considerably higher level of Silesian economic development and industrial production compared with other parts of Poland.

The autonomy should be also regarded as a kind of a plebiscite bargaining chip. Since The Organisation Status Act was a response to the Bill of the German Parliament of 14th October 1919[18], which guaranteed Silesians a limited autonomy and divided Silesia into two provinces: Lower Silesian (ger. *Niederschlesien*) and Upper Silesian.

The result of the last plebiscite on 20th March 1921 (47,7% votes for Poland) was the Third Silesian Uprising, whose result was incorporation of a greater part of Upper Silesia into Poland.

3. Institutional framework of Silesian autonomy

Sejm Śląski (the Silesian Parliament) was a legislative body similar to the *Sejm RP* (The Parliament of RP). The executive body was *Śląska Rada Wojewódzka* (Silesian Voivodeship Council), which consisted of *wojewoda* (voivode), *wicewojewoda* (vice voivode) and five members (chosen by the Silesian Parliament). The Silesian Voivode was not accountable to the Silesian Parliament and was nominated (with his deputy) by *Naczelnik Państwa* (Head of the State) and later by *Prezydent* (President) at the request of *Rada Ministrów* (Council of Ministers). The Silesian Voivode was the head of

[13] B. Danowska-Prokop, U. Zagórska-Jonszta, *Wybrane problemy ekonomiczno-społeczne i polityczne na Górnym Śląsku*, Katowice 1995, pp. 10-11.
[14] K. Popiołek, *Zaborcze plany kapitalistów śląskich*. Katowice-Wrocław 1947, pp. 51-54.
[15] P. Dubiel, *Spojrzenie w przeszłość (wspomnienia działacza śląskiego)*, Katowice 1973, p. 102.
[16] *Vide* pp. 6-7 of this paper.
[17] Z. Landau, J. Tomaszewski, *Anonimowi władcy. Z dziejów kapitału obcego w Polsce (1918-1939)*, Warszawa 1968, p. 39.
[18] B. Danowska-Prokop, U. Zagórska-Jonszta, *Wybrane problemy*… op. cit., p. 15.

general administration, as well as of tax and school administrations, and had a right of: legislative initiative, convening the Silesian Voivodeship Council and suspending its resolutions, if they were in breach of the acts of Silesian or Polish Parliament, or exceed Council powers. In other parts of Poland Voivodeship Councils' heads were chosen by citizens. The Silesian Parliament was authorized to decide on matters of: administration and local self-government, political system, general and vocational education at all levels, trade unions, agricultural irrigation, water management, and partly on taxes and fees system. The Silesian Parliament could not decide on matters of: customs, defence, justice, foreign policy, railways, mail and mining. Any changes introduced by the Polish Parliament concerning mining and metallurgy had to be accepted by the Silesian Parliament.

Citizens living in Silesia on the day of its acquisition by Poland were entitled to vote in the elections to the Silesian Parliament. The elections were universal, equal, direct and secret. After the first election, 34 parliament members were Polish and 14 German.

According to article 44 of the Organization Statute Act, its modification were possible with the consent of the Silesian Parliament only. So in the interwar period it was claimed that this system was a "a union of two states" and its fiscal situation was similar to that of Austro-Hungarian Monarchy[19].

4. The Geneva Convention and the differences of the Polish and Silesian legal systems

Geneva Convention intended to mitigate the effects of its legal, economic, and social division[20] and regulated the issue of national minorities and introduced transitional agreements for a period of three years, *inter alia*: the German commitment to buy 0.5 million tons of Upper Silesian coal every month. In June 1925 the commitment expired and Germany refused further imports of coal, and increased customs duties. Poland did not loose this customs war owing to a strike of English miners in 1926[21]. The customs war was ended by a trade treaty in 1930, which allowed Poland a contingent export to Germany of 0.32 million tons of coal every month. Polish authorities were authorized to introduce the Polish currency in Silesia on six months' notice. The notice was done by Council of Ministers with the consent of the Silesian Parliament in December 1922.

The relation between the Geneva Convention and the Organization Status Act was as follows: the Convention was an act of international law and concerned the Upper Silesian part of SV only. The Organization Status Act was an act of Polish law

[19] W. Jaworski, *Konstytucja z marca 1921. Prawo polityczne od 2 października 1919 do 4 lipca 1921*, Kraków 1921, pp. 7-8.
[20] B. Danowska-Prokop, U. Zagórska-Jonszta, *Wybrane problemy*… op. cit., p. 22.
[21] Ibidem, p. 71.

and concerned all of SV. The legal regulation of autonomy was not dependent on the Convention. On the other hand the Convention limited powers of the Silesian Parliament in such issues as: mining, industry, trade, labour market and system of inspections. Those issues were to be regulated for 15 years by a German law which entered into force on 15th Jun 1922. Exceptions were possible if a new Polish law applied to the whole area of Poland. Therefore, the Geneva Convention limited the legal integration of Silesia with the rest part of Poland.

On the other hand, it must be noted that German social legislation was more favourable for citizens then Polish[22]. German social legislation applied in the Upper Silesian part of SV only. As far as sickness and disability insurance is concerned, the German insurance ordinance of 19th July 1911 applied in the Upper Silesian part of SV, while in other parts of Poland the law in force was the act of the Parliament of 28th March 1933 on social security[23]. Moreover, in the Upper Silesian part of SV the mining and sickness insurance was regulated by the act of German parliament of 17th June 1912 on mining fraternities. The laws in the Cieszyn's part of SV were unified with the legal system of Poland[24].

In interwar Silesia, the following legislations were in force: German, Austrian in the Cieszyn's part of SV, the laws issued by *Rada Narodowa Księstwa Cieszyńskiego* (The National Council of the Duchy of Cieszyn), the laws issued by *Tymczasowa Komisja Rządowa w księstwie Cieszyńskim* (The Temprorary Governmental Commision in the Duchy of Cieszyn), the laws issued by the International Commission for Plebisicte, the acts issued by the Polish Parliament and the Polish President, the acts issued by the Silesian Parliament, the laws issued by the Silesian Voivode and of the Temporary Silesian Voivodeship Council from 17th June until October 1922, the Geneva Convention securing the rights of national minorities, Czechoslovak Republic law in the *Zaolzie* and *Ziemia Czadecka* annected by Poland in 1938. It should be noted that even the Upper Silesian part and Cieszyn part of SV legal systems were not aligned until 1939[25].

[22] J. Ciągwa, *Wpływ centralnych organów Drugiej Rzeczypospolitej na ustawodawstwo śląskie w latach 1922-1939*, Katowice 1979, p. 44.
[23] Dz. U. No 51, item 396 inc. ch.
[24] W. Dąbrowski, *Referat Generalny o budżecie Województwa Śląskiego na rok admin. 1936/37*, Katowice 1936, p. 23.
[25] Z. Ciągwa, Środki *unifikacji śląskiego systemu prawnego z systemem prawa ogólnopolskiego w latach 1922-1939*, Acta Universitatis Wratislaviensis No 485. Przegląd Prawa i Administracji XIII. Wrocław 1980, pp. 152-171.

5. Silesian social structure – transformation and legal regulations

The social and employment structure of the Silesian population – usually employed in heavy industry and mining (about 55%) – was much more similar to that of England, Belgium or Luxemburg, than in the other parts of Poland, where population was typically employed in agriculture (about 60%). The percentage of Silesian population working in public services, trade and insurances was very similar to the percentage of Silesian population involved in agriculture (approximately 10%)[26]. The interwar SV was characterized by a significant concentration of capital (mainly German). For one entrepreneur in Silesia there were 42 industry workers. In the other parts of Poland this relation was 1:21[27]. The German capital was gradually reduced (to 40% in 1926). Also Franco-Belgian (22% in 1926) and Anglo-American capital (20% in 1926) gradually decreased its share in the economy[28].

The reduction of share of the German capital was strictly associated with the problem of tax fraud. Examples may be noted of the activities of the Hohenlohe's manufacturing plants with a subsidiary German company – Oehringen-Bergbau AG detected by the Silesian Inland Revenue in 1923. These included: reducing the amount of materials and products, driving up production costs, loading the balance with non-existent transactions, and customs fraud, resulting in tax arrears amounting to about 10 million Polish zlotys[29]. Similar tax fraud was attempted by: Cäsar Wolheim Company, Ironworks "Królewska" and "Laura" S.A., Giesche S.A. and Heckel von Donersmarck-Beuthen Estates Ltd[30], Prince of Pszczyna – von Plees[31], and Oswag S.A. which went bankrupt because of alleged debt to Anmanium A.G. (a Swiss company which in fact was German)[32]. Tax arrears usually resulted in establishing receivership by the Magistrate's Court in Katowice and seizure of property by the State Treasury and the Silesian Treasury.

Usually, as the result of tax arrears German capital was taken over the by the Polish Treasury. That happened especially during the great depression which caused *inter alia*, bankruptcy of: Steelwork "Pokój", "Katowicka Spółka Akcyjna dla Górnictwa i Hutnictwa" and the above mentioned steelworks "Królewska" and "Laura" S.A.[33]. The struggle against the great depression in Silesia was supported by the Polish Tresuary which reduced rail fares and accelerated the construction of the railway line

[26] J. Żarnowski, *Społeczeństwo Drugiej Rzeczypospolitej 1918-1939*, Warszawa 1973, p. 38.
[27] Ibidem, p. 32.
[28] B. Danowska-Prokop, U. Zagórska-Jonszta, *Wybrane problemy*… op. cit., p. 66.
[29] Ibidem, p. 68. It is Worth noting that in 1939 these manufacturing plants tax arrears increased to about 32 millions Polish zlotys.
[30] Ibidem, p. 69.
[31] Ibidem, p. 78. In the year 1934 his tax arrears in income tax and wealth tax has rated 11 millions Polish zlotys. These arrears had been a reason of taking over *inter alia* 76% of his forests and 56% of his farm lands.
[32] Ibidem p. 76.
[33] Ibidem, p. 77.

from Kalety to Podzamcze (from Silesia to the port in Gdynia) in 1930. This railway line known also as *Magistrala Węglowa* (Coal Trunkline) and was built and operated with significant participation of French capital[34]. Another important element of Polish Treasury support for Silesia was *FunduszWyrównawczy* (Compensation Fund) which repelled dumping policies in the coal trade used by the other countries.

Germans were a significantly richer part of the Silesian society. In the year 1929 they occupied 83% of managerial positions in mines, steel works and large manufacturing plants[35]. After incorporation of Silesia into Poland the situation changed – engineers, mostly from outside (because of a low level of education in Silesia) started taking over higher positions in the boards of mining companies and partly in the board of Polish-French company "Skarboferm", which leased *inter alia* 36 State Treasury owned mines[36]. The action of substituting German managers was overlooked in 1930s by the voivode Michał Grażyński. The action was based *inter alia* on refusing the right of residence visas to Germans employed in Poland. The social transformation caused antipathy of the uneducated Upper Silesians towards the migrants – ironically called in the Silesian dialect *gorole* (those occupying high positions). „Silesian nation was badly mistaken. […] Only the lords have changed! Old ones have gone to Berlin, new have come from Warsaw and Krakow. […] Which one of them are worse? Everything suggests that our relatives are"[37].

The lack of specialists was also notable in the cadres of officials (the article 33 of Organization Status guaranteed preferences in hiring officials from SV). In this situation *Naczelna Rada Ludowa* (the Superior People's Council) decided to increase wages of every official employed in a governmental and local self-governmental administration in SV by 40%[38]. The largest number of specialists arrived from Malopolska[39].

Similarly, higher salaries and wages were paid in the industrial sector. The average salary of a Silesian mine's director was two times higher than the average salary of mine director in Zaglebie Dabrowskie or Krakow area. Miners earned much more than manufacturing industry employees.

The Silesian nation had no own intelligentsia. A manifestation of this situation was the fact that there was no university in SV. The Prime Minister of Poland – professor of *Politechnika Lwowska* (Lwow Polytechnic) – and professors of *Akademia Górniczo-Hutnicza w Krakowie* (AGH University of Science and Technology in

[34] Ibidem, p. 74; H. Dąbrowski, S. Kokot, M. Moczulski, *1926-2006 Kalety-Podzamcze*, Warszawa 2006, p. 14.
[35] J. Jaros, *Historia górnictwa węglowego w Zagłębiu Górnośląskim (1915-1945)*, Katowice 1969, pp. 154-155.
[36] M. Grzyb, *Narodowościowo-polityczne aspekty przemian stosunków własnościowych i kadrowych w górnośląskim przemyśle w latach 1922-1939*, Katowice 1978, p. 37.
[37] A. Brożek, *Pamiętniki*, Katowice 1957, p. 81.
[38] W. Borth, *Naczelna Rada Ludowa na Górnym Śląsku*, Opole 1980, p. 106.
[39] B. Danowska-Prokop, U. Zagórska-Jonszta, *Wybrane problemy… op. cit.*, p. 48.

Krakow) evidently contributed to create this situation, which supposedly should help to "polonaise" the Silesians[40]. The low level of education among Upper Silesians persisted throughout the interwar period. In the period between 1929-30 there was one university student per around 2600 Upper Silesia residents (in the remaining part of Poland there was one per 750). Therefore, a typical model of a Silesian family was one with many children, a well-earning and uneducated father and a mother who stayed at home and raised children. This model of Silesian family still existed in early nineties[41].

During the interwar period Upper Silesia was populated not only by Poles and Germans but also by a group of people called in the Silesian dialect *chachary* – uneducated people with no awareness of ethnic affiliation. In his speech in the Silesian Parliament, Wojciech Korfanty[42] estimated this group at about 30% of the Silesian population[43].

6. Characteristics of the Silesian financial autonomy

The differences of the SV legal system concerned the most important public levies such as taxes (including *podatki lokalne* – local taxes – known in the interwar period as *podatki komunalne* – communal taxes).

The public levies regulated uniformly in the Polish and Silesian legal systems included: direct taxes such as: *podatek przemysłowy* (industrial tax), *scalony podatek przemysłowy od obrotu* (integrated industrial tax on turnover), *danina majątkowa* (estate levy), *podatek wojskowy* (military tax), *państwowy podatek od uboju* (state tax on slaughter), *podatek od kapitałów i rent* (tax on capital and dividend)[44], *podatek dochodowy* (income tax)[45], *podatek nadzwyczajny od niektórych zajęć* (extraordinary tax on some engagements)[46]; indirect taxes on: sugar, strach sugar, yeast, beer, wine and saturated honey, mineral oils, fats, carbonic acid, acetic acid, lighters made of gold and silver; other public levies: *opłata stemplowa* (stamp duty) and *fundusz pracy* (labour fund). The taxes regulated by pre-independence German acts included: *podatek gruntowy* (land tax) and *podatek od spadków i darowizn* (inheritance and donation tax). The public levies which were not collected in Silesia included: *podatek od nieruchomości* (property tax), *podatek od lokali* (tax on premises), *podatek od placów*

[40] I. Regowicz, *Wspomnienia śląskie i poznańskie z lat 1919-1934*, Opole 1976, p. 142.
[41] B. Danowska-Prokop, U. Zagórska-Jonszta, *Wybrane problemy*… op. cit., p. 29.
[42] Silesian nationalist activist, journalist and politician, serving as member of *Reichstag* and *Landtag*, and later on in the Polish Parliament. Briefly, He also was aparamilitaryleader, known for organizing the Silesian Uprisings.
[43] *Sprawozdanie etnograficzne Sejmu Śląskiego II kadencji* (Ethnographic Report of Second Term Silesian Parliament). Session seventh from 23rd June 1930, WAPK.
[44] It is worth noting that law in force in Silesia was *ustawa śląska z dnia 24 maja 1927 r.* (Act of Silesian Parliament of 24rd May 1927) – Dz. U. Śl. No 14, item 28 – which had been identical with the Nationwide act of Polish Parliament.
[45] However, there was collected additional municipal tax to this tax collected the in the Upper Silesian part of SV and in Poznanskie and Pomorskie Voivodeships.
[46] This tax had been collected from 1st January 1936.

budowlanych (tax on construction sites) and *podatek od energii elektrycznej* (electricity tax). Public levies which were collected only in Silesia included: *Śląski Fundusz Gospodarczy* (Silesian Economic Fund) – a tax similar to tax on premises, but collected from the landlords and not from tenants.

The communal taxes in SV were collected according to *ustawa o tymczasowem uregulowaniu finansów komunalnych w Województwie Śląskiem z dnia 14 kwietnia 1924 r.* (Act of the Polish Parliament of 14th April 1924 on temporary regulation of communal finances in the Silesian Voivodeship)[47]. The communal taxes in other parts of Poland were collected according to *ustawa o tymczasowem uregulowaniu finansów komunalnych z dnia 11 sierpnia 1923 r.* (Act of Polish Parliament of 11th August 1923 on temporary regulation of communal finances)[48].

The land tax was collected uniformly – just like in other parts of Poland. *Gminy wiejskie* (rural communes) could collect an additional tax along the state land tax, *gminy miejskie* (municipal communes) could collect the above mentioned additional tax or an autonomous communal land tax. According to the acts of the Polish Parliament, the revenues from the land tax from the area of a given commune were divided as follows: rural commune – 40%, *powiat* (county) – 50%, *samorząd wojewódzki* (voivodeship self-government) – 10%; *gmina miejska niewydzielona z powiatu* (municipal commune not separated from the county) – 70%, county – 20%, voivodeship self-government – 10%; *gmina miejska wydzielona z powiatu* (municipal commune separated from the county) – 90%, voivodeship self-government – 10%. Moreover, 6% of all these revenues was given over to *izby rolnicze* (agricultural chambers). According to the acts of the Silesian Parliament, the revenues from the land tax were divided as follows: rural commune – 40%, county – 60%; municipal commune not separated from the county – 60%, county – 40% (but if the number of municipal communes in the county was higher than the number of rural ones, this relation was reversed); municipal commune separated from the county – 100%; agricultural chambers – 0% (In this case, agricultural chambers were supported by a special, additional land tax).

Construction sites according to the acts of the Polish Parliament were taxed by the state, while municipal communes could established an additional communal tax on construction sites. The additional tax revenues could not be higher than revenues from the state tax on construction site collected from a given municipal commune area. Accordingly, acts of the Silesian Parliament provided for a tax on construction sites, which could be established by Silesian municipal communes only, and its rate had to be approved by the supervisory authority.

[47] Dz. U. Śl. of 1926 No 17, item 30 inc. ch., Temporary Regulation of Communal Finances in Silesian Voivodeship Act hereinafter.
[48] Dz. U. of 1932 No 106, item 884 inc. ch., Temporary Regulation of Communal Finances Act hereinafter.

The buildings in the other parts of Poland were taxed with a state property tax and an additional communal tax with a consolidated rate. In the other parts of Poland, 10% of the additional communal tax revenues were given over to the voivodeship self-government. Silesian rural and municipal communes could establish a communal property tax. The revenues from this tax were the commune's revenue only.

Podatek od kopalń (mining tax) in the other parts of Poland could be collected by communes which had coal, salt or oil mines on their territory. The tax could not be collected from treasury-owned mines, had to be approved by the supervisory authority and its rate was consolidated by the act of the Polish Parliament. The mining tax in SV had been collected at the same rate. The revenues from mining tax in SV were received: by the commune where the mine was located – 50% (but the commune was obliged to transfer the relevant part of the revenue to the communes where mine employees resided), county where the mine was located – 25% and other communes without mines on their territory – 25%.

The revenues from the tax on premises (40%) in the other parts of Poland were received by municipal communes[49]. In the SV revenues from the tax on premises were received by the Silesian Economic Fund[50]. Moreover, the rural and municipal communes could collect *podatek od zbytku mieszkaniowego* (tax on luxury housing). Luxury houses were those that could be deemed as unnecessarily big for people occupying them. In Silesia the collection of tax on luxury housing was inadmissible.

The collection system of *podatek od przemysłu i handlu* (tax on industry and trade) was not unified in Poland until the *dekret Prezydenta RP z dnia 14 stycznia 1936 r.* (The RP President's decree of 14th January 1936[51] was issued. The decree changed the article 8 of the Temporary Regulation of Communal Finances Act. The amendment introduced the option of collecting tax on industry and trade as a share of the revenues from state industrial tax (17%). This was in turn collected as tax on turnover plus an additional tax on turnover, in the form of *świadectwa przemysłowe* (industrial certificates) and *karty rejestracyjne* (registration cards). The Temporary Regulation of Communal Finances in Silesian Voivodeship provided for the additional tax only[52].

The revenues from industrial tax on turnover according to the acts of Polish Parliament were divided between: municipal communes (including the rural communes with municipal nature) – 45%, county – 45%, voivodeship – 10%; in case of a rural commune – 90%, county – 10%. According to the acts of Silesian Parliament, the revenues from industrial tax on turnover were divided between: a municipal commune separated from the county (except Bielsko town) – 100%; a municipal commune not

[49] *Dekret Prezydenta RP z dnia 14 listopada 1935 r.Podatek od lokali* (The RP President's decree of 14th November 1935 Premises tax) – Dz. U. No 82, item 505.
[50] *Ustawa z dnia 8 lutego 1928 r. o Śląskim Funduszu Gospodarczym* (The Act of Silesian Parliament of 8th February 1928 on Silesian Economic Fund – Dz. U. Śl. of 1933 No 22, item 46 inc. ch.
[51] Dz. U. No 3, item 15.
[52] W. Dąbrowski, *Referat Generalny*… op. cit., p. 19. The author considers that Act of Silesian Parliament was incompatible with the Act of Polish Parliament and should been revised.

separated from the county (including Bielsko) – 85%, county – 15%; rural commune (including a rural commune with municipal nature) – 65%, county – 35%. The integrated industrial tax on turnover was collected uniformly, but according to the acts of the Polish Parliament, 20% of revenues from this tax were given to the *Fundusz Zapomogowo-Pożyczkowy* (Fund of Assistance and Loans).

The income tax in the former Prussian area (Upper Silesia, Wielkopolska and Pomerania) could be collected in rural and municipal communes and counties with the additional communal tax. Throughout Poland the rural and municipal communes had their shares in the revenues from income tax. The acts of the Silesian Parliament provided the system of dividing revenues from the income tax and additional communal tax. It is worth noting that the system was based on the income schedules, like income from mining, trading and industrial companies or income from farming, forestry and fishery. The share in income tax and the additional tax were received by every commune and county. The system of revenue allocation guaranteed revenues to the local self-government unit of taxpayer's residence. It is worth noting that 3% of all revenues from income tax were given over to the *Śląski Komunalny Fundusz Zapomogowo-pożyczkowy* (Silesian Communal Fund of Assistance and Loans).

Throughout Poland, self-government units received revenues from an additional tax to *podatek od spożycia, zużycia względnie produkcji* (tax on consumption, use or production). An exception were taxes on: *węgiel* (coal), *oleje mineralne* (mineral oils), *sól i cukier* (salt and sugar) and *patenty akcyzowe* (excise patents) which were in form of revenue shares[53]. Those revenue shares were divided differently in Silesia and in the other parts of Poland. In other Polish areas, the share of the Fund of Assistances and Loans was bigger than that of counties and municipal communes.

The following an additional fess to: opłaty patentowe (patent fees), opłaty od wyrobu i przerobu spirytusu (fees on sprit manufacture and processing), opłaty od wyrobu drożdży oraz od sprzedaży spirytusu i napojów alkoholowych (fees on yeast production and sale of sprit and alcohol products) could be collected throughout the Polish territory. The additional fees could be established at a lower level in SV (100% of revenues from the above mentioned fees was collected for the Silesian Treasury) than in the other parts of Poland (200% of revenues from the above mentioned fees were collected for the Polish Treasury).

The Polish Parliament acts provided for an additional fee: *państwowa opłata od pism urzędowych dotyczących przeniesienia własności nieruchomości* (state fee on official documents concerning the transfer of property ownership). The additional fee had to be collected at the rate of 50% of the state fee. Moreover, the acts of Silesian Parliament provided *podatek od przyrostu wartości rynkowej nieruchomości* (tax on increasing property market value) at the rate of 10% of the difference between the market value of the property before and after taxation.

[53] Ibidem, p. 20.

What is more, the acts of Polish Parliament provided for *podatek od zaprotestowanych weksli* (tax on denied bills of exchange), which did not exist in Silesia. Polish law established a 10% share for the Fund of Assistance and Loans in the revenues from inheritance and donation tax. According to the Silesian Parliament acts, the mentioned tax (100%) was a commune revenue, as it is nowadays. The acts of the Polish Parliament provided for three optional communal taxes on the whole territory of the country: *podatek od plakatów,szyldów i anonsów* (tax on posters, signboards and announcement), *podatek od publicznych zabaw, rozrywek i widowisk* (tax on entertainment, recreation and shows) and *podatek od polowania* (tax on hunting). The acts of Silesian Parliament an autonomous *podatek od przedmiotów zbytku* (tax on luxury items) – for ex ample on hunting weapons. This tax had been the revenue of Silesian communes and county associations.

The acts of the Polish Parliament also introduced *podatek wyrównawczy* (compensatory tax) – the kind of land tax which could be optionally collected by rural communes. According to the article 43 of the Temporary Regulation of Communal Finances Act, the state could collect 2% of every additional communal levy as the cost of its collection. The temporary Regulation of Communal Finances in the Silesian Voivodeship Act did not provide for such a regulation.

Fundusz Drogowy (the Road Fund) was appropriated from the Silesian finances, like in the case of national finances. The source of revenues of the fund was similar and included *inter alia*: *opłaty od pojazdów mechanicznych i konnych* (fees on motor and horse vehicles), more liberal in Silesia, incomes from advertisement placed along the roads outside towns and cities, and revenues from taxation on fuel. Among the Silesian special funds, apart from the Road Fund, the autonomic acts provided for the Silesian Economic Fund, which was already mentioned above. In the state budget there were nine special funds. Thus, it can be concluded that the Silesian budget realised the principle of completeness to a greater extent than the national budget.

The Silesian Treasury's revenues with time grew faster than the Polish Treasury's. According to *tangenta* (tangent), the Silesian Treasury was obliged to transfer a part of their revenues to the Polish Treasury for general needs of the state. The rate of *tangenta* was determined by the Council of Ministers on the basis of the Silesian Voivodeship Council's proposal[54].

7. The relations between the Silesian and Polish Treasury

The main financial dispute between the Silesian Voivodeshp Council and the Council of Ministers was the amount which should be transferred from the Silesian Treasury to the Polish Treasury, based on the *tangenta* calculated according to the article 5 of the Organization Status. The dispute was not solved until the end of the

[54] B. Danowska-Prokop, U. Zagórska-Jonszta, *Wybrane problemy*… op. cit., p. 19.

Second Republic of Poland, in spite of the declaration of the willingness expressed on 25th of January 1937 in an expose of the Silesian Voivodeship – Michał Grażyński[55].

The relations between the *Skarb Śląski* (Silesian Treasury) and *Skarb Państwa* (Polish State Treasury) were often erroneously assessed by the public opinion, journalists and academic papers. An example of such assessment was the paper written by professor Ignacy Weinfeld, entitled *Skarbowość polska*. The author stated that Silesian Treasury did not contribute to any expenses for: the maintenance of the Polish government, defence or diplomacy, and only partly contributed to the state's general expenses by transferring the *tangenta*[56]. More radical and erroneous judgements were expressed by Feliks Ostrowski who wrote in his paper[57] that "SV is an exception, maintained exclusively by the Treasury of the Republic of Poland". The reasons of the above mentioned judgements were: insufficient knowledge of the Organization Status regulations (especially its article 5[58]), disregarding the transfer of revenues from SV to State Treasury (exceeding the *tangenta*), disregarding the fact that Silesian Treasury covered expenses which would have to be covered by State Treasury if the Silesian autonomy did not exist[59].

Until the settlement of mutual relations between the two treasury administrations was reached, the law from before 1919 was in force in Silesia. It consisted of the laws issued by German, Prussian, and Czech authorities, as well as the allied commissions. The Silesian Parliament accepted them and nationwide Polish Parliament acts regulating the taxes issues (instead their pre-1919 tax equivalents). The additional tax rates established by the Silesian Parliament could not be higher than 100% of the state taxes, exceptions were acceptable if accepted by the Polish *Ministerstwo Skarbu* (Ministry of the Treasury). It can be concluded that there were two legal tax systems in force Silesia: the restricted Silesian tax legal system and the national tax legal system. All revenues from all taxes and fees collected in SV were the revenues of the Silesian Treasury which had its own tax administration. A part of these revenues was transferred to the State Treasury according to *tangenta*. The amount of the revenues transferred every year was determined by the following formula:

C / 2 – D / 2 x A / B

A – civilian residents of SV,

B – civilian residents of Poland (including the SV),

C – revenues of the Silesian Treasury from all taxes and fees without additional taxes and fees,

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[55] W. Dąbrowski, *Stosunek skarbu śląskiego do skarbu państwa*, Katowice 1939, p. 9.
[56] I. Weinfeld, *Skarbowość polska*, Warszawa 1935, p. 433.
[57] *Podział dochodów w Polsce na tle statystyki podatkowej* [in:] *Pięć lat na froncie gospodarczym*, vol. 2, Warszawa 1931.
[58] Which provides that: "the mutual relation between the State Inland Revenue and Silesian Inland Revenue will be regulated by uniform acts of parliaments of Poland and of Silesia. The bills of these acts will be submitted by the Ministry Council in agreement whit Silesian Voivodeship Council".
[59] W. Dąbrowski, *Stosunek skarbu… op. cit.*, pp. 16-17.

D – revenues of the Silesian Treasury and the State Treasury from all taxes and fees without additional taxes and fees.

According to these regulations all customs were the revenues of the State Treasury. Silesian Inland Revenue had a dual nature because it collected taxes and fees for the Silesian and the State Treasury. According to Wojciech Dąbrowski, the Silesian Inland Revenue was the only administrative organ authorized to collect taxes on the SV area. Therefore, the introduction of compulsory monopolies (on: spirits, tobacco, salt and lotteries) replacing indirect taxes (which reduced the Silesian Treasury revenues) was against grammatical and teleological interpretation of the Organization Status[60].

The disputes how to determinate the *tangenta* concerned among others the method of qualification of the state monopolies (as taxes or not). In practice it was assumed that the monopolies were not taxes. This assumption resulted in a significant reduction of the Silesian Treasury's revenues. Wojciech Dąbrowski proved that in the period 1924-1938 the Silesian Treasury overpaid about 71 million Polish zlotys to the State Treasury. It meant that Silesian Treasury overpaid approximately 2/3 of all monies due through the *tangenta*)[61].

There were a few noteworthy attempts to establish an exclusive interpretation of the article 5 of Organization Status. One was calling for arbitration by professor Stanisław Wróblewski – the chairman of *Najwyższa Izba Kontroli Państwa* (Supreme Audit Office of the State), submitted to the Silesian Parliament in 1929. Another was the appointment of a committee composed of prominent lawyers which according to the documents submitted by the Ministry of Treasury and the Silesian Treasury would have to pass an authoritative opinion. That proposal was submitted to the Silesian Parliament in 1932. Both had not been realized[62].

From the very beginning of the Organization Status in force, its revision was discussed, initially by a committee of Silesian lawyers in 1923-1924. The committee was appointed by the Silesian Voivodeship Antoni Schultis. The committee discussed the amendment of articles 14 and 15, which required that the internal organization of the Silesian Voivodeship should be regulated by further acts. The Polish governmental committee for Silesian Voivodehip status arrangement with the Constitution of Republic of Poland of 17th March 1921 wasappointed for the period between 1924 and 1925. The work of both committees resulted in novelisation of the Organization Status. On 29th October 1932, the Silesian Voivodeship Council submitted to the Silesian Parliament the bill on the internal organization of the Silesian Voivodeship. However, the said bill did not become act of law. In December 1932, the Silesian Voivod – Konstanty Wolny submitted *Materiały do Ustawy Konstytucyjnej z dnia 15 lipca 1920*

[60] Ibidem, p. 22. The autor cites the professors A. Krzyżanowski and A. Taylor definitions of which confirm the validity of including the monopolies to the taxes.
[61] Ibidem, p. 37.
[62] Ibidem, p. 47.

r. (Supplement to the Constitutional Act of 15th July 1920. It was meant to help with interpretation of the Constitutional Act by the Silesian Parliament while working on the internal organization of the Silesian Voivodeship. On 10th May 1937 in Katowice, during a convention of Silesian activists representing the economic and social groups, the problem of internal organization of Silesian Voivodeship was discussed again. Further discussion about the internal organization issues was taken on in the first number of *Głos Prawników Śląskich* (Silesian Lawyers' Journal) published by *Śląskie Towarzystwo Prawnicze* (Silesian Lawyers' Society). A questionnaire in that issue of the Journal was composed of two questions: 1. "Should the Organization Status be amended, or should a new one be issued, and how should the relation between the Silesian Parliament laws and laws of Polish Parliament or President decrees be regulated?" 2. "Do the Prime Minister, Council of Ministers and Ministries have a right to issue *rozporządzenia wykonawcze* (implementing regulations) to the laws of the Silesian Parliament according to the article 27 paragraph 1 of *Ustawa Konstytucyjna z dnia 23 kwietnia 1935 r.* (The Constitutional Act of 23rd April 1935)?"[63].

The most important amendment of the Organization Status while it was in force was the amendment of its article 44, introduced by the article 81 of the April Constitution Act. It stated that the Organization Status remained in force and its amending was allowed by the act of the Polish Parliament only.

Despite the above mentioned discussions and novelizations, disputes about the relation between the Silesian and State Treasuries had not been solved.

Conclusion

On the final note, it is worth noting that the Silesian autonomy was a financial autonomy in fact. Wojciech Dąbrowski called the Silesian budget a non-autonomic budged. He called that budged a state budged as well, because from it financed the obligations of the Polish State[64] realized in SV. Dąbrowski divided the expenses of Silesian budged into three categories: 1. maintaining the State administration (general administration, school, tax and treasury administrations and the police) – the *tangenta* was also included in this category, 2. maintaining the autonomic administration, such as the Silesian Parliament and the local self-government institutions[65], 3. for investments. It should be noted that the above division is based on subjective criteria and the financial autonomy can not be considered only from the point of view of budget expenses for autonomic administration. The financial autonomy has to be considered as the possibility to take independent decisions about budged expenses in matters legally restricted for central or local government administration. For example the Silesian

[63] Dz. U. No 30, item 227; April's Constitution Act hereinafter.
[64] Equal up to 6% of all budget expenditure in the administrative year 1937-1936; W. Dąbrowski, *Stosunek skarbu… op. cit.*, p. 40.
[65] Ibidem, p. 41.

Voivodeship had its own education system organised differently than in other parts of Poland.

The Silesian financial autonomy was based on an inverted relation between the Silesian Treasury and the State Treasury, if we consider the relation between State Treasury and other Voivodeship to be a classic situation. The Silesian Inland Revenue collected most of public levies from the Silesian Voivodeship area. The collected revenues were transferred to the State Treasury. In case of other Voivodeships, the State Inland Revenue collected the levies. Other Voivodeships could establish additional taxes or share the revenues with the State Treasury.

The Upper Silesia is still a region with domination of heavy industry and its social problems have not been solved. Separatist aspirations were not revived in Poland after 1989, but an increasing number of Silesians demand an autonomy. The confirmation of this fact was the last election to the *Sejmik Województwa Śląskiego* (Silesian Voivodeship Assembly) in which *Ruch Autonomii Śląska* (Silesian Autonomy Movement) was supported by 8,49% of the electorate. The manifestation of the tendency of local self-government units in Silesia to integrate is the *Górnośląski Związek Metropolitalny* (Upper Silesian Metropolitan Union). Today Silesians are not wealthier than inhabitants of other parts of Poland, and The Silesian Voivodeship is economically integrated with other Polish regions. Therefore, present demands for an autonomy cannot be justified with economic, but with cultural reasons.

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Публичные финансы и автономия территориальных самоуправляемых единиц (на примере России)

(Public Finance and Autonomy of Territorial Self-government Units - Russian experience)

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Аннотация: В настоящей статье представлена структура публичных финансов территориальных самоуправляемых единиц в Российской Федерации, а также проблемы и перспективы развития финансовой автономии местного самоуправления.

Ключевые слова: местное самоуправление, гарантии, финансовая основа, публичные финансы, доходы.

Abstract: In this article the structure of public financeof territorial self-government units (Russian experience) is presented, and also this article describes problems and prospects of the development ofself-government units financial autonomy.

Keywords: self-government units, guarantees, financial base, public finance, incomes.

Краеугольным вопросом муниципально-правовой политики в России является проблема обеспечения экономической самостоятельности местного самоуправления, достаточности его доходов для осуществления полномочий по решению вопросов местного значения.

Начало данной проблемы в новейшей истории развития местного самоуправления «российского образца» было положено 28 февраля 1996г., когда Российская Федерация, присоединившись к Европейской хартии местного самоуправления 1985 г., тем самым признала одну из основ местного самоуправления, сформулированную в ст. 9 Хартии следующим образом: органы местного самоуправления имеют право, в рамках национальной экономической политики, на обладание достаточными собственными финансовыми ресурсами, которыми они могут свободно распоряжаться при осуществлении своих полномочий, при этом фи7нансовые ресурсы органов местного самоуправления

должны быть соразмерны полномочиям, предоставленным им Конституцией или законом, а также по меньшей мере часть финансовых ресурсов органов местного самоуправления должна пополняться за счет местных сборов и налогов, ставки которых органы местного самоуправления вправе определять в пределах, установленных законом[1].

Однако еще в начале XX века классик российского муниципального права Л.А. Велихов писал, что самое уязвимое место местного самоуправления не в сфере прав и даже не в сфере надзора, но в сфере средств, а именно в финансовой области, тем самым обозначая важность и значимость публичных финансов в формировании местного самоуправления[2].

В рамках данной проблемы на сегодняшний день не достигнута даже относительная «зона согласия» в вопросе дефиниций экономической (финансовой) основы местного самоуправления. Так, до сих пор нет ясности в вопросе ее наименования: экономическая это или финансово-экономическая основа местного самоуправления и т.п.[3] Не внесло ясности и Постановление Конституционного Суда от 17 июня 2004 г. N 12-П "По делу о проверке конституционности пункта 2 статьи 155, пунктов 2 и 3 статьи 156 и абзаца двадцать второго статьи 283 Бюджетного кодекса Российской Федерации в связи с запросами Администрации Санкт-Петербурга, Законодательного Собрания Красноярского края, Красноярского краевого суда и Арбитражного суда Республики Хакасия», оперирующее категорией «материальная основа осуществления публичных функций и полномочий муниципальных образований»[4].

Однако, не смотря на теоретические споры вокруг наименования феномена публичных финансов и их роли в развитии местного самоуправления, несомненным является их основополагающий, базисный характер в комплексном институте местного самоуправления.

Вместе с тем высокая дотационность муниципальных образования в РФ[5], негибкая, статичная система местных налогов[6], отсутствие механизма

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[1] Европейская хартия местного самоуправления" (Страсбург 15.10.1985) // Собрание законодательства РФ. 07.09.1998. N 36. Ст. 4466.

[2] Велихов Л.А. Основы городского хозяйства. М.-Л., 1928. Ч. 2. С. 243.

[3] Пешин Н.Л. Правовое регулирование местного самоуправления: проблемы теории и практики // Конституционное и муниципальное право. 2010. N 8. С. 54-55.

[4] Постановление Конституционного Суда РФ от 17.06.2004 N 12-П "По делу о проверке конституционности пункта 2 статьи 155, пунктов 2 и 3 статьи 156 и абзаца двадцать второго статьи 283 Бюджетного кодекса Российской Федерации в связи с запросами Администрации Санкт-Петербурга, Законодательного Собрания Красноярского края, Красноярского краевого суда и Арбитражного суда Республики Хакасия"// Российская газета. N 134. 25.06.2004.

[5] См.: Сводная аналитическая записка по результатам экспертно-аналитического мероприятия «обеспечение реализации Федерального закона от 6 октября 2003 года № 131-ФЗ «Об общих принципах организации местного самоуправления в РФ» в 2007 году» С. 9; Российское местное самоуправление: итоги муниципальной реформы 2003-2008 гг. Аналитический доклад Института современного развития// http://www.insor-russia.ru/ru/programs/doc/3928.

компенсации бюджетам муниципальных образований выпадающих доходов в связи с льготами и изъятиями, установленными по региональным и местным налогам законодательством о налогах и сборах Российской Федерации[7] и многие другие практические проблемы привели к тому, что осью, вокруг которой вращается научная полемика в сфере местного самоуправления, на сегодняшний день стал вопрос о публичных финансах местного самоуправления как его экономической основы. Несмотря на имевшие место вплоть до 2010 г. преобразования финансово-экономической основы местного самоуправления, данная сфера деятельности по-прежнему остается нерешенной стратегической проблемой муниципально-правовой реформы, начатой в 2003 г. и ознаменовавшейся принятием Федерального закона РФ от 06.10.2003 N 131-ФЗ "Об общих принципах организации местного самоуправления в Российской Федерации" [8].

По результатам проводимой реформы Институтом современного развития был подготовлен аналитический доклад «Российское местное самоуправление: итоги муниципальной реформы 2003-2008 гг.», в котором отмечалось, что эволюция налогового и бюджетного законодательства РФ в нынешнем десятилетии ограничила финансовую автономию и обеспеченность муниципальных образований, при этом экономический (докризисный) подъем страны в минувшие годы как бы прошел мимо муниципалитетов, а в целом по стране в 2005 г. (первый год функционирования новой системы организации местных финансов) доля доходов местных бюджетов относительно других уровней бюджетной системы опустилась до самого низкого за последние 10 лет уровня[9]. Учитывая тот факт, что независимость органов местного самоуправления в исполнении своих функций и полномочий, а также гарантия подлинной свободы и самостоятельности действий зависят от финансовой самостоятельности, последняя является conditio sine qua non реализации права на местное самоуправление.

Таким образом, констатируя существенную ограниченность финансово-экономического базиса муниципалитетов в России, встает закономерный, из причинно-следственной связи логически вытекающий вопрос о существовании подлинного местного самоуправления в Российской Федерации. Данный вопрос

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[6] Бутаков А.В. К исследованию Новейшей истории российской государственности: Византия история без конца. Омск. 2011. С.- 185.

[7] См., Заключение Счетной палаты Российской Федерации на проект федерального закона "О федеральном бюджете на 2011 год и на плановый период 2012 и 2013 годов". М., 2010. С. 209 // Официальный сайт Счетной палаты РФ http://www.ach.gov.ru/ru/expert/before/?id=598.

[8] Федеральный закон от 06.10.2003 N 131-ФЗ "Об общих принципах организации местного самоуправления в Российской Федерации"// Собрание законодательства РФ". 06.10.2003. N 40. Ст. 3822.

[9] Российское местное самоуправление: итоги муниципальной реформы 2003-2008 гг. Аналитический доклад Института современного развития// http://www.insor-russia.ru/ru/programs/doc/3928.

отнюдь не является риторическим, поскольку некоторыми учеными, в частности, С.А. Авакьяном, подвергнувшим фундаментальному исследованию конституционные основы и особенности российской модели местного самоуправления и пути ее совершенствования, в итоге перед научным сообществом был поставлен вопрос: "А есть ли в России местное самоуправление?"[10]. Вопрос закономерен и потому, что без реальной финансовой самостоятельности и свободы органам местного самоуправления невозможно управлять и исполнять местные бюджеты, а, следовательно, и должным образом, с учетом местных нужд удовлетворять потребности местного сообщества.

Под публичными финансами муниципалитетовв дальнейшем будет подразумеваться совокупность общественных отношений, урегулированных нормами финансового и муниципального права, возникающих в процессе создания, распределения и использования централизованных фондов денежных средств, необходимых местному самоуправлению для выполнения своих задач, функций и делегированных полномочий, являющиеся базисом и необходимым условием автономии территориальных саморегулируемых единиц.

Не смотря на то, что в России финансовая самостоятельность органов местного самоуправления обеспечивается разными способами, среди которых и формирование муниципальной собственности, и осуществление собственной финансово-хозяйственной деятельности, субстратом финансовой самостоятельности муниципалитетов являются публичные финансы,- собственный местный бюджет территориальной самоуправляемой единицы.

В соответствии со ст. 15 Бюджетного кодекса Российской Федерации от 31.07.1998 N 145-ФЗ, каждое муниципальное образование имеет собственный бюджет, при этом использование органами местного самоуправления иных форм образования и расходования денежных средств для исполнения расходных обязательств муниципальных образований не допускается. Данное правило распространяется на все муниципальные образования, созданные на территории РФ, независимо от их территориального уровня, численности населения, уровня социально-экономического развития и иных факторов и исключает возможность осуществления органами местного самоуправления муниципальных образований своих полномочий на основе сметы доходов и расходов, формируемой в составе бюджетов других уровней бюджетной системы Российской Федерации[11].

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[10] Авакьян С.А. Конституционные основы местного самоуправления в Российской Федерации: итоги пятнадцатилетнего развития, современное состояние // Конституционный вестник. 2008. N 1. С. 292 - 302; Он же. Особенности российской модели местного самоуправления и пути ее совершенствования // Вестник Московского университета. Серия 11. Право. 2008. N 2. С. 61 - 75, N 3. С. 64 - 74; Он же. Есть ли в России местное самоуправление? // Российская Федерация сегодня. 2009. N 16.

[11] Комментарий к Федеральному закону «Об общих принципах организации местного самоуправления в Российской Федерации»/ Под ред. И.В Бабичева, Е.С. Шугриной. М.: Норма: ИНФРА-М. 2010. С.429.

Несмотря на то, что местные бюджеты, как и бюджеты иных публично-территориальных образований формируются в рамках унифицированных процедур бюджетного процесса, на примере местных бюджетов наиболее остро стоит вопрос о соблюдении принципа сбалансированности бюджета, что на сегодняшний день привело к следующей ситуации в сфере публичных финансов муниципальных образований в России.

1. Проблемы формирования доходной части бюджетов муниципальных образований в России за счет налоговых поступлений

Критичность обстановки, складывающейся вокруг собственных налоговых доходов муниципальных образований, не раз отмечалась в российской научной литературе.[12] Причина сформировавшегося неблагоприятного финансового климата, в котором сегодня вынуждены существовать муниципалитеты, кроется в том числе в самой природе местных налогов, в их статичности. Так, положение статьи 9 Европейской Хартии местного самоуправления 1985 г., предусматривающее наличие в основе ресурсов органов местного самоуправления достаточно разнообразных и гибких финансовых систем, с тем, чтобы следовать, насколько это практически возможно, за реальным изменением издержек, возникающих при осуществлении местными органами своих полномочий, не в полной мере было реализовано в российской правовой действительности.

В соответствии со ст. 15 Налогового кодекса РФ[13] в Российской Федерации на долю местного уровня власти, который является максимально приближенным к населению, приходится всего лишь два налога: земельный налог и налог на имущество физических лиц. Вместе с тем объектом налогообложения как в первом, так и во втором случае являются статичные объекты, будь то земельный участок с периодически варьируемой кадастровой стоимостью, либо определенное имущество, стоимость которого также не претерпевает существенных колебаний. Таким образом, данные финансовые источники но своей природе не зависят от колебаний экономической конъюнктуры, в отличие от собственно производительной деятельности объектов предпринимательства как базовых элементов экономической системы, которыеобъектами обложения местными налогами не выступают.

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[12] См., напр.: Рекомендации Круглого стола «О проблемах и перспективах укрепления финансовых основ местного самоуправления» (Москва, 19 октября 2006г.) (Редакционный материал) // Вопросы местного самоуправления. 2007. N 1. С. 45-47; Герасименко Н.В. Правовое регулирование деятельности органов местного самоуправления в бюджетно- налоговой сфере //Законодательство и экономика. 2003. № 4. С. 37-46.

[13] Налоговый кодекс Российской Федерации (часть первая) от 31.07.1998г. № 146-ФЗ // Собрание законодательства РФ. № 31. 03.08.1998. Ст. 3824.

Однако муниципалитетам не приходится рассчитывать на константность данных налоговых поступлений, поскольку любое изменение в правовом регулировании земельного налога, налога на имущество физических лиц на федеральном уровне непосредственно отражается на финансовой самостоятельности местных бюджетов, оказывает прямое влияние на возможность исполнения муниципальными образованиями своих расходных обязательств, предусмотренных местными бюджетами.

В связи с чем, даже наличие гарантий заблаговременности внесения изменений, отвечающих принципу разумных сроков вступления в силу изменений, вносимых в законодательство о налогах и сборах, закрепленному в ст. 5 Налогового кодекса РФ, при отсутствии учета реальных финансовых возможностей муниципальных образований, необходимости сохранения и развития их финансовой самостоятельности, служат только временной отсрочкой неблагоприятных последствий подобных изменений для финансовой автономии муниципальных образований.

В связи с этим местные налоги играют второстепенную роль в процессе фискального перераспределения общественных ресурсов и не покрывают большую часть расходов муниципальных органов. По данным Федеральной налоговой службы России, в 2009 году поступления налоговых доходов в местные бюджеты составили 719,8 млрд. рублей, или 30 % общих доходов местных бюджетов. По сравнению с докризисным 2008г. уровень поступлений налоговых доходов сохранился на том же уровне. При этом местные налоги (земельный налог и налог на имущество физических лиц) составили 14,2 % общих поступлений налоговых доходов в местные бюджеты (в 2008г.- 11,5%, 2007 г.- 12,2% и в 2006г.-10%) и не обеспечивают финансовую самостоятельность органов местного самоуправления.[14]

К примеру, за 2006 г. доля местных налогов в структуре налоговых доходов местных бюджетов составляла 13,2% (из них земельного налога - 12%, а налога на имущество физических лиц – лишь 1,2%). На долю отчислений от налогов иных уровней бюджетной системы (НДФЛ, ЕНВД, ЕСХН, государственной пошлины) приходится около 17% доходов[15].

Таким образом, можно согласиться с оценками экспертов, считающих, что в настоящее время налоговые и бюджетные реформы в целом направлены на формирование доходов и распределение налоговых поступлений между уровнями

[14] Заключение Счетной палаты Российской Федерации на отчет об исполнении федерального бюджета за 2009 г., С. 326 // Официальный сайт Счетной Палаты РФ http://www.ach.gov.ru/userfiles/tree/zakluch2009-tree_files-fl-329.pdf.

[15] Силуанов А.Г. Обеспечение сбалансированности местных бюджетов в условиях реализации Федерального закона от 6 октября 2003 г. № 131-ФЗ / Доклад Силуанова А.Г. на «круглом столе» в Комитете Совета Федерации по вопросам местного самоуправления [WWW-документ] // Официальный web-сайт Минфина России // URL: http://www1.minfin.ru/rms/doklad261006.ppt (2007. 30 августа).

бюджетной системы не на основе стабильных долговременных налоговых источников, а главным образом за счет регулирования и выравнивания, результатом чего явилась полная привязанность муниципальных образований к публичной собственности вышестоящего уровня - налогам, базой которых являются объекты, развитие которых не зависит от усилий муниципалитетов[16].

К данному выводу также приводят статистические показатели собственных налоговых доходов муниципальных образований в структуре доходов последних в целом по России.

В среднем, выполнение годового плана налоговых доходов муниципальными образованиями на 100% и выше дает примерно 39,9% их собственных доходов, что с необходимостью свидетельствует о том, что потенциал муниципальной налоговой базы, по существу, уже исчерпан и не может выступать стимуляционным ресурсом их экономического развития[17].

Выход из сложившейся ситуации может заключаться в установлении пропорциональной зависимости между эффективностью производства и налогами, составляющими доходную часть местного бюджета, посредством использования потенциала существующей в РФ налоговой системы, с тем, чтобы у муниципальных образования были доходы, которые зависят от результатов деятельности муниципалитетов.

Таким образом, формирование эффективной, рациональной и прогрессивной экономической и правовой основы налоговых доходов в структуре публичных финансов местного самоуправления необходимо выделить в качестве одного из актуальных направлений современной муниципально - правовой политики Российской Федерации, поскольку именно налоговые доходы должны выступать основным источником благосостояния и самодостаточности муниципального образования.

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[16] См., напр., Ларионов А.В. Право собственности на средства местного бюджета // Конституционное и муниципальное право. 2005. N 7; Проблемы реализации и перспективы развития конституционной модели российского местного самоуправления: Круглый стол // Государство и право. 2004. N 3. С. 36; Чеботарев Г.Н. Вертикаль публичной власти в регионе: какой ей быть? // Проблемы разграничения предметов ведения и полномочий между федеральными органами исполнительной власти, органами исполнительной власти субъектов Российской Федерации и органами местного самоуправления: Материалы научно-практического семинара. Тюмень, 2002. С. 5; Миронов Н. Местное самоуправление: незавершенный проект. Была ли реализована правительственная концепция муниципальной реформы? // Сравнительное конституционное обозрение. 2008. N 2.

[17] Бутаков А.В. Указ. соч., С. 185.

2. Гипертрофированность безвозмездных поступлений от органов государственной власти Федерации и ее субъектов в структуре публичных финансов муниципальных образований как фактор, дестабилизирующий автономность территориальных самоуправляемых единиц

Объективной реальностью местного самоуправления в России является его высокая степень дотационности. Согласно Заключению Счетной палаты Российской Федерации на отчет об исполнении федерального бюджета за 2009 г., реализация в России реформы местного самоуправления повлекла за собой рост расходных обязательств субъектов Российской Федерации на осуществление полномочий по выравниванию бюджетной обеспеченности местных бюджетов.

В 2009 году местные бюджеты были исполнены по доходам в сумме 2387,6 млрд. рублей, или на 1 % меньше, чем в 2008 году (2 411,7 млрд. рублей), и по расходам - 2 440,0 млрд. рублей, или на 0,8 % больше, чем в 2008 году (2 422,2 млрд. рублей)[18].

В 2009 году продолжился рост объема долга муниципальных образований: по состоянию на 1 января 2010 года указанный долг составил 133,4 млрд. рублей, что на 28,2 млрд. рублей (26,8 %) больше, чем на начало 2009 года (105,2 млрд. рублей).

Объем предоставленных межбюджетных трансфертов (безвозмездных поступлений из бюджетов других уровней) местным бюджетам составил в 2009 году 1 424,8 млн. рублей, или **58,6 % общей суммы доходов местных бюджетов** (в 2008 году – 59,7 % (1 401,8 млн. рублей), в 2007 году – 58 %)[19].

Таким образом, расходные полномочия на территории муниципальных образований реализуются органами местного самоуправления почти на 60 % за счет межбюджетных трансфертов из бюджетов субъектов Российской Федерации.

Из приведенных статистических данных следует, что с каждым годом наблюдается рост дефицита местных бюджетов, в связи с чем закономерно и существенно растет долг муниципальных образований.

При этом, наблюдаемый в течение последних трех лет высокий (около 60%) удельный вес межбюджетных трансфертов в структуре доходной части публичных финансов муниципалитетов свидетельствует о наличии существенной зависимости последних от федерального и регионального центров, не смотря на то, что природа местного самоуправления подразумевает самостоятельность, автономность и независимость.

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[18] Заключение Счетной палаты Российской Федерации на отчет об исполнении федерального бюджета за 2009 г. С. 325-326 // Официальный сайт Счетной палаты РФ http://www.ach.gov.ru/userfiles/tree/zakluch2009-tree_files-fl-329.pdf.

[19] Там же. С. 326.

Необходимо отметить, что сама возможность выравнивания финансового положения муниципальных образований за счет средств федерального и регионального бюджетов предусмотрена в ст. 9 Европейкой Хартии местного самоуправления 1985г., в соответствии с которой данная мераявляется способом защиты более слабых в финансовом отношении органов местного самоуправления путем ввода процедур финансового выравнивания или эквивалентных мер, направленных на корректировку последствий неравномерного распределения возможных источников финансирования, а также лежащих на этих органах расходов.

Однако, допуская подобный механизм перераспределения доходов налоговой системы, Хартия ограничивает его применение следующими гарантиями, а именно: такие процедуры или меры не должны ограничивать свободу выбора органов местного самоуправления в пределах их собственной компетенции.

Данная правовая гарантия обусловлена объективной способностью дотационных механизмов подавлять налоговый потенциал муниципалитетов в сфере формирования публичных финансов, поскольку не стимулирует последних к поиску стабильных и долговременных налоговых источников. Подобный симбиоз местных бюджетов с региональными и федеральным бюджетами ставит под сомнение не только автономность муниципальных образований, но и само местное самоуправление как конституционную ценность.

Критичность существующей в России ситуации с межбюджетными трансфертами для муниципальных образований отмечается и федеральной властью. На прошедшем 23 мая 2011г. расширенном заседании Президиума Совета при Президенте Российской Федерации по развитию местного самоуправления Председатель Правительства РФ В.В. Путин отметил, что, составляя практически половину городских расходов, межбюджетные трансферты ставят муниципалитет в позицию, как правило, просителя и, самое главное, не стимулирует их инициативу; при этом было отмечено, что на федеральном уровне выработан единый подход к порядку предоставления финансовой помощи регионам, а вот в паре «регион–муниципалитет» этого пока не сделано, в связи с чем каждый субъект Российской Федерации действует по своему усмотрению[20].

На практике подобная ситуация привела к тому, что субъекты Федерации предпочитают использовать целевые субсидии, а не дотации на выравнивание бюджетной обеспеченности (средства, не обусловленные целевым использованием). Не смотря на то, что контролировать расходование субсидий

[20] Стенограмма расширенного заседания Президиума Совета при Президенте Российской Федерации по развитию местного самоуправления от 23.05.2011г./Официальный сайт Председателя Правительства РФ/ http://premier.gov.ru/events/news/15312/.

легче, однако, эта практика значительно снижает финансовую автономию органов местного самоуправления и является прямым нарушением ст. 9 Европейской Хартии местного самоуправления в части ограничения свободы выбора органов местного самоуправления в пределах их собственной компетенции.

В целом необходимо отметить, что предоставление межбюджетных трансфертов является экстенсивным способом выравнивания финансовой обеспеченности муниципалитетов и не ведет к равномерному и поступательному развитию последних, хотя, фактически, и позволяет к заданному моменту времени привести все муниципальные образования к относительно общему финансовому знаменателю. Но, вместе с тем, укоренение и долгосрочность дотационных бюджетных отношений между муниципальными образованиями и региональным, федеральным центром способствует усилению зависимости муниципалитетов, ограничению их имманентной автономии и самостоятельности.

При этом интенсивным способом преодоления дефицита местных бюджетов является поиск новых, либо модернизация уже существующих долговременных налоговых источников доходов местных бюджетов. Однако необходимо констатировать, что в Российской Федерации местное самоуправление на сегодняшний день финансируется по «дотационной», а не «налоговой модели».

3. Неналоговые доходы в структуре публичных финансов территориальных самоуправляемых единиц в Российской Федерации: состояние и перспективы развития

Неналоговые доходы играют не столь дискуссионную и первостепенную роль в формировании доходной части публичных финансов территориальных самоуправляемых единиц в России, однако, также обладают определенной спецификой.

К неналоговым доходам муниципальных образований, в соответствии со Ст.Ст. 41, 42, 46, 64 Бюджетного кодекса Российской Федерации от 31.07.1998 N 145-ФЗ, относятся: 1) доходы от использования имущества, находящегося в муниципальной собственности (аренда, передача в доверительное управление и т.п.); 2) доходы в виде прибыли, приходящейся на доли в уставных капиталах хозяйственных товариществ и обществ, дивиденды по акциям, принадлежащим муниципальным образованиям; 3) часть прибыли муниципальных унитарных предприятий; 4) доходы от платных услуг, оказываемых бюджетными учреждениями, находящимися в муниципальной собственности и др.

При этом происходит существенная дифференциация перечисленных неналоговых доходов местных бюджетов по типам муниципальных образований.

В 2009 году отмечалось значительное снижение поступления неналоговых доходов в структуре местных бюджетов, которые, по итогам года, составили всего 243,5 млрд. рублей, что ниже уровня, к примеру, 2008 года на 12,5% или 34,9 млрд. рублей. При этом основное снижение произошло за счет уменьшения доходов от использования имущества, находящегося в муниципальной собственности по сравнению с 2008 годом на 8,2% и доходов от продажи материальных и нематериальных активов – на 26,1%[21].

Как уже отмечалось, существует явная зависимость распределения неналоговых доходов от типов муниципальных образований, в связи с чем указанные доходы распределяются крайне неравномерно в следующих пропорциях.

Таблица 1[22]

Показатели	**Городские округа**	**Муниципальные районы**	**Поселения**	**всего**
Доходы от предпринимательской и иной приносящей доход деятельности	69,6%	28,3%	2,1%	100%
Доходы от использования имущества находящегося в мун. собственности	66,1%	19,3%	14,6%	
Платежи при пользовании природными ресурсами	50,7%	49,3%	0,0%	
Доход от оказания платных услуг и компенсации затрат государства	65,7%	31,4%	2,9%	
Доходы от продажи материальных и нематериальных активов	60,6%	24,3%	15,1%	
Штрафы, санкции, возмещение ущерба	64,1%	35,9%	0%	
Другие неналоговых доходов	61,1%	0%	38,9%	
Всего (млрд.руб.)	157,3	59,4	26,8	243,5

[21] Информация о результатах мониторинга местных бюджетов Российской Федерации по состоянию на 1 января 2010 года // Официальный сайт Министерства финансов РФ/ http://www1.minfin.ru/ru/reforms/local_government/monitoring/.
[22] Там же. С. 6.

Из приведенных данных следует, что из суммарного объема неналоговых доходов муниципалитетов более 50% доходов приходится на долю городских округов, что не случайно, поскольку в границах именно этого типа муниципальных образований сосредоточены материальные активы (объекты муниципальной собственности), а, следовательно, и муниципальные предприятия, учреждения.

Как показывает анализ отчетных данных, доходы от использования имущества, находящегося в муниципальной собственности, составляют основную долю неналоговых доходов муниципальных образований. В городских округах доля данного вида дохода в общей сумме неналоговых доходов составляет 49,9%, в муниципальных районах – 38,5%, в поселениях – 64,5 процента[23]. Однако, не смотря на доминирующее положение доходов от муниципальной собственности в структуре неналоговых доходов, на сегодняшний день существуют административно-правовые барьеры для инновационного и эффективного управления муниципальной собственностью.

Национальным планом противодействия коррупции на 2010 - 2011 годы, утвержденным Президентом РФ от 31.07.2008 N Пр-1568[24], был введен комплекс мер, направленных на улучшение государственного управления в социально-экономической сфере, включающих в себя регламентацию использования муниципального имущества, а также передачи прав на использование такого имущества.

Результатом правовой политики государства, направленной на борьбу с коррупцией, явилось существующее на сегодняшний день в российском антимонопольном законодательстве общее правило заключения договоров аренды, договоров безвозмездного пользования, договоров доверительного управления муниципальным имуществом, иных договоров, предусматривающих переход прав владения и (или) пользования в отношении муниципального имущества, не закрепленного на праве хозяйственного ведения или оперативного управления, только по результатам проведения конкурсов или аукционов на право заключения этих договоров[25].

При этом, законодательство Российской Федерации о защите конкуренции, регулирующее вопросы управления муниципальной собственности путем передачи ее в аренду, доверительное управление и т.д. во многом коллизионно, в силу чего создаются административные и правовые препятствия для оптимального управления муниципальной собственностью.

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[23] Там же.

[24] Национальный план противодействия коррупции на 2010 - 2011 годы, утв. Президентом РФ от 31.07.2008. N Пр-1568 // Российская газета. N 164. 05.08.2008.

[25] Федеральный закон от 26.07.2006 N 135-ФЗ "О защите конкуренции" (принят ГД ФС РФ 08.07.2006, Ст.17.1// Российская газета. N 162. 27.07.2006.

Сложившаяся ситуация в сфере эффективного управления муниципальным имуществом была отмечена в Распоряжении Правительства РФ от 30.06.2010 N 1101-р «Об утверждении Программы Правительства РФ по повышению эффективности бюджетных расходов на период до 2012 года», где в качестве важнейшей сферы оптимизации деятельности публично-правовых образований было выделено управление муниципальной собственностью, для повышения эффективности которого предлагается реализация мер по следующим основным направлениям: 1) упорядочение состава муниципального имущества и обеспечение его учета; 2) инвентаризация объектов муниципальной собственности, оформление прав на них; 3) замена практики передачи имущества, специально приобретенного за счет бюджетных средств одного публично-правового образования, другому публично-правовому образованию путем предоставления субсидий на соответствующие цели, распределяемых по прозрачным критериям; 4) создание прозрачных процедур, определяющих вопросы аренды муниципального имуществаи др[26].

Необходимо констатировать, что муниципальная собственность- ключевой элемент муниципальной экономики, лежащий в основе удовлетворения общественных потребностей населения муниципального образования[27]- на сегодняшний день составляет значительную (более 50%) часть неналоговых доходов муниципалитетов, однако, административно-правовые барьеры не позволяют эффективно использовать весь экономический потенциал данного источника доходов.

4. Увеличение расходных обязательств муниципальных образований вследствие необоснованного расширения перечня вопросов местного значения как тенденция, ведущая к росту дефицита бюджета территориальных самоуправляемых единиц в России

В ходе реализации в России реформы местного самоуправления на территориальные самоуправляемые единицы были возложены расходные обязательства по решению, в том числе, отдельных государственных полномочий без предоставления дополнительных источников финансирования[28].

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[26] Распоряжение Правительства РФ от 30.06.2010 N 1101-р «Об утверждении Программы Правительства РФ по повышению эффективности бюджетных расходов на период до 2012 года»// Собрание законодательства РФ. 12.07.2010. N 28. Ст. 3720.

[27] Экономика муниципальных образований: Учеб. пособие / Под общ. ред. проф. В.Г. Игнатова. М.: ИКЦ "МарТ"; Ростов н/Д: Издательский центр "МарТ". 2005. С. 206.

[28] Щепачев В.А. Совершенствование правового регулирования - основа для устойчивого развития территорий муниципальных образований // Юридический мир. 2009. N 4. С. 41-42.

На начальном этапе реформы в период с 2005 по 2006 гг. произошло расширение перечня вопросов местного значения, большая часть из которых привела к увеличению объема расходных обязательств муниципальных образований[29].В 2006 году, по данным Минфина России, расходные обязательства муниципальных образований выросли на 254 млрд. руб. (на 21%), тогда как в 2005 году они составляли 1210 млрд. руб., а в 2007 году также возросли в значительной степени[30].

В частности, на уровень муниципалитетов были переданы следующие полномочия органов государственной власти субъектов Федерации: социальная поддержка и социальное обслуживание граждан пожилого возраста и инвалидов, граждан, находящихся в трудной жизненной ситуации, а также детей-сирот, безнадзорных, ветеранов, малоимущих; организация оказания специализированной медицинской помощи в специализированных медицинских учреждениях; строительство и содержание автомобильных дорог общего пользования межмуниципального значения; поддержка сельскохозяйственного производства и др.[31]. Однако подобная ситуация не привела к закреплению за местными бюджетами необходимых дополнительных источников финансирования, корректировке распределения доходов по уровням бюджетной системы и методики формирования межбюджетных отношений. Так, по экспертной оценке Счетной палаты Российской Федерации, еще в 2006 году для реализации Федерального закона от 06.10.2003 N 131-ФЗ "Об общих принципах организации местного самоуправления в Российской Федерации"- основополагающего нормативно-правового акты для местного самоуправления в России- необходимо было дополнительно выделить 360 млрд. руб., что в 1,7 раза превышало затраты, направленные на эти цели в 2005 г.[32].

Сложившийся дисбаланс между объемом расходных обязательств и источниками их финансирования во многом повлиял на то, что, по данным Счетной палаты РФ за 2009 г., фактические потребности местных бюджетов существенно превысили имеющиеся финансовые ресурсы для их удовлетворения:

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[29] Рекомендации Круглого стола "О проблемах и перспективах укрепления финансовых основ местного самоуправления" (Москва, 19 октября 2006 г.) (Редакционный материал)// Государственная власть и местное самоуправление. 2006. N 12.

[30] Решение Комитета по вопросам местного самоуправления от 14.06.2007 N 95/4 "О заключении Комитета Государственной Думы по вопросам местного самоуправления на проект Федерального закона N 425445-4 "О внесении изменений в главу 25 части второй Налогового кодекса Российской Федерации и Бюджетный кодекс Российской Федерации" // СПС «Консультант-Плюс».

[31] Силуанов А.Г. Доклад на «круглом столе» в Комитете Совета Федерации РФ по вопросам местного самоуправления 26 октября 2006 года (19.09.2007) по теме: «Обеспечение сбалансированности местных бюджетов в условиях реализации Федерального Закона от 6 октября 2003 г. № 131-ФЗ». С. 11/ Официальный сайт Министерства Финансов РФ// http://www1.minfin.ru/ru/reforms/local_government/reports/.

[32] Рекомендации Круглого стола "О проблемах и перспективах укрепления финансовых основ местного самоуправления" (Москва, 19 октября 2006 г.) (Редакционный материал)// Вопросы местного самоуправления. 2007. N 1. С. 45-46.

в 2009 г. объем дефицита местных бюджетов составил 52,4 млрд. рублей (при запланированном профиците, по данным Министерства финансов России, в сумме 156,6 млрд. рублей), а в 2008г. дефицит местных бюджетов составил лишь 10,5 млрд. рублей[33]; при этом общий объем долга муниципальных образований в РФ на 01.06.2011г. составил внушительную цифру- 173 359 350,1 тыс. руб.[34]

Указанная ситуация еще более осложняется тем, что у ряда местных бюджетов выпадает существенная доля поступлений от земельного налога в связи с установленными федеральным законодательством льготами по уплате этого важнейшего местного налога. На данное обстоятельство, негативным образом сказывающееся на финансовой автономии муниципалитетов, было обращено внимание в Бюджетном послании Президента РФ о бюджетной политике в 2012-2014 гг., содержащем в качестве основного направления налоговой политики и формированию доходов бюджетной системы инвентаризацию установленных федеральным законодательством льгот по региональным и местным налогам и оценке их эффективности. Также в Послании допускается решение возникшего вопроса по земельному налогу путем отмены установленных льгот, способствующей переходу к более справедливому способу распределения собственных налоговых доходов между субъектами Федерации и муниципальными образованиями, а также как способ повышения налоговой автономии местных властей[35].

Как итог, на сегодняшний день местное самоуправление в России имеет необоснованно расширенный перечень полномочий органов местного самоуправления по решению вопросов местного значения, в дополнение к которым переданы полномочия с регионального уровня власти, не обеспеченные в полном объеме финансовыми ресурсами.

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[33] Заключение Счетной палаты Российской Федерации на отчет об исполнении федерального бюджета за 2009 г. С. 325-326// Официальный сайт Счетной палаты РФ http://www.ach.gov.ru/userfiles/tree/zakluch2009-tree_files-fl-329.pdf.

[34] Объем государственного долга субъектов Российской Федерации и долга муниципальных образований на 01.06.2011. Официальный сайт Министерства Финансов РФ// http://www1.minfin.ru/ru/public_debt/subdbt/.

[35] Бюджетное послание Президента РФ о бюджетной политике в 2012-2014 гг. // Российская газета. № 5516. 2011. 30 июня.

5. Пути преодоления финансовой зависимости муниципальных образований от федерального и регионального бюджетов, а также способы модернизации публичных финансов территориальных самоуправляемых единиц в России

Сегодня вопрос о финансовой автономии муниципальных образований, структуре их публичных финансов стоит «на повестке дня»демократического правового государства, которым себя провозгласила Российская Федерация. В связи с этим с инициативой модернизации публичных финансов территориальных самоуправляемых единиц выступают как сами муниципальные образования, так и федеральная власть.

С одной стороны, Общероссийской общественной организацией Всероссийский совет местного самоуправления в обобщенном докладе о развитии местного самоуправления в России в качестве основной проблемы была выделена финансовая несамостоятельность основной массы муниципалитетов, а в качестве выхода из сложившейся ситуации были предложены: перераспределение налогов от малого бизнеса с тем, чтобы 80% из них распределялись в пользу местных бюджетов; налог на доходы физических лиц до 50% распределялся в пользу городских округов и до 30%- бюджетам поселений; транспортный налог, а также часть налога на прибыль предприятий также должны приходиться на долю местных бюджетов; распределить по уровням бюджетной системы налог на недвижимость физических лиц, а также доходы от налога, взимаемого по упрощенной системе налогообложения[36].

С другой стороны, Президентом Российской Федерации Д.А. Медведевым в Бюджетном послании о бюджетной политике в 2012-2014 гг. был предложен иной способ решения проблемы финансовой автономии муниципалитетов. В частности, речь идет о завершении подготовки к введению местного налога на недвижимость по завершении кадастровой оценки объектов капитального строительства с тем, чтобы уже в 2012 году взимать данный местный налог[37].

О скором введении дополнительного местного налога на недвижимость говорил на расширенном заседании Президиума Совета при Президенте Российской Федерации по развитию местного самоуправления и Председатель Правительства Российской Федерации- В.В. Путин. Так, в ближайшее время планируется принятие поправок в Налоговый кодекс Российской Федерации: практически целиком, в объёме 90%, федеральный законодатель передаст

[36] Муниципалитеты ждут помощи от "Фронта". Местное самоуправление делится проблемами с ОНФ// Коммерсантъ. №125 (4666). 12.07.2011.
[37] Бюджетное послание Президента РФ о бюджетной политике в 2012-2014 гг. // Российская газета. № 5516. 2011. 30 июня.

муниципалитетам доходы от патентов, в связи с чем у муниципальных образований появится мощный инструмент пополнения бюджета[38].

В связи с вышеизложенным, несомненно, что в сфере экономической и финансовой основы местного самоуправления в России грядут перемены, несмотря на то, что представления о характере и масштабах этих перемен у представителей местного и федерального уровня власти различны.

Вместе с тем представляется возможным пойти по пути увеличения числа местных доходов путем перераспределения уже закрепленных Налоговым кодексом РФ за субъектами Федерации платежей в пользу местного уровня публичной власти. При этом, для перехода на основу стабильных и долговременных налоговых источников и ухода от схем регулирования и выравнивания, необходимо перераспределить поступления от тех доходов, объект обложения которыми зависит от результатов деятельности муниципальных образований, среди которых можно выделить налог на прибыль организаций, налог на доходы физических лиц, а также налог на добавленную стоимость.

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2. Муниципалитеты ждут помощи от "Фронта". Местное самоуправление делится проблемами с ОНФ // Коммерсантъ, 12 июля 2011г., № 125.

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[38] Стенограмма расширенного заседания Президиума Совета при Президенте Российской Федерации по развитию местного самоуправления от 23.05.2011г.//Официальный сайт Председателя Правительства РФ/ http://premier.gov.ru/events/news/15312/.

The Comparison of Budget Incomes and Expenditures of Self-governing Territorial Units in the Czech Republic and Poland

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Abstract: This article deals with incomes and expenditures of self-governing territorial units budgets in the Czech Republic and Poland. The fist two parts of the article are focused on general classification of incomes and expenditures of public budges. Next chapter discuses incomes and expenditures of particular self-governing unit in the Czech Republic as well as the purposes to witch such financial means from public budgets could be used for. Following chapter deals with the same topic but within Polish self-governing territorial units. The final part of this article refers to similarities and differences in both countries in comparison. Methods as deduction, analysis and comparative analysis were used in this article.

Keywords: budget, self-governing territorial units, incomes, expenditures, tax.

1. Introduction

Nowadays there is a tendency to transfer more and more competences to self-governing territorial unit and decentralization associated with it. Financial decentralization is closely related to such phenomenon. Listing of municipalities´ and regions´ incomes in the Czech Republic (respectively municipalities, districts and regions in Poland) become wealthier and therefore particular self-governing territorial units are able to manage explicit volume of resources without any state intervention.

There is no other option how to start paper dealing with incomes and expenditures of public budgets than explaining, in short, by using definition what actually budget signifies. In general terms, budget means summary of expenditures for certain budget period as well as list of incomes for such particular period of time[1]. Budget stands for some balance, financial plan or economical tool, where incomes and expenditures of the subject interfere and according to witch it is possible to obey. I further deal with particular incomes and expenditures of self-governing territorial units in the Czech Republic and Poland in this article.

[1] In Mrkývka, P., Pařízková, I. Základy finančního práva. 1. vyd. Brno: Masarykova univerzita, 2008, p. 150

2. Classification of public budgets incomes

Public budget incomes or so called "public incomes" are those that flow into public budgets[2]. Potential resources of public budgets include incomes from[3]:

- own management and use of public property,
- taxes,
- fees and other payments on behalf of public budgets,
- lease or purchase of public property.

The above-mentioned kinds of incomes are considered as typical public incomes by theory of financial law. This is because an **irreversible principle**[4] shows. Those are the incomes which flow into public budget form different subjects[5]. Beside these, also returnable incomes exist, which means they are drawn for particular period of time, which are not typical for public funding but still they are used a lot in the public resources management.

They include:

- time deposits[6],
- short-term bank loan,
- medium-term and long-term bank loan,
- subsidies (from domestic and international subjects),
- commercial paper emission (short-term state cash warrants or long-term state bondsmen)

Short-term bank loan is used to cover short-time budget deficit during financial year. Medium-term and long-term loan then serve to finance the investment. Most of the incomes have irretrievable nature[7].

It is also possible to sort the incomes according to the fact that they are repetitious or unrepeated. First of all, taxes but also for ex. incomes from property lease, incomes from business and donations belong to group of repetitious incomes (so called common incomes). To the second category, group of unrepeated incomes (or capital incomes), we can count for ex. loans, privatization incomes, duties and contributions from other public budget[8].

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[2] In Hamerníková, B., Maaytová, A. et al. Veřejné finance. 2. vyd. Praha: Wolters Kluwer ČR, 2010, p. 108.
[3] In Denek, E. et al. Finanse publiczne. Warszawa: Wydawnictwo naukowe PWN, 1995, p. 31.
[4] Or how are Hamerníková and Maaytová using, so-called noncredit incomes (In: Hamerníková, B., Maaytová, A. et al. Veřejné finance. 2. vyd. Praha: Wolters Kluwer ČR, 2010, p. 108)
[5] In Peková, J., Pilný, J., Jetmar, M. Veřejná správa a finance veřejného sektoru. 3., aktualizované a rozšířené vydání. Praha: ASPI, 2008, p. 220.
[6] Compare with Denek, E. et al. Finanse publiczne. Warszawa: Wydawnictwo naukowe PWN, 1995, p. 31.
[7] In Peková, J., Pilný, J., Jetmar, M. Veřejná správa a finance veřejného sektoru. 3., aktualizované a rozšířené vydání. Praha: ASPI, 2008, p. 220.
[8] Compare with Hamerníková, B., Maaytová, A. et al. Veřejné finance. 2. vyd. Praha: Wolters Kluwer ČR, 2010, p. 108, and Peková, J., Pilný, J., Jetmar, M. Veřejná správa a finance veřejného sektoru. 3., aktualizované a rozšířené vydání. Praha: ASPI, 2008, p. 220-221.

Next option is to divide public budget incomes in accordance with criterion of level of liability to obligatory incomes (mandatory, mainly tax incomes) and optional (their introduction depends on decision of competent public administration organ). Besides these classifications it is possible to sort public budget incomes into scheduled and unplanned and finally to fiscal (incomes flow to public budget in narrower concept) and parafiscal (the incomes flow into extra budgetary funds, for example in case of obligatory public health insurance)[9].

3. Classification of public budget expenditures

You can imagine expenditures as relations of division and utilization public budget and extra budgetary funds in budget system[10]. Public expenditures are also possible to be understood as financial resources dedicated by particular governments in their competence to finance their activity and to satisfy society needs and these all on the base of political decisions made within democratic process[11]. It is possible to classify public budget expenditures in accordance with several criteria. From this point of view, the fundamental and the most important benchmark for their division are according to their irretrievability to refundable and nonrefundable expenditures. In terms of means and allocation consequences, we can sort public expenditures into allocation, redistributive and stabilizing expenditures. Last but not least there is a sorting in accordance with budgetary structure, therefore into liability (based on budget chapter), specific, sectorial and consolidating classification[12]. Furthermore we can sort the expenditures to scheduled and unplanned, common and capital, etc.[13]

Determination of expenditures objectives is much more difficult than specification of types of revenues. Nevertheless we can distinguish from several basic groups of income:

- social and economical development of state funding self-governing territorial units´ development funding,
- covering losses and additional funding of business in public sector,
- households´ support,
- covering expenditures on public goods,
- maintenance of state administration (self-governing territorial units´ administration),

[9] In Peková, J., Pilný, J., Jetmar, M. Veřejná správa a finance veřejného sektoru. 3., aktualizované a rozšířené vydání. Praha: ASPI, 2008, p. 223-224.
[10] Ibidem, p. 234.
[11] In Ruśkowski, E. System prawa finansowego II: Prawo finansowe sektora finansów publicznych. Warszawa: Oficyna a Wolters Kluwer business, 2010, p. 119.
[12] Compare with Mrkývka, P., Pařízková, I. Základy finančního práva. 1. vyd. Brno: Masarykova univerzita, 2008, p. 220-223, and Peková, J., Pilný, J., Jetmar, M. Veřejná správa a finance veřejného sektoru. 3., aktualizované a rozšířené vydání. Praha: ASPI, 2008, p. 234-239.
[13] In Peková, J., Pilný, J., Jetmar, M. Veřejná správa a finance veřejného sektoru. 3., aktualizované a rozšířené vydání. Praha: ASPI, 2008, p. 234-239.

- resourcing internal and external state security,
- securing the public debt[14].

Allocation of financial resources through public financial funds not only that it is not accomplished on market rules bases but on the other hand, it limits more private investment expenditures. That is why self-governing territorial units funding is thought to be inadequate interference into the market[15].

4. Budget incomes and expenditures of self-governing territorial units

4.1. Budget incomes and expenditures of self-governing territorial units in the Czech Republic

Let us have a look closer at particular incomes of self-governing territorial units´ budgets within the Czech Republic Incomes of regions includes mainly freehold allowances and property rights, incomes from results of proper activity, economical activity of organization allowances, which were established by the region, administrative activities income including public representation incomes (duties and fines), tax revenues or their shares, state budget and state funds grants, accepted pecuniary gifts and benefits, 50% share on regulation charges for issued licenses to run slot machines, resources provided through the National fund, etc.[16] Region can use also refundable resources for reimbursement of their needs (warrant loans, bank credit, refundable financial aid, or pay offs from purchase of obligations of self-governing territorial unit)[17].

We also include incomes from property and property rights, incomes from results of self activity, incomes from economic activity of the organization, which was established by municipality, administrative activities´ income including public representation incomes (duties, fines, tax payments), tax revenues or their shares, state budget and state funds grants, accepted pecuniary gifts and benefits, 50% share on regulation charges for issued licenses to run slot machines, resources provided through the National fund, etc.[18] Municipalities, same as regions can use also refundable resources for reimbursement of their needs (warrant loans, bank credit, refundable financial aid, or pay offs from purchase of obligations of self-governing territorial unit)[19]. Municipality budget income is further revenue from local municipality

[14] See Denek, E. et al. Finanse publiczne. Warszawa: Wydawnictwo naukowe PWN, 1995, p. 35.
[15] Ibidem, p. 36.
[16] Art. 7 and 8 Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended.
[17] See art. 7 sub. 4 (or art. 8 sub. 4) in conjunction with art. 4 sub. 5 letter b) Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended.
[18] Art. 7 and 8 Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended.
[19] See art. 7 sub. 4 (or art. 8 sub. 4) in conjunction with art. 4 sub. 5 letter b) Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended.

according to Act No. 565/1990 Sb., o rozpočtových pravidlech územních rozpočtů (about local duties and grants from region budget[20].

Tax revenues generate the most important part of public budget. Almost 90% of all public budget incomes are revenues of tax nature[21]. By taxation it is meant in this case the takeover of part of the income (or property), that has arose in consequence of particular subject activities on the market[22]. Two different approach of tax are distinguished, namely: tax sensu largo and tax sensu stricto. By the tax sensu largo, it is understood pecuniary performance, which is called tax, custom or duty by law it is called pecuniary performance, if the law states that it is necessary to precede its administration at law of tax Code and pecuniary performance within split administration. Such approach of tax includes also tax deduction, tax loss or other way of taxation as well as tax extras[23]. On the other hand, tax sensu stricto is comprehended by financial theory as obligatory amount set by rate as provided by law in advance, by which the part of economical subject´s nominal pension is more or less regularly derived on nonrefundable bases on the behalf of public monetary fund[24].

Tax system is composed by complex of taxes valid in particular state. Taxes are sorted within the tax system according to different viewpoints, for example: according to object (taxes of assessment of capital and corporation type), according to subject (personal income tax, corporation taxes, taxes of consortium participants, household taxes), and according to way of tax paying (precipitation and declared taxes). The most common division is according to taxpayer´s binding to income and into direct and indirect taxes.

Personal income tax, legal person income tax, value added tax, real estate tax, road-traffic tax, succession duty, gift tax, real estate-transfer tax, petrol tax, tax on beer and wine, natural gas and some other gases tax, tax on tobacco products, tax on solid fuels and tax on power are all taxes occurred on the Czech Republic territory.

Financial system of fees includes regulation charges, court fees, special taxes with character of charge that are out of regulation charges register, ecological fees associated with environmental protection and local charges[25].

Region can use its budget to finance following kinds of expenditures. First of all, there are obligations that result from performance of duties set by special legal regulations, expenditures on activity of region´s authorities in its autonomous competence, expenditures associated with performance of public administration, to which the region is in charge of by special legal regulations, obligations that result from

[20] Art. 7 sub. 1 letter e) Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended.
[21] In Hamerníková, B., Maaytová, A. et al. Veřejné finance. 2. vyd. Praha: Wolters Kluwer ČR, 2010, p. 108.
[22] In Denek, E. et al. Finanse publiczne. Warszawa: Wydawnictwo naukowe PWN, 1995, p. 33.
[23] Art. 2 sub. 3 and 4 Act No. 280/2009 Sb., daňový řád, as amended.
[24] In Mrkývka, P. a kol. Finanční právo a finanční správa. 2. díl. Brno: Masarykova univerzita, 2004, p. 5.
[25] See Radvan, M. a kol. Finanční právo a finanční správa – berní právo. Brno: Masarykova univerzita, 2008, p. 41-42.

concluded contracts within its management and from treaty relations of its own organizations. Furthermore, the region can spent financial resources on grants that flow into budgets of municipalities in relevant region, on obligations accepted in terms of cooperation with other territorial units or with other subjects, on interest reimbursement from accepted loans and credits, on costs of issues of bonds and on covering the pay-offs that belong to their owners, on expenditures on support of subjects doing community service and on subsidy of private business beneficial to region. Region can also cover other costs carried within region´s performance inclusive of gifts and allowances with social or humanitarian purpose, grants to Regional Council of cohesion region at the same time tranches, installments on credit and payments of refundable financial aid as well as payment of bond stocks by their owners[26].

There are several types of reimbursements in municipality's budget expenditures. Most of them have similar character as the ones of region, but some differences may occur. These could be obligations that result from performance of duties set by legal regulations, expenditures on activity of municipality´s authorities in its autonomous competence (associated with property care and its development, expenditures associated with performance of public administration, to which the municipality is in charge of by legal regulation, obligations that result from concluded contrasts within its management and from treaty relation of its own organizations as well as obligations accepted within cooperation with other municipalities or with other subjects together with subsidies to common activities. Then it can be for example on interest reimbursement from accepted loans and credits, on costs of issues of bonds and on covering the pay-offs that belong to their owners, on expenditures on support of subjects doing community service and on subsidies of private business beneficial to municipality and last but not least, other costs carried within municipality´s performance (inclusive of gifts and allowances with social or humanitarian purpose)[27]. Besides these, the municipality naturally covers payments of accepted loans, credits and refundable aids, and payments of stocks of bonds to their owners[28].

Over and above, the law that determines which incomes flow into which budget is also pivotal. This is Budgetary tax rating Act (Zákon o rozpočtovém určení daní[29]). This act designates which tax yield (shares on taxes yields) flows into region budget, municipality budget or into National fund of road-traffic infrastructure. All other tax yields and their claim attributions direct to state budget, if the special law does not set it differently.[30] The objective of this act is to ensure fiscal sufficiency of particular levels

[26] Art. 10 sub. 1 and 2 Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended.
[27] Art. 9 sub. 1 Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended.
[28] See art. 9 sub. 2 Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended.
[29] Act No. 243/2000 Sb., o rozpočtovém určení výnosu některých daní územním samosprávným celkům a některým státním fondům (zákon o rozpočtovém určení daní), as amended.
[30] Art. 6 Act No. 218/2000 Sb., o rozpočtových pravidlech, as amended.

of self-governing territorial unit´s budgets and to ensure covering regions' and municipalities´ basic needs.

There is a distinction on deposit taxes and shared taxes according as the whole tax yield (the tax sensu stricto) flows into one public budget or it splits relatively on particular budgets. The entire yield of deposit tax comes to municipality or region´s budget. Real estate tax, individual income tax, legal person income tax, (whose tax payer is municipality) they all belongs to taxes whose yield flow to municipality's budget. On the other hand, value added tax, individual income tax, legal person income tax (except taxes whose tax payer is municipality or region) are shared taxes, such taxes whose yield is divided into particular public budgets[31].

The yields from other taxes of sensu largo type flow into following public budgets:

- Yield of road-traffic tax and share on national gross-yield of consumer tax on petrol flow into State fund of traffic infrastructure.
- Customs revenue flow into state budget and European Union budget.
- Yield of time charge and road fee flow into State fund of traffic infrastructure
- Yield of insurance rate of social security flow to state budget.
- Local charge yield flow into municipality's budget
- Regulation charge yield flow into state budget, municipality´s and region´s budget,
- Yield of environmental charges flow into state budget, municipality´s budget and National environmental fund[32].

Yield of gift tax, real estate-transfer tax yield as well as yields of other consumer taxes flow whole into state budget.

4.2. Budget incomes and expenditures of self-governing territorial units

In Poland mixed system of self-governing territorial units´ incomes is used and it is partly based on own resources, that are controlled separately by municipalities, districts and regions[33], and partly based on grants and subsidies from state budget. Accepted system is a compromise between required situation of the widest financial decentralization and current real potential of the state. Same as in the Czech Republic, there is principle of adequacy maintained in Poland, which means the principle on which bases some sort of balance should exist between public assets which are

[31] Compare with Radvan, M. a kol. Finanční právo a finanční správa – berní právo. Brno: Masarykova univerzita, 2008, p. 211.
[32] In Radvan, M. a kol. Finanční právo a finanční správa – berní právo. Brno: Masarykova univerzita, 2008, p. 216
[33] In Poland, there is three-level administrative division - gmina (pl) = obec (cz); powiat (pl) = okres (cz); województwo (pl) = kraj (cz).

managed by self-governing territorial unit. There is also set of tasks which should be fulfilled by such self-governing unit[34].

There are three categories of incomes, which flow into self-governing territorial units in Poland:

1. Particular incomes
2. General subsidies
3. Purpose-built grants

The most developed system of particular incomes in Poland belongs to municipalities. Particular incomes of municipalities include tax yields from real estate taxes, agricultural taxes, forest tax, vehicle tax, natural person income tax, inheritance tax, gift tax, Further the resources gained from charges (market, local, spa, dog´s licenses etc.), incomes from benevolent societies and institutions receiving contributions from the state budget, incomes from management of municipality´s property, succession and gifts on behalf of municipality, incomes from designated financial sanctions and fines, interests from loans provided by municipality, grants from budgets of other self-governing territorial units are also included in municipality incomes[35].

Incomes of districts in Poland are composed of yields from charges according to special legal regulations, incomes from benevolent societies, institutions receiving contributions from the state budget, incomes from management of district´s property, succession and gifts on behalf of district, incomes from designated financial sanctions and fines, interests from loans provided by district, grants from the budgets of other self-governing territorial units, part of the yield of natural person income tax (10,25 %) as well as of legal person tax (1,40 %) that have domicile or place of residence on the district´s territory[36]. Finally, the budgets of regions in Poland are filled by incomes from benevolent societies, institutions receiving contributions from the state budget, incomes from management of region´s property, succession and gifts on behalf of region, incomes from designated financial sanctions and fines, interests from loans provided by region, grants from the budgets of other self-governing territorial units, part of the yield of natural person income tax (1,60 %) as well as of legal person tax (14,75 %) that have domicile or place of residence on the region´s territory[37].

Financial resources gained into the self-governing territorial units´ budgets in Poland through general subsidies and certain-purpose grants are not counted into particular incomes of the self-governing territorial units´ budgets. This is because such means are transferred form state budget. Subsidies as such are nonpaid and

[34] Compare with Ruśkowski, E. System prawa finansowego II: Prawo finansowe sektora finansów publicznych. Warszawa: Oficyna a Wolters Kluwer business, 2010, p. 231-240, and Ofiarski, Z. Prawo finansowe. Warszawa: Wydawnictwo C.H.Beck, 2007, p. 169.
[35] Art. 4 sub. 1 Ustawy o dochodach jednostek samorządu terytorialnego, 13. 11. 2003, as amended.
[36] Art. 5 sub. 1 Ustawa o dochodach jednostek samorządu terytorialnego, 13. 11. 2003, as amended.
[37] Art. 5 sub. 1 Ustawa o dochodach jednostek samorządu terytorialnego, 13. 11. 2003, as amended.

nonreversible financial aid provided most often by state to concrete subjects (self-governing territorial units or political parties) and to movements for financing their activity. General subsidy could be divided into several parts: dilatation, compensatory, stabilization, enlightenment.

Purpose subsidy is provided from state budget to fulfill particular purpose or particular task[38]. Groups of these tasks are noticed in the law.

Besides above mentioned subsidies, the self-governing territorial units in Poland are also allowed to draw the financial means from foreign resources, from European union´s budget or from other resources designated by law[39].

Public expenditures are the costs that are accomplished within public finances of self –administrations sector. There does not exist exhaustive enumeration of tasks for witch those public financial means could be used for in the Polish legal regulation. But it is possible to distinguish several groups of activities that are financed from regional units´ budgets:

- Tasks in the area of separate power (for ex. environmental protection, high-way, pavements and bridges administration, estate management, education, etc.). Such objectives could be divided into obligatory and activities that can but do not have to be do be financed by self-governing territorial units.
- Activities within delegated powers of community.

5. Conclusion

In conclusion, in the virtue of the above-mentioned it is possible to notice several differences among incomes and expenditures of the particular self-governing territorial units in the Czech Republic and in Poland. The leading and the most important difference is the list of the self-governing territorial units´ incomes in particular legal forms. The Polish legal form consist very detailed description of particular kind of the self-governing territorial units´ incomes, especially the relationship between the budgets of the particular self-governing territorial units´ budget and state budget is described there very detailed. The next variation is in resources of budget incomes in municipalities. List of taxes and fees whose yields flow straight into municipality´s budget is wider in Poland than in the Czech Republic. Emphasis on this as full autonomy as possible and relative independence of the lowest level of the self-governing territorial unit could be seen in this fact. There are not only differences between both legal forms but similarities could be found too. If the spectrum of incomes and expenditures of the self-governing territorial units is compared, it is evident that they are very similar. The main difference to be noticed is that in Poland there is a three-level self-government which means that it is necessary to

[38] In Ofiarski, Z. Prawo finansowe. Warszawa: Wydawnictwo C.H.Beck, 2007, p. 177-179.
[39] Art. 3 sub. 3 Ustawa o dochodach jednostek samorządu terytorialnego, 13. 11. 2003, as amended.

split expenditures as well as incomes and yields from taxes and fees within three subjects, not only between two, as it is the Czech Republic.

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11. Act No. 250/2000 Sb., o rozpočtových pravidlech územních rozpočtů, as amended;
12. Ustawa o dochodach jednostek samorządu terytorialnego, 13. 11. 2003, as amended;
13. Act No. 280/2009 Sb., daňový řád, as amended;

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Responsibility for the Public Finances in the Autonom Territorial Self-government Units

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Abstract: This article deals with the one part of the autonomy and fiscal decentralisation the responsibility for the public finances. The paper try to make a system in the controls, subsequent responsibility and eventually sanctions. Firstly it defines the public finances and their role in the municipal autonomy. After the analyzation the article try to suggest some ideas how the legislation can be changed to make the system more efective. The paper try to determined the main problems connected with the responsibility.

Keywords: economy, financial control, local government, management, municipality, responsibility, sanctions.

1. Introduction

Decentralisation of local government has become quite a hot problem in the last years in all transition countries. The changes in the state economy have requested also the changes in the organization of the local interests. One of the main principles of the democracy and rule of law is the autonomy of the local government. In my opinion you cannot create the local autonomy without the autonomy of the local finances even though that the political decision in Czech republic does not look like. Nowadays the discussion about distribution of the revenues from the shared taxes from the central budget to the budgets of the the municipalities has become more and more popular. Unfortunatly they do not try to find the space for increasing the local autonomy revenues. Both the central and local politicians just talk about the fairness of the rule for redistribution. The majors of the smaller municipalities want more the majors of the biggest cities do not want to get less. Their the discussion with the relevant ministries illustrated dependance of the local government on the central administration. In my opinion this is an insufficient result after 22 years of democracy.

The problem which I would like to analyze is the responsibility for the public finances in the municipalities. In my opinion this issue has the highest priority in the way to the decentralization because it is insufficient to give the instrument to the municipalities in the form of their own revenues and do not implement effective system of responsibility. In this article I would like to focus on the current situation in the lowest part of the autonomy in the municipalities: villages, towns and cities.

2. Public finances in the municipalities

First it is necessary to clarify the definition of the public finances which municipalities can dispose with. "Public finance is a term for specific financial relations and operations in economic system between institutions of public administration on one side and other subjects on the other side (it means citizens, households, companies etc.)"[1]

„The public finance were defined as relations among public budget elements and among public administration institutions and other economic subjects."[2]

The theory includes among import aspects of autonomy of territorial self-governing units the right to own property, managing the property, the right to gain finance independently from state budget and also the right to plan independently own budget[3].

The public finances in the municipalities are all transactions and legal relations which goes throught the whole municipal budget. There are the revenues and expenses regardless whether the source or purpose is public or private.

In the case of the biggest cities it makes quite a huge amount of money concentrated in the hands of a few councilors. For example the budget of Prague is 52 billion crowns for 2011[4]. With little exaggeration we can say that it is like a budget of o small state. Because of this in my opinion the responsibility should be established properly.

3. The system of responsibility

The obligations regarding to management and economy of local governments are appointed in more regulations and also the responsibility relation and sanctions are spread into more acts. In this article I would like to make the system of responsibility for the public finances in the municipalities more clear.

[1] Hamerníková, B., Kubátová K. Veřejné finance učebnice. Praha : Eurolex, 2004, s. 4.
Hamerníková, B. Maaytová, A. et al. Veřejné finance. 2. vyd. Praha : Wolters Kluwer ČR, 2010.
[2] Hamerníková, B., Kubátová K. Veřejné finance učebnice. Praha : Eurolex, 2004, s. 229
[3] Peková, J. Finance územní samosprávy : teorie a praxe v ČR. 1. vydání Praha : Wolters Kluwer ČR, 2011, s. 67.
[4] Zdroj: www.ulice.tyden.cz [citováno dne 14.9.2011]

4. Constitution

The system of each branch of public law should starts with the constitutional law in accordance with the principle of legality (article 2/3 of the Constitution). The constitution in Czech republic gives in the area of responsibility only general principles which should be developed in the acts and secondary legislation. In our case we can mention these articles of

1. act no. 1/1993 Sb., constitution of the Czech republic:
   2. Article 8: Self-government of territorial self-governing units is guaranteed.
   3. Article 101: Self-governing territorial divisions are public-law corporations which may have their own property and which operate according to their own budget.
4. act no. 2/1993 Sb., Charter of Fundamental Rights and Freedoms, for exemple article 11/5: Taxes and fees may be levied only on the basis of law.

Act no. 128/2001 Sb., about the municipalities

This act is one of the most important legislative acts which determines the basic rules of the management and economy of the municipalities which is the integral part of the right to the autonomy. The management is concretized also in other acts:

especially act no. 250/2000 Sb., about the budget rules of the local budgets which is mentioned below,

act no. 563/1991 Sb., about accountancy)

act no. 137/2006 Sb., about the public contracts[5].

The general obligation is specified in the article no. 38/1 which says that the property of the municipality must be used effectively and economically and in the interest of the municipality and its legal assignments. The municipality must take care

[5] Vedral, J. Váňa, L., Břeň, J., Pšenička, S. Zákon o obcích (obecní zřízení). Komenář. Praha : C.H.Beck, 2008, s. 219. Otrusinová, M. Kubíčková, D. Finanční hospodaření municipálních účetních jednotek – po novele zákona o účetnictví. Praha : C.H. Beck, 2011.

about its preservation and development of the property. For the purpose of this article we use also article 38/2, 38/3 and 38/4 which say: The property of the municipality has to be protected against destruction, damage, steal or abuse. The municipality is obliged to protect its property from unauthorized acts and exercise the right to compensation of damage and the right for the return of unjust enrichment. The municipality is obliged to continuously monitor whether debtors pay their obligations and ensure that the consequent rights will not be lapsed.

The conclusion after the analyzation of these articles is that addressee of the obligation is the municipality. From the view of the responsibility it is absolutely useless in accordance with the principle nemo iudex sine actore. The other problem is that the addressee the subject which has the obligation is vague. Even if the external control works the only conclusion can be that the municipality must manage better itself. The question is who is the municipality? Body, member, all citizens? Who has the obligation? If it means the citizens the only way for reparation is the political responsibility for their councilors but the question is whether it is enough when the public finances amount to millions and billions crowns.

Another problem is in that the review of the management and economy of the municipality can be provided by the regional office body (article no. 42/1) but the control of the execution of their own competencies is also provided by the Home Office (article no. 129/1). It is ill-conceived and non systematic. The review in accordance to article no. 42 which defines that the annual municipality management and economy has to be inspected by district office or by auditor, the responsibility is better determined. Article no. 103/4 a) defines the obligation of the major to order the annual review of the municipal management and economy. During the year has the municipality the right to ask district office or auditor to provide an exceptional inspection of management and economy.

In the article no. 129a the review provided by the Home office is specified. The article defines the obligation during the control, the obligation to cooperate, the protocol requirements. When the control reveals some deficiencies the major has the obligation to meet the representative body with the deficiencies and suggest of their removal. In accordance to the review there is defined only sanction in the form of disciplinary fine which is imposed to the physical person who causes that the municipality does not cooperate (article no. 129c).

In my opinion this is insufficient. There is no sanction for the deficiencies in the municipal management, in most cases we cannot even identify who is responsible.

Act no. 250/2000 Sb., about the budget rules of the local budgets

From the point of view of this article this act is in the case of the municipal management and especially responsibility for the management only a marginal legislation. It defines mainly the rules according to the budget preparation. In contrast

with the act about the municipalities this act defines the sanctions for the breach of the budgetary discipline in the article no. 22/5, and then several administrative torts in article no. 22a. The sanctions defined by this act are very mild (can be found below). The municipality breaches the budgetary discipline when it uses the finance from the budget of self-government unit or the budget of union of municipalities in a way which is unjustified use. The unjustified use of finance is a use which is not in accordance with other act, contract or conditions which regulated the use of finance from the budgets mentioned above. The unjustified use comes also when the municipality is not able to prove how were the finance used. The administrative torts are defined mainly as mistakes during the preparation and planning processes of budget. Among others it is unprepared outlook of the budget, mucipality is not doing the control of economy management The adressee of sanctions is the municipality. There is the same problem as with the general obligation for the effective and economy use of the municipal property which is mentioned above. On the top of that the citizens will not be in the position of "actor" because the fine will be imposed to the municipality that means that the citizens will pay it. I agree with Pařízková[6] that there should be legislation when the concrete person will be responsible for the municipal management.

Sanction for the breach of budgetary discipline is returning the amount of finance which equals the amount of unjustifiably used finance back to the budget of provider (means self-governing unit budget or budget of the municipality union. If the unjustifiably used finance is not returned on time than a one pro mille for each day after the term can be requested.

Sanction for the administrative torts is criminalty up to one million Czech crowns

The act says that the sanction can be forgiven. Forgiving the sanction is widely used and any personal responsibility is missing, what makes the system very ineffective.

Financial control

Financial control is specified in the act no. 320/2001 Sb. For the responsibility for the public finances we distinguish

- public administration control which is provided by the control bodies
- internal control system provided by the controled body.

The aims of the financial control are defined in the article no. 4, we can sumerized them as:[7]

- effective finance management, fulfilling the purposes of municipal politics

[6] Pařízková, I. Financování území samosprávy. (seminář na PrF MU ze dne 18.11.2010)
[7] Peková, J. Finance územní samosprávy : teorie a praxe v ČR. 1. vydání Praha : Wolters Kluwer ČR, 2011, s. 267.

- finding the mistakes in finance management and proposing the ways of prevention of mistakes
- making the accounting correct, trustworthy and complete. Finding the mistakes in accounting.

In the area of the public administration control the local governments should create a system for the financial control of their own management, also for the management of their organization bodies and contributory organizations (article no. 8). The representative bodies are obliged to control the municipal management in accordance to the public finances from the state budget (article no. 10).

The internal control system is divided in two parts:

a) management control

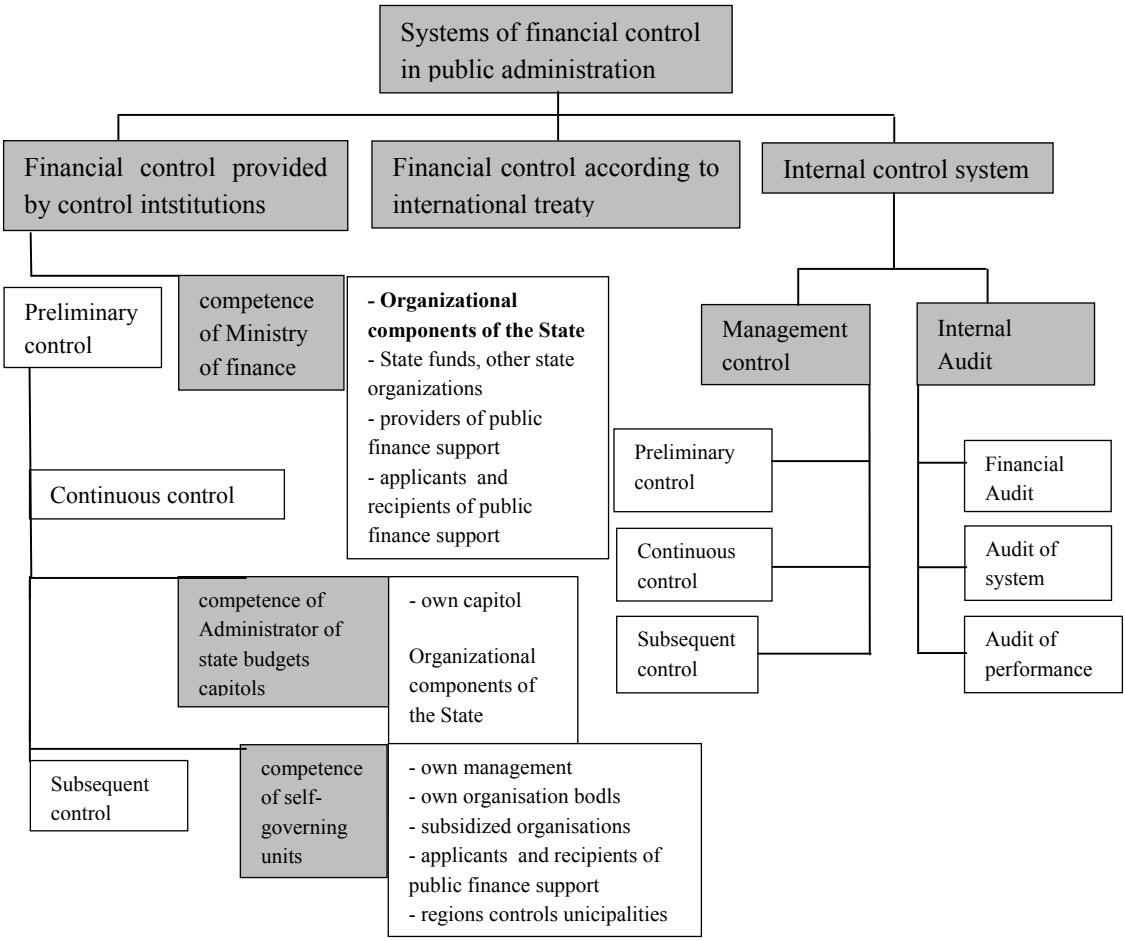
b) internal audit.

The management control is provided by the leaders within the internal management of the transaction in the state of preparation, before approval, during the execution up to the bill and consecutive control. Management control is a system of internal financial control defined in the main act No 320/2001. It is a set of formalized processes which are used by employees of the public administration institutions (including the municipality offices). The main goals are the property protection, guaranteeing the truth and correctness of financial operations of the office, coherence of the financial operations with the budget regulations and financial operation in accounting processes and finally meeting the goals of organization and the quality of the provided processes. The management control should be integrated into all of the financial, budget and accounting processes in public administration. The management control does not have strict regulations and it is in the competency of public administration offices to publish their own internal regulations. In this internal regulation should be defined competency and responsibility of employees, the system of reciprocal tasks of employees, should be defined[8]. The internal audit is a independent review of the effectiveness of the management control (article no. 3).

For better orientation the system of financial control is illustrated by the picture below:

[8] Zdroj: (http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/verspr_kontrola_16254.html#K1) [citováno dne 14.9.2011]

Scheme: Financial control systems in Public Administration[9]



In my opinion the greatest problem with the financial control is that there is no effective instrument which can ensure that the requirements of the control are not fulfilled only formally. There are requirements that each transaction should go through approvals of tree responsible persons. In reality they often just attach their signature and they do not control anything. The other extreme situation also happens – they are afraid to approve anything. This slow down the management and the economy. The act is very genel, the responsible relations are not properly defined and there are ineffective sanctions. The adressees of the sanctions are the municipalities – there is no responsibility of the concreate persons who attached they signature as a sign that they have controlled the transaction and it is in accoradance to the legislation and economical and effective use of the public finances.

[9] Zdroj: REKTOŘÍK, J., ŠELEŠOVSKÝ, J. a kol.: Kontrolní systémy veřejné správy a veřejného sektoru. Praha, 2003, str. 67

Tax law

This part of article is aimed on the local tax and charges, because the finances from the state budget where we can also include the shared taxes are review by the representative body (see above). It is necessary to add that the collection of the taxes and charges is a right not an obligation. Even if we have a municipality with a huge debt and they do not utilize the taxes and charges for rising their revenues we can maybe ask whether this is a economical and effective municipal management. But this should stay on the political responsibility of the councillors and in this case I think it is all right. Everything can not be enforced by the state authority, we can not forget that we are in the area of the local autonomy, that means self-government – own way how to solve the problems even thought that in transition countries this do not effect so much as in the countries of the western Europe or United States. But the legal responsibility can not substitute the political responsibility in each case unless the system will be stodgy and the management impossible and ineffective more than when there is no control. But the political responsibility is the main reason why the revenues from the charges and local taxes are in the transition countries minimal.

There are tree acts which specify the management of the taxes:

- Act no. 338/1992 Sb., about the real property tax,
- Act no. 565/1990 Sb., about the local charges.

Both do not set up any responsibility relations or sanction of which the municipality can be adressee[10]. The act no. 280/2009 Sb., tax procedure code has an establishment in article 261 which looks like responsibility. The adressee is the tax administrator in our case it means the municipality whithin collecting the local charges because the real property tax is collected and enforced by the tax bodies. In article 261 there is an instrument called complaint which can be used for the procedure of the tax administrator for which there is no another legal means of protection. But I can not imagine the practical use of this instrument in the area of local charges.

Classification of review of management and economy

Pařízková classified the control of management and economy to two parts

- internal control,
- external control.

The internal control is provided by the local governments themselves by their own organisation bodies, them the annual control of the management (act no. 420/2004 Sb.,) and the internal control by the act no. 320/2001 Sb., mentioned above. The

[10] Radvan, M. a kol. Finanční právo a finanční správa. Berní právo. Brno : Masarykova univerzita, 2008, s. 283 – 323, 463 – 472.

external control is provided for exemple by the tax administration bodies, Ministry of finance, etc.[11]

In the professional literature there are no other clasiffications. In my opinion the clasiffication which will be useful also for the practice of the municipalities will be in accordance to the body who provides the control. The clasiffication to internal and external is in my opinion for the practice insufficient the more that there are couple of acts which regulates practically the same management and economy of the municipalities. Maybe it will be better to make something like a code of controls and reviews to get all control mechanisms on one place in provided in the same conditions.

Penal Code

The municipality is a legal person that means that currently it is not possible to make it responsible from the point of view of the criminal law. I think this is should stay even when Czech republic enter the modern european states which use criminal responsibility of the legal persons. In this case we can use austrian legislation in which the municipalities are removed from the criminal responsibility[12]. The decisions are made by concrete physical persons not by the municipality or by the unknown number of citizens.

In our criminal code these are the articles relevant to the municipal management:

- embezzlement (article no. 206)
- scam (article no. 209)
- subvention scam (article no. 211)
- breach of trust (article no. 220)
- negligence breach of trust (article no. 221)
- negotiating benefits within the input of public contracts, public competition and public auction (article no. 256)
- plots within the input of public contracts and public competition (article no. § 257)
- abuse of power (article no. 329)
- acceptance of bribe (article no. 331)
- bribery (article no. 332)
- indirect bribery (article no. 333)

This is the issue of criminal law in this article it is used only to complement the whole system of the responsibility for the public finances. Economic criminality and corruption are independent but nowadays serious problems which can accelerate in millions crowns. Because of this it is also necessary to make the system of control more clean, more

[11] Pařízková, I. Finance územní samosprávy. Brno : Masarykova univerzita, 2008, s. 162

[12] Sedláčková, J. Trestní odpovědnost právnických osob. Dostupný z: http://casopis.vsehrd.cz/2011/05/trestni-odpovednost-pravnickych-osob/[citováno dne 15.9.2011].

practical. It is not enought to insist on formal meeting on requirements without the real control of management and economy of the municipalities. The criminal bodies need to have information from close associates. But the associates or citizens should believe in the system of criminal responsibility to announce crimes in their municipality.

Conclusion

The system of responsibility for the disposition with the public finances is quite widespread and go throught the whole system of public law, it intervenes in the administrative, financial, tax and criminal law. The base is naturally set up by the constitution law. Even though in my opinion the system is insufficient. There is a great area for the corruption and inefficiency. The responsibility is very impersonal what follows into the situation that nobody is responsible.

The citizens of the municipalities do not trust in the municipal representants and the political responsibility is lengthy because of the term circle. In my opinion to make the self-dependence of the municipalities come true and more effective it is necessary besides increase of the own revenues increase also the responsibility for the economy of the persons who handle the funds of the municipalities.

I think that in the act about the municipalities in the case of the obligation to effective management and economy the adressee which is now the municipality should be replaced by the concreate organ. Than I think there should be set up a personal responsibility for the management with the public finances in the administrative law in accordance with the principle ultima ration in the criminal law. Maybe there should be a possibility for citizens to ask for review of the municipal management. To prevent grumblers there can be a rule than when there is misconduct from the side of the organisation body the costs lay on the responsible person, where there is no misconduct the costs will lay on the requirer. Also the require can not be only person but a group of persons for exemple set up in the act in percents, because of different size of municipalities.

But can not forget than excessively strict control of the management and economy slow down the development of the municipalities (see above the exemple with the financial control). The municipalities are built on the principle of autonomy that means less of state inspection. The state inspection should be replaced by the political control of the voters. In our countries (transition countries) it means that the councillors are afraid of rising taxes but also making business projects.

In my opinion in our legal culture the control and responsibility system can be more effective if the management and economy of the municipality is transparent.

The legislator should change the difficult and in my opinion very often ineffective system of the control of the municipal management and economy. But he should take care about the borders between the political, administrative and criminal responsibility (ultima ratio). In every time the legislator should think about the main

idea: the municipal autonomy means also fiscal autonomy which can be reach only by effective system of control which is some way independent on the state body.

Legislation

- Act no. 1/1993 Sb., the Constitution of the Czech republic
- Act no. 2/1993 Sb., Charter of Fundamental Rights and Freedoms
- Act no. 128/2000 Sb., about the municipalities
- Act no. 250/200 Sb., about the budget rules of the local budgets
- Act no. 280/2009 Sb., tax procedure code
- Act no. 320/2001 Sb., about financial control
- Act no. 338/1992 Sb., about the real property tax
- Act no. 40/2009 Sb., criminal code
- Act no. 565/1990 Sb., about the local charges

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12. Zdroj: http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/verspr_kontrola_16254.html#K1 citováno dne 14.9.2011]
13. Zdroj: www.ulice.tyden.cz [citováno dne 14.9.2011]

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Voluntary Fulfillment of the Tax Obligation in Russia: Principles and Terms

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Abstract: this article is devoted to the order of fulfillment of the tax obligation in Russia.The author outlines and analyzes principles of its fulfillment. The special attention is given to the term of fulfillment of the tax obligation and mechanisms of changes of the given term in Russia.

Keywords: the tax, the obligation, a principle, term, a delay, the installments, the tax credit.

1. Principles of voluntary fulfillment of the tax obligation in Russia

The following principles lay in the basis of voluntary fulfillment of the tax obligation:

1.1. The principle independence;
1.2. The principle of appropriate currency;
1.3. The principle of payment in full;
1.4. The principle of addressing;
1.5. The principle of timeliness.

1.1. In accordance with Clause 1 of Article 45 of the Tax Code of the Russian Federation the taxpayer (the levy payer , the withholding agent) is obliged to execute tax liability (tax levy) if the other is not established by the tax and levy legislation. In the definition 41-O from 22.01.2004[1] the Constitutional Court of the Russian Federation pointed out, that the tax (levy) is considered paid independently if it is paid on behalf of the taxpayer (the levy payer) and due to its own monetary resources. The withholding agent is obliged to pay the tax only due to the monetary resources withheld at the tax payer. Tax payment due to monetary resources of the withholding agent is forbidden by the law. Timeliness of execution of the tax obligation means, that the tax (levy) should be paid in time, established by the legislation on the tax and levy legislation.

At carrying out by the state of tax amnesty the requirement of timeliness of execution of the tax obligation is overcome by means of a legal design - fiction. For example, In accordance with the Federal Law 269-FZ from 22.12.2006 « About the

[1] "Economy and a life ". 2004. №20.

simplified procedure of declaring of incomes by physical persons «persons»[2] in case of payment declared payment, taxes for the last tax periods are considered paid in due time.

It is necessary to note, that term of payment of the tax (levy), stipulated by the current legislation, can be changed by granting a delay, the installments or the investment tax credit. In this case the requirement of timeliness of payment will be observed, despite of infringement of the term of payment of the tax (levy) established by the law. Term of payment of the tax can not be changed on earlier term whereas the taxpayer has the right to execute the duty ahead of schedule.

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Irrespective of the applied form term of payment of the tax cannot be changed, in the following cases:

1) criminal suit to attributes of the crime connected with infringement of the legislation on taxes and tax collections (item198, 199, 199.1, 199.2 UK of the Russian Federation) is initiated;
2) manufacture on suit about a tax offence or on suit about an administrative offence in the field of taxes and tax collections, customs suit regarding the taxes which are a subject payment in connection with moving of the goods through customs border of the Russian Federation is spent;
3) there are sufficient bases to believe, that this person will take advantage of such change for concealment of the money resources or other property which is a subject the taxation, or this person is going to leave for limits of the Russian Federation on a constant residence;
4) within three years previous day of submission by the interested person of the application for change of term of payment of the tax and (or) gathering, the decision on cancellation before the given delay, the installments or the investment tax credit in connection with infringement of conditions of their granting has been passed.

At presence of the above-stated circumstances the decision on change of term of payment of the tax cannot be born, and the passed decision is a subject to a cancelling. As the third basis has estimated character to the taxpayer (the payer of levy) the right to judicial protection by the appeal of the made decision in the judicial or administrative order is guaranteed.

[2] Assembly of the legislation of the Russian Federation. 2007. № 1. Item 32.

Bodies which competence includes decision-making on change of terms of payment of taxes and tax levies are the following:

- under federal taxes and tax levies - Federal tax service of Russia and the Government of the Russian Federation (in case of granting a delay or the installments for the term from one to three years). By the Current legislation it is stipulated three exceptions of the given rule:

- under the tax to incomes of physical persons - Managements of Federal tax service of Russia in subjects of the Russian Federation. Decisions on change of terms of payment of taxes are accepted in coordination with corresponding financial bodies of subjects of the Russian Federation, municipal formations.

- under the profit tax of the organizations, regarding the tax rate enlisted in the regional budget - the bodies authorized on it by the legislation of subjects of the Russian Federation.

- on a State Tax - the bodies (officials) authorized according to chapter 25.3 NK of the Russian Federation to make legally significant actions for which the State Tax is a subject to payment.

- under regional and local taxes - Managements of Federal tax service of Russia in subjects of the Russian Federation. Decisions on change of terms of payment of taxes are accepted in coordination with corresponding financial bodies of subjects of the Russian Federation, municipal formations. The body authorized on granting of the investment tax credit under regional taxes, is defined by the legislation of the subject of the Russian Federation.

- under the taxes which are a subject payment in connection with moving of the goods through customs border of the Russian Federation, - Federal customs service of Russia or the customs bodies authorized to it.

If according to the budgetary legislation of the Russian Federation federal taxes or levies partially are a subject to transfer in budgets of subjects of the Russian Federation and local budgets, terms of payment of such taxes or levies (except for a State Tax) change regarding the sums which are a subject transfer in regional and local budgets, in coordination with financial bodies of corresponding subjects of the Russian Federation, municipal formations. The similar rule is applied and at transfer of a part of regional taxes in local budgets. In a case of absence of such coordination tax body not in the right to make a decision on change of term of payment of the tax (levy).

2. A delay (installments) of payment of the tax and levy

The delay represents change of term of payment of the tax (levy) on later term with lump sum payment of the tax (levy). The installments is a change of term of payment of the tax (levy) on later with stage-by-stage payment by parts. As the given forms of change of term of payment of the tax differ among themselves only with way

of payment of the tax (levy), the bases and the order of granting of a delay and the installments are completely identical.

By the general rule the delay (installments) is given for the term of no more than one year. Under the decision of the Government of the Russian Federation the delay (installments) under federal taxes (levy) regarding, enlisted in the federal budget, can be given for the term of from one year till three years. In 2009 during a sharp phase of world financial crisis the Minister of Finance of the Russian Federation has been allocated by the right under certain conditions to defer (installments) on payment of federal taxes (penalties) for the period till five years. Now given norm NK the Russian Federation has lost the force in connection with expiry of the term of action, but the unwillingness of the legislator to exclude it from NK of the Russian Federation testifies to its possible application in the future at recurrence of the crisis phenomena.

The delay or the installments on payment of the tax can be given to the interested person which financial position does not allow to pay this tax within the established timeframe, however there are sufficient bases to believe, that the opportunity of payment by the specified person of such tax will arise during term on which the delay or the installments is given, at presence even one of the following bases:

1) causing damages to this person as a result of act of nature, technological accident or other force majeure circumstances;
2) an unaccordance (untimely granting) of budgetary appropriations and (or) limits of budgetary obligations to the interested person and (or) untimely finishing limiting volumes of financing of charges up to the interested person - the addressee of budgetary funds in volume, sufficient for duly execution by this person of a duty on payment of the tax, and also untimely transfer to the interested person from the budget in volume, sufficient for duly execution by this person of a duty on payment of the tax, money resources, including on account of payment of the services rendered by these person (the executed works, the put goods) for the state, municipal needs;
3) threats of occurrence of attributes of an inconsistency (bankruptcy) of the interested person in case of lump sum payment of the tax by it;
4) if the property status of the physical person (without taking into account property on which collecting cannot be turned) excludes an opportunity of lump sum payment of the tax;
5) if manufacture and (or) realization of the goods, works or services by the person carries a seasonal nature. The list of branches and the kinds of activity having a seasonal nature, it is approved by the Governmental Order of the Russian Federation № 382 from 06.04.1999[3];

[3] Assembly of the legislation of the Russian Federation. 1999. №15. Item1827.

6) if there are the bases for granting a delay or the installments on payment of the taxes which are a subject payment in connection with moving of the goods through customs border of the Customs Union, established by the customs legislation of the Customs union and the legislation of the Russian Federation on customs business. In accordance with the item 134 of the Federal law from 27.11.2010 № 311-FZ «About customs regulation in the Russian Federation»[4] establishes the following additional bases:
   - the goods imported on territory of Russia, are the goods, exposed to fast damage;
   - realization by the person of deliveries under the international contract;
   - the goods imported on customs territory of the Russian Federation, are the goods included in approved Government of the Russian Federation the list of separate types of imported foreign air courts and accessories to them concerning which the delay or the installments of payment of the customs duties, taxes can be given.

By laws of subjects of the Russian Federation and statutory acts of representative bodies of local self-management the additional bases for granting a delay (installments) on payment accordingly regional and local taxes can be established.

In case of granting a delay (installments) on the first or second basis, percent for the sum of the delayed (spread) taxes (gathering) are not charged. In other cases percent at a rate of an ode of the second rate of refinancing of the Central Bank of the Russian Federation applied during action of a delay (installments) are charged.

By the general rule the size of a delay (installments) is limited by cost of pure actives of the organization or property of the physical person (except for property on which collecting cannot be turned). The given restriction does not extend only on granting of a delay (installments) in connection with under financing from the budget.

The application for granting a delay or the installments on payment of the tax with the instruction of the bases and the appendix of their documents confirming moves in the corresponding authorized body. The copy of the specified application goes the interested person to five-day term in tax body in a place of its account. Following documents are applied on the application for granting a delay or the installments on payment of the tax:

1) information of tax body in a place of the account of this person about a condition of its calculations under taxes, levies, penalties;
2) information of tax body in a place of the account of this person, containing the list of all accounts opened to the specified person in banks;
3) information of banks on monthly turns of money resources for every month from previous submission of the specified application of six months under accounts of this person in banks, and also about presence of its settlement documents placed

[4] Assembly of the legislation of the Russian Federation. 2010. № 48. Item 6252.

in the corresponding card file of not paid settlement documents, or on their absence in this card file;

4) information of banks on the rests of money resources on all accounts of this person in banks;

5) the list of counterparts - debtors of this person with the instruction of the prices of the contracts concluded with corresponding counterparts – debtors (the sizes of other obligations and the bases of their occurrence), and terms of their execution, and also a copy of the given contracts (the documents confirming presence of other bases of occurrence of the obligation);

6) the obligation of this person providing for the period of change of term of payment of the tax observance of conditions on which the decision on granting a delay or the installments makes, and also the schedule of repayment of debts prospective by it;

7) documents confirming presence of the bases of change of term of payment:

- The conclusion about the fact of approach concerning the interested person of force majeure circumstances, and also the certificate of an estimation of the damage caused to thus person as a result of the specified circumstances, made by enforcement authority (the state body, institutions of local government) or the organization, representatives in the field of a civil defense, protection of the population and territories against extreme situations.
- The document of financial body and (or) the main manager (manager) of the budgetary funds, containing data on the sum of budgetary appropriations and (or) limits of budgetary obligations which are not given (are out of time given) to the specified person, and (or) about the sum of limiting volumes of financing of charges which are not finished (are out of time finished) to this person in volume, sufficient for duly execution of a duty by it on payment of the tax.
- The document of the addressee of budgetary funds (the state, municipal customer), containing data on the sum of money resources which is not listed it (is out of time listed) to the interested person from the budget in volume, sufficient for duly execution of a duty by it on payment of the tax, on account of payment of the services rendered by such person (the executed works, the put goods) for the state, municipal needs.
- The analysis of a financial condition of the managing subject lead by federal enforcement authority, authorized under the control and supervision over taxes and tax collections, according to a technique approved by federal enforcement authority, authorized to carry out function on development of a state policy and legal regulation in sphere of an inconsistency (bankruptcy) and financial improvement.

- Data about movable and real estate of the physical person (except for property on which according to the legislation of the Russian Federation collecting cannot be turned).
- The document made by the interested person confirming, that in the aggregate profit from realization of the goods (works, services) such person the share of its income of branches and the kinds of activity having a seasonal nature, makes not less than 50 percent.

In the application for granting a delay or the installments on payment of the tax the interested person assumes liability to pay the percent added for the sum of debts. On demand of the authorized body the interested person represents the authorized body documents on property which can be a subject of the mortgage, or the guarantee.

The decision on granting a delay or the installments on payment of the tax or about refusal in its granting is accepted by the authorized body in coordination with financial bodies in conformity with clause 63 NK the Russian Federation within 30 working days from the date of reception of the application of the interested person.

Under the petition of the interested person the authorized body has the right to make a decision about time (for the period of consideration of the application for granting a delay or the installments) stay of payment of the sum of debts by the interested person. The copy of such decision is represented the interested person in tax body in a place of its account in five-day term from the date of decision-making.

The decision on granting a delay or the installments on payment of the tax should contain the instruction for the sum of debts, the tax on which payment the delay or the installments, terms and the order of payment of the sum of debts and charged percent is given, and also in corresponding cases documents on property which is a subject of the mortgage, or the guarantee.

The decision on granting a delay or the installments on payment of the tax comes into effect from the date of, established in this decision. Thus due пени for all time from the date of, the tax established for payment, about day of coming into force of this decision join in the sum of debts if the specified term of payment precedes day of the introduction of this decision by virtue of.

If the delay or the installments on payment of the tax is given on the security of property, the decision on its granting comes into effect only after the conclusion of the contract about the mortgage.

The decision on refusal in granting a delay or the installments on payment of the tax should be motivated. The decision on refusal in granting a delay or the installments on payment of the tax can be appealed against by the interested person in the judicial or administrative order.

The copy of the decision on granting a delay or the installments on payment of the tax or about refusal in its granting goes the authorized body to three-day term from

the date of acceptance of such decision to the interested person and in tax body in a place of the account of this person.

Action of a delay (installments) stops at approach of any of the following of the bases:

- expiry of the term;
- prescheduled payment of the tax (levy, the penalty) and corresponding percent;
- at infringement by the interested person of conditions of granting of a delay (installments). For example, cancellation of the agreement of lawsuit and renewal of manufacture on business about bankruptcy;
- revealing the circumstances interfering change of term of payment of the tax (gathering, пени, the penalty).

Action of a delay (installments) ahead of schedule stops under the decision of the authorized body which has made a decision respective alteration of term of discharge of duty on payment of the tax and levy. In this case the interested person should within one month after reception of the corresponding decision by it to pay not paid sum of debts, and also penalties for each calendar day, since the day following day of reception of this decision, till day of payment of this sum inclusive.

Thus remained the debts not paid the sum it is defined as a difference between the sum of the debts certain in the decision on granting of a delay (installments), increased on the sum of percent for the period of its action, both actually paid sums and percent.

The notice on a cancelling of the decision on a delay or the installments goes the authorized body made this decision to the interested person by mail the certified mail within five days from the date of decision-making. The notice on a cancelling of the decision on a delay or the installments is considered received after six days from the date of a direction of the certified mail. The copy of such decision in the same terms goes to tax body in a place of the account of these persons.

The decision of the authorized body on prescheduled cancellation of a delay, the installments can be appealed against by the interested person in court by way of, established by the legislation of the Russian Federation.

3. The investment tax credit

The investment tax credit represents such change of term of payment of the tax at which at presence of the bases established by the law the opportunity during the certain term is given to the organization and in the certain limits to reduce the payments under the tax with the subsequent stage-by-stage payment of the sum of the credit and the added percent.

The investment tax credit can be given only to the organization under the profit tax of the organizations, and also on regional and local (except for the tax to property of physical persons) to taxes for the term of from one year till five years.

Granting of the credit is carried out by reduction of payments under the tax until the sum of reduction will not be made even to the sum of the credit. Thus payments under the tax both in accounting, and in the tax period cannot be less, and the sum of reduction is more - than 50 % from the sum of the tax (advance payment). In case the size of the investment tax credit exceeds as much as possible admissible sum of reduction the remained part of the credit is transferred for the following tax (accounting) period down to granting the credit in full.

If it is concluded more than one contract by the organization about the investment tax credit which validity has not expired by the moment of the next payment under the tax, the saved up sum of the credit is defined separately on each of these contracts. Thus the increase in the saved up sum of the credit is made in the beginning concerning the conclusion of the contract first on term, and at achievement by this saved up sum of the credit of the size stipulated by the specified contract, the organization can increase the saved up sum of the credit under the following contract.

The investment tax credit can be given at presence even one of the following bases:

1) carrying out by the tax bearer - the organization of research or developmental works or modernization of own manufacture, including directed on creation of workplaces for invalids or protection of an environment against pollution by industrial wastes and (or) increase of a power production efficiency of the goods, performance of works, rendering of services;
2) realization by this innovative organization or innovative activity, including creation new or perfection of applied technologies, creation of new kinds of raw material or materials;
3) performance by this organization of especially important order on social and economic development of region or granting of especially important services by her to the population;
4) performance by the organization of the state defensive order;
5) realization by this organization of investments into creation of the objects having the highest class of power efficiency, including apartment houses, and (or) concerning renewed energy sources, and (or) concerning objects on manufacture of thermal energy, the electric energy, having efficiency more than 57 percent, and (or) other objects, the technologies having high power efficiency, according to the list approved by the Government of the Russian Federation.

By laws of subjects of the Russian Federation and statutory acts of representative bodies of local self-management the additional bases of granting of the investment tax credit on regional and local to taxes accordingly can be established.

The sum of the credit given on the first or on the fifth bases should be equivalent 100 % of cost of the equipment got by the tax bearer used exclusively in the purposes specified in these items. The sum of the credit given on other bases is defined under the agreement of parties.

The investment tax credit is given by the decision of the authorized body under the application of the organization and is made out by the contract of the established form between the corresponding authorized body and this organization.

The decision on granting the organization of the investment tax credit is accepted by the authorized body in coordination with financial bodies in conformity with clause 63 HK the Russian Federation within 30 working days from the date of reception of the application.

The contract about the investment tax credit should provide the order of reduction of tax payments, the sum of the credit (with the instruction of the tax on which the investment tax credit), validity the contracts charged for the sum of the credit percent, the order of repayment of the sum of the credit is given to the organization and the added percent, documents on property which is a subject of the mortgage, or the guarantee, the responsibility of the parties. If the credit is given on the security of property simultaneously with the basic contract the contract of the mortgage consists.

The contract about the investment tax credit should contain positions according to which realization or transfer to possession, using or the order to other persons of the equipment or other property which purchase by the organization was a condition for granting the investment tax credit are not supposed during term of its action, or conditions of such realization (transfer) are defined.

Percent for the sum of the credit should be established at a rate of not less by one second and no more the three fourth rate of refinancing of the Central Bank of the Russian Federation.

The copy of the contract is represented the organization in tax body in a place of its account in five-day term from the date of the conclusion of the contract.

Action of the contract about the investment tax credit stops at:

- expiry of the term of the credit;
- prescheduled repayment by the tax bearer of the sum of the credit with the added percent;
- achievement of the agreement of the parties;
- removal of the decision of court in case of infringement of conditions of granting of the credit;
- revealing the circumstances excluding change of term of payment of the tax.

If during validity of the contract about the investment tax credit the organization which has concluded it will break the conditions of realization stipulated by the contract or transfers to possession, using or the order to other persons of the equipment or other property which purchase was the basis of granting of the investment tax credit, this organization within one month from the date of cancellation of the contract about the investment tax credit is obliged to pay all the sums of the tax not paid earlier according to the contract, and also corresponding пени and percent for not paid sums of the tax added for each calendar day of action of the contract about the investment tax credit proceeding from the rate of refinancing of the Central Bank of the Russian Federation, operated for the period from the conclusion before cancellation of the specified contract.

If the organization which has received the investment tax credit in connection with performance of especially important order on social and economic development of region or granting of especially important services to the population, breaks the obligations in connection with which execution the investment tax credit during the term established by the contract not later than three months from the date of cancellation of the contract it is obliged to pay all sum of not paid tax and percent for this sum which are charged for each calendar day of action of the contract proceeding from the rate equal to the rate of refinancing of the Central Bank of the Russian Federation is received.

Proceeding from analyzed above the legislation, the investment tax credit represents the investment credit tax obligation which has resulted an innovation of the tax obligation. By virtue of item 414 GK the Russian Federation the innovation assumes change or a subject, or a way of execution of the obligation.

Carry of term of payment of the tax to later term and even payment of the tax stage by stage, parts cannot testify to change of a way of execution of the tax obligation as requirements to the appropriate execution, stipulated items 45 NK the Russian Federation, are applied and to the tax which term of payment has been changed. By virtue of it we cannot speak about an innovation of the tax obligation in case of granting a delay (installments) as neither the subject, nor a way of execution of the tax obligation do not vary.

On the contrary, granting of the investment tax credit testifies to change of a subject of the tax obligation. A subject of the new obligation becomes state-private partnership on investment in especially significant kinds of economic activities: technical modernization of the industry, innovative activity, etc.

Each of the parties the investment tax obligation is allocated mutually by the rights and the duties which are absent at participants of the initial obligation. The state (municipal formation) on behalf of the authorized bodies undertakes to give to the tax bearer on credit under concessionary interest rates of the investment by reduction of the

size of tax payment, and the tax bearer undertakes to carry out activity approved by the state during validity of the contract partially due to the state investments.

Reduction of tax payment should be considered as granting of money resources by the state as according to legal position KS the Russian Federation[5] the tax represents a part of property of the tax bearer of which that has not the right to dispose at own discretion. Giving to the tax bearer the right to dispose of a part of this property, the state to that actually gives to it the given means.

Feature of an innovation of the tax obligation in this case is that it stops an innovation not completely, and only partially - no more than on 50 %. Such restriction of reduction of tax payment is stipulated by the current legislation.

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[5] The Decision of the Constitutional Court of the Russian Federation from 12/17/1996 20-Å « On business about check of constitutionality of items 2 and 3 parts of first clause 11 of the Law of the Russian Federation from June, 24th, 1993 «About federal bodies of tax police» // Assembly of the legislation of the Russian Federation. 1997.№1. Item 197.

A hírközlési szabályozó hatóság jogállásának, szervezetének és „szabályozó" hatáskörének sajátosságai a közigazgatás szervezeti rendszerében

(The Specifics of Legal Status, Organization and Scope of Activity of the Infocommunication Authority in the Organization of Administrative Bodies)

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Ez a tanulmány a „Közigazgatási autonómiák és autonóm közigazgatások" megnevezésű OTKA pályázat keretén belül és támogatásával született (OTKA azonosító szám: K-78357).

A legtöbb országhoz hasonlóan hazánk közigazgatási intézményrendszerében is egyre jelentősebb szerepet kap a szabályozó hatóság szervezete és különösen „szabályozó" hatásköre. A szabályozó hatóság tipizálása, elemzése, fogalmi elemeinek feltárása azonban az „angolszász jogrendszereken" kívül igencsak komoly nehézségekbe ütközik, hiszen a puszta adaptációval vagy elnevezéssel a szabályozó hatóság nem lesz az adott ország közigazgatási szervezeti jogának immanens része, illetve önálló szervezet-típusa.

Magyarországon mindez különösen jellemző, hiszen a világgazdaság és a nemzetközi kereskedelem folyamatos fejlődésének, illetve átalakult szerkezetének hatásai alapján szükségszerűen adaptált közigazgatási jogintézmények, szabályozási elvek és módszerek nagyobbrészt úgy épültek be hazánk jogrendszerébe, hogy sem dogmatikai, sem jogalkotási értelemben nem alakítottuk ki a jogrendszer (különösen a közigazgatási jog) többi elemével való harmonizált kapcsolatukat. Hazánk tehát a kellő jogtudományi előkészítés nélkül vette át a fejlett piacgazdaságokban töretlen és szerves fejlődés eredményeként kialakult, kiforrott közigazgatási intézményeket, amelynek szembetűnő példája a szabályozó hatóság.

Általánosan megállapítható, hogy a szabályozó hatóság - ugyan országonként változatos szervezeti keretekben és jogállással - számos közigazgatási ágazatban meghatározó szervtípussá vált, azonban igazi térhódítása világszerte a piaci közszolgáltatások[1] szerkezeti és közellátás-szervezési reformjával kapcsolatos

[1] A legtipikusabb piaci alapú közszolgáltatások: a villamos-energia szolgáltatás, a távhőellátás, a gázszolgáltatás, az ivóvízellátás, a szennyvízelvezetés, a vasúti-, közúti-, és légi közlekedés, szállítás,

ágazatokban jellemző. Egyrészt ugyanis a piaci közszolgáltatások szerkezeti reformja - döntően liberalizációja és privatizációja - világviszonylatban egységes kereteket mutat (miután a közszolgáltatás-liberalizáció általánosan a XX. század végén vált általános folyamattá, illetve a piaci közszolgáltatások technológiai szempontból egységes hálózatok útján működnek). Másrészt e közszolgáltatások olyan jellegzetes sajátosságokkal rendelkeznek, amelyek a gazdasági közigazgatás keretében jelentősen feszítik a közigazgatás hagyományos struktúráit. Ebből következően a piaci közszolgáltatásokkal összefüggő gazdasági közigazgatásnak világviszonylatban is egységesíthető jogintézményei alakultak ki és terjedtek el, amelyek közül a közigazgatási szervezeti jog szempontjából a szabályozó hatóság emelhető ki.

Tanulmányomban tehát a piaci közszolgáltatások közszektor-reformjának legtipikusabb területét jelentő hírközlési igazgatás mintáján keresztül kísérlem meg - az általánosság szintjén - feltárni a szabályozó hatóságok fő elméleti ismérveit[2].

Mindenekelőtt a piaci közszolgáltatásokkal és annak tipikus területét képező hírközléssel összefüggésben megállapítható, hogy a gazdaságba beavatkozó közigazgatás határainak, tartalmának, eszközeinek kialakítása mindig is elemi kérdésként merült fel a piacgazdaságokban, kormányzati rendszerekben. A társadalmi jólét fokozása, biztosítása keretében ugyanis jelentős kihívás elé állítja a közpolitikát és a kormányzati döntéshozatalt a közszolgáltatások ellátása és a „magángazdaság", a piaci verseny működése közötti megfelelő egyensúly kialakítása. Napjaink világgazdasági viszonyai között ez a kérdés és annak összetettsége tovább fokozódik. Egyfelől ugyanis a globalizálódó gazdasági helyzet egyre inkább indokolja a közszektor, a közkiadások csökkentését, másfelől azonban a közszolgáltatások szerkezeti reformja (különösen liberalizációja és privatizációja) nem minden esetben minősíthető a legjobb megoldásnak. Sőt a közszektor-reform számos területen igencsak kockázatos lépés, hiszen - a legtöbb esetben - visszafordíthatatlan következményekkel járhat. Vagyis a közszolgáltató ágazatok egy részében nem feltétlenül okoz hatékonyabb működést a piaci verseny és a magántulajdonosi szerkezet (pl.: vízszolgáltatás, vasúti szolgáltatás, stb).

A közszolgáltatásokat jellemző alapvető szükségletet, közérdeket és a fogyasztók számára elérhető ellátás garantálását nagyon nehéz mérlegre tenni a piaci verseny és a magántulajdon gazdasági hatékonyságával szemben. A kérdés azonban mégsem kerülhető meg pusztán azzal, hogy a közszektor-reform kockázatos jellege miatt (pl.: az esetlegesen kialakuló „magánmonopólium" által társadalmi szinten

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egyéb tömegközlekedés, a postai és távközlési szolgáltatások (sajátosan a műsorszolgáltatás és a műsorterjesztés).

[2] *A hírközlési szabályozó hatóságok elemzésének alapvető forrásául szolgált* a Nemzeti Média- és Hírközlési Hatóság (Információ- és Tudásmenedzsment szervezeti egysége) által előfizetett ESPICOM ország-jelentések (ESPICOM International Telecoms Intelligence - ITI, Egyesült Királyság: Espicom Limited, Chichester, West Sussex (UK), USA: Espicom USA Inc., Princeton, New Jersey, Japán: Global Information Inc., Kawasaki, Kanagawa) feldolgozása és értékelése.

okozott ún.: holtteherveszteség[3]) nem szükséges, illetve elhalasztandó, mert a sikeres liberalizáció és privatizáció addig nem látott fejlődést, minőségjavulást, fogyasztási növekedést és gazdasági hatékonyságot okoz az adott - közszolgáltatás tartalmú - ágazatban. (Ez utóbbira példa a távközlés és részben a légiközlekedés, stb.)

A gazdasági verseny és a magántulajdonosi szerkezet (a „magánszektor") tehát nem „mindenható", így önmagában nem jelent garanciát a társadalmi és a gazdasági hatékonyság megvalósulására, sikereire. Mégis nyilvánvaló előnye, hogy a működőképes verseny bármely szabályozási eszköznél hatékonyabb gazdálkodást és gazdasági fegyelmet biztosít, illetve bármely „mesterségesnek" minősíthető (pl.: állami, közpolitikai) tervezésnél, szervezésnél eredményesebb gazdasági működést jelent. Egy biztos, az elhibázott közszolgáltatás-reform (pl.: magán-monopólium kialakulása) jelentős károkat okozhat a társadalom, az adott közösség számára, amelyhez képest - a piaci verseny kizárásának hátrányaival együtt is - nagyságrendekkel előnyösebb a közszektor, az állami ellátórendszer keretében működő közszolgáltatási struktúra.

Mindenesetre egyfajta alaptételként megállapítható, hogy a piaci alapú közszolgáltatások szerkezeti szintű reformjának - liberalizációjának - egyetlen („legitimálható") valódi értelme, funkciója és egyben célja lehet, mégpedig a közérdek hatékonyabb érvényesülése, vagyis a társadalmi jólét, a „közjó" növelése, a szolgáltatás magasabb színvonalú ellátása, a választék és a minőség fejlesztése, valamint a szolgáltatás gazdasági és társadalmi hatásainak eredményesebb kiaknázása. Ha e szempontokat mérlegre téve a közszolgáltatás reformja nem szolgálja a közösség érdekeit, akkor sokkal hatékonyabb az állami ellátás bármely típusa és formája.

Ha az állami beavatkozás, a közigazgatás szempontjából nézzük a közszektor, a közszolgáltatások reformjának kérdését, akkor a legfontosabb szempont, hogy az állami monopólium közvetlenül és egyszerűen irányítható, hiszen az állam tulajdonosi hatalma[4]

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[3] PIRRONG, S. Craig: The Economics, Law, and Public Policy of Market Power Manipulation. Norwell, Massachusetts, Kluwer Academic Publishers, 1996., 34., 77., 209., 257. o.; TRAIN, Kenneth E.: Optimal Regulation: The Economic Theory of Natural Monopoly. Cambridge, Massachusetts, MIT Press, 1997., (5. kiadás), 185. o.; STERNER, Thomas: Policy Instruments for Environmental and Natural Resource Management. Washington D.C.: Resources of the Future, RFF Press - The World Bank - The Swedish International Development Cooperation Agency (Sida), 2003., 117., 151., 152. o.; Williamson, Oliver E.: Hierarchies, Markets and Power in the Economy: An Economic Perspective. Industrial and Corporate Change, Vol. 4. No. 1., (1995), 21 - 49. o

[4] NOAM, Eli: Telecommunications in Europe. New York, NY: Oxford University Press, Inc., 1992., 3-25. o.; ELIASSEN, Kjell A. - From, Johan (szerk.): The Privatisation of European Telecommunications. Aldershot, Hampshire, HR (UK): Ashgate Publishing Limited, 2007., 28., 59., 94-97., 102-104., 113-115. o.; BACHE, Ian - George, Stephen: Politics in the European Union. Oxford, OX: Oxford University Press, 2006., 16., 419-420. o.; WELFENS, Paul J. J. - Graack, Cornelius: Telekommunikationswirtschaft: Deregulierung, Privatisierung und Internationalisierung. Berlin-Heidelberg, Springer-Verlag, 1996., 45., 50. o.; MEGGINSON, William L.: The Financial Economics of Privatization. New York, NY: Oxford University Press, Inc., 2005., 73., 277. o.; GOODMAN, Joseph W.: Telecommunications Policy-making in the European Union. Cheltenham, Glos, Edward Elgar Publishing Limited, 2006., 6., 16-19., 23-38., 41., 43-45., 51-63., 65-70. o.; MAJONE, Giandomenico: Regulating Europe (European Public Policy), London, Routledge, 1996., 20. o.; CAPORASO, James - Risse, Thomas - Cowles, Maria Green: Transforming Europe: Europeanization and Domestic Change. Ithaca, New York, Cornell University Press, 2001., 62-69., 77. o.; HULSINK, Willem: Privatisation and Liberalisation in European Telecommunications: Comparing

széleskörű és szinte korlátlan közigazgatási befolyást tesz lehetővé. Vagyis az állami tulajdonban működő közszolgáltató monopólium működésében viszonylag könnyen érvényesíthetők az állam gazdasági, közösségi, fejlesztési, stratégiai és egyéb céljai, szempontjai. Megjegyzendő azonban, hogy a teljesen monopolizált piacokon, illetve az állami vállalat esetén fennálló egyszerűbb beavatkozási lehetőséget, az erősebb befolyást (vagyis az állam tulajdonosi, vállalatirányítási, vállalatigazgatási hatalmát) az állami vállalat hatékonytalan működésének gazdasági tényezői általában lerontják. Ezzel szemben a piaci alapokon és a magántulajdonosi szerkezetben működő szolgáltatások körében az állami beavatkozás garanciális kerete nem irányítási, hanem kizárólag közhatalmi típusú[5]. Azaz a magánszektor szolgáltatásait a közigazgatás csak hierarchián kívüli jogalkotás és jogérvényesítés (hatósági tevékenység) útján befolyásolhatja, amely mind tartalmában, mind eljárásában, mind az igazgatott jogalanyok védelmében, mind pedig az igénybevehető jogorvoslatok szempontjából garanciálisan kötött, tehát jogállami alapokon rendkívül merev közigazgatási tevékenység-rendszert jelent.

Pontosan ez a szempontrendszer, mégpedig: egyik oldalról az állam gazdasági döntéseinek könnyebb érvényesítési lehetősége (gyakran a közszolgáltató állami szervezet gazdaságtalan működése mellett), míg másik oldalról a gazdasági, piaci alapú verseny hatékonysága (de az állami akarat nehezebb és lassabb közhatalmi alapú érvényesítése) képezi az egyik legfontosabb döntési alapot és határvonalat a gazdasági közszolgáltatások megszervezésének módszereiben.

A közigazgatás-tudomány szempontjából tehát a közszolgáltatás-reform legfontosabb kérdése, hogy az adott közszolgáltatást érdemes-e az irányításhoz képest eltérő közhatalmi közjogi rezsim és garanciális korlátok közé szorított jogérvényesítési rend körébe helyezni, illetve, hogy a közszolgáltatás milyen eszközökkel, módszerekkel „helyezhető át" az állami tulajdon és az állami szolgáltatási monopólium struktúrájából a gazdasági verseny és a magántulajdon keretébe[6].

E kérdések tükrében a piaci közszolgáltatások ellátásának és reformjának világviszonylatban determinált közigazgatási kerete kivételesen fontossá, illetve szinte

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Britain, the Netherlands and France. London: Routledge, 1999., 5-11., 75-93., 108. o.; SHY, Oz: The Economics of Network Industries. Cambridge, CB: Cambridge University Press., 2001., 7-8., 105., 106., 119., 126-128. o.; MUELLER, Milton L.: Universal Service: Competition, Interconnection and Monopoly in the Making of the American Telephone System. Cambridge, Massachusetts, MIT Press - Washington D.C.: AEI Press, 1997., 189-190. o.;

[5] Az állami beavatkozás alapstruktúrájának szerkezeti átalakulása, a közhatalmi befolyás térnyerése abban az esetben is érvényesül, ha az állam a liberalizált piacon ugyan meghatározó befolyás nélkül és szűk keretekben, de fenntartott bizonyos tulajdonosi szerepet, meghatározott tulajdonosi részesedést a „volt" állami távközlési vállalatban (inkumbensben). A fejlett piacgazdaságok liberalizációs folyamatait tekintve ugyanis kivétel nélkül megállapítható, hogy az állami tulajdon fenntartása esetében is egyrészt elválasztásra került az állami tulajdonban működő vállalat és az állami, közhatalmi funkciók, hatáskörök gyakorlása, másrészt - szintén kivétel nélkül - garanciák övezik a köztulajdon és a magántulajdon egyenlőségét.

[6] A kiterjedt liberalizációig (közel 100 éven keresztül) mind a távközlési ellátást nyújtó vállalat, szervezet, mind pedig a távközlési szolgáltatási rendszer szinte teljeskörűen állami tulajdonban állt. Vagyis nemcsak a távközlési vállalat működött állami tulajdonban, hanem a „távközlési ellátás", az ellátás lehetősége és állami feladata is (néhány fontosabb kivétel: Egyesült Államok, Finnország).

egyedülállóan érdekessé válik. A közigazgatás rendszere, felépítése ugyanis kivétel nélkül az állami szuverenitás, illetve a nemzeti sajátosságok alapját képezi, amelyet minden egyes - független - állam saját maga alakít és amelybe beavatkozást egyetlen ország sem tűr (még a legsikeresebb és legegységesebb regionális integráció, az Európai Közösség keretében sem). A piaci közszolgáltatások alapvető sajátossága azonban, hogy egyrészről kiterjedt, napjainkra már világméretű hálózatok útján működnek, másrészről mind az átvitel, mind a műszaki, technológiai alapok, mind pedig a gazdasági szempontok mentén, országhatárokat nem ismerve mutatnak egységes, közös jellemzőket. Ebből következően a piaci (hálózatos) közszolgáltatások működtetése, igazgatási és piacszerkezeti reformja csak a közszektor-reformban élenjáró országok által igen hosszú időn keresztül és nagyon nehezen „kijárt-kifejlesztett", illetve részben nemzetközi összefogás mentén kifejlődött, napjainkra világviszonylatban egységesedő közigazgatási eszközök és intézmények keretében folytatható sikeresen. Természetesen az egyes országok messzemenőkig önállóak a közszolgáltatások szervezésében és országonként számos sajátos módszer is jellemzőnek mondható, mégis minden piaci közszolgáltatás-működésnek, reformnak van egy meghatározható közös alapja, közigazgatási módszere, eszközcsoportja, amelynek jogrendszerbe illesztése nélkül a közszolgáltatás-szervezés nem tudja betölteni egyetlen igazi célját, mégpedig a közjó érvényesülését (Szervezeti szempontból e körben a szabályozó hatóságok sajátos tevékenységei emelhetők ki.)

A közszolgáltatások fejlődését tekintve a közszektor-reform az „olajválságok"[7] óta folyamatosan napirendi pontot képez mind a fejlett, mind fejlődő piacgazdaságok közpolitikai döntéshozatalában és közigazgatási rendszerének megszervezésében. Ezen belül a piaci közszolgáltatások liberalizációja-privatizációja mind időben, mind tartalmában közvetlen összefüggést mutat, sőt szükségességének felismerése és kibontakoztatásának igénye szinte egybeesett a közszektor-, a gazdaság- és a kereskedelem liberalizációjának általános folyamataival[8].

[7] MACRORY, Patrick F. J. - Appleton, Arthur E. - Plummer, Michael G. (szerk.): The World Trade Organization: Legal, Economic and Political Analysis. New York, NY.: Springer, 2005., 10. o.; SIMMONS, Matthew R.: Twilight in the Desert: The Coming Saudi Oil Shock and the World Economy. Hoboken, New Jersey, John Wiley&Sons, Inc., 2005., 10., 50., 56., 59-62. o.; STIGLITZ, Joseph E.: Making Globalization Work. New York, NY: W.W. Norton & Company, Inc., 2006., 141., 172. o.; THUROW, Lester: Zero-Sum Solution. New York, NY: Simon & Schuster, Inc., 1985., 33-34., 87. o.; BAUMOL, William J. - Litan, Robert E. - Schramm, Carl J.: Good Capitalism, Bad Capitalism, and the Economics of Growth and Prosperity. Yale University, 2007., 13., 18., 31., 229. o.;

[8] E tekintetben kiemelendő a Világbank és a Nemzetközi Valutatalap gazdasági liberalizációra irányuló hatékony ösztönző mechanizmusa is, lásd részletesebben: CSIKÓS-NAGY Béla: Közgazdaságtan a globalizáció világában. II. kötet, (Szerkesztő: Glatz Ferenc), Bp., MTA Társadalomkutató Központ, 2002., 64. o.; GULYÁS Gyula - Jenei György: Összehasonlító közpolitika. Bp., Aula Kiadó Kft., 2002., 376. o.; THE WORLD BANK: Entering the 21st Century. (World Development Report 1999/2000), New York, N.Y.: Oxford University Press, 2000., 17., 21-22. o.; STIGLITZ, Joseph E. - Charlton, Andrew: Fair Trade for All: How Trade Can Promote Development. New York, NY: Oxford University Press, 2005., 34., 80-81., 89., 94., 205. o.; HELD, David - McGrew, Anthony: Globalization Theory: Approaches and Controversies. Cambridge, CB: Polity Press, 2007., 106., 113., 190., 194. o.; LAEGREID, Per - Christensen, Tom (szerk.): Transcending New Public Management: The Transformation of Public Sector Reform. Aldershot HR: Ashgate Publishing Limited, 2007., 93-95. o.;

A liberalizáció azonban a piaci alapú közszolgáltatások körében - a távközlésen kívül - igencsak rövid ideig volt általánosan „népszerű”. A közszektor, a közpolitika, a gazdaságpolitika és a jogpolitika keretében megnyilvánuló liberalizációs hullám ugyanis inkább csak egyfajta általános „fellángolást” jelentett az egyes országokban. A távközlésen kívüli piaci közszolgáltatások vonatkozásában jellemző kezdeti átfogó, óriási léptékű és az egyes államok részéről igen „határozott szándékú” reform, liberalizációs folyamat tehát rövid időn belül (néhány, főleg „angolszász” ország kivételével) megtorpant, lelassult vagy teljesen elakadt.

A távközlés viszont, egyrészt szinte teljesen egyedülálló, önálló és más ágazatokra is alapvető hatást gyakorló utat járt be a liberalizáció és a privatizáció - a közszektor-reform - világméretű folyamataiban. Másrészt a piaci alapú közszolgáltatások között - napjainkig - a legeredményesebben kibontakozó liberalizációs folyamatot jelenti. Harmadrészt igen sajátos összefonódást mutat, sőt egyfajta alapfeltételét képezi más ágazatok közszektor-szerkezeti reformjának, valamint a világgazdaság, a nemzetközi kereskedelem, a nemzetközi pénzügyi rendszer, illetve egyéb gazdasági, társadalmi, közpolitikai és közpénzügyi viszonyok keretében érvényesülő liberalizáció általános folyamatainak.

A távközlési liberalizáció így mind a megvalósítás, mind a piaci korlátok teljeskörű tényleges lebontása, mind pedig a piaci verseny fejlődése és a privatizáció folyamata szempontjából - tartalmát, hatásait, sőt időszakait tekintve is - jelentős eltéréseket mutat a piaci alapú közszolgáltatások más ágazataihoz, illetve a liberalizáció világgazdasági, nemzetközi kereskedelmi szintű átfogó „térnyerésének” jellemzőihez képest.

A távközlési igazgatás rendje továbbá általánosan tükrözi az állam és a gazdaság viszonyrendszerének, a közszolgáltatások megszervezésének, szerkezeti szintű átalakításának, illetve a közszolgáltatásokkal összefüggő gazdasági folyamatokba beavatkozó közigazgatás módszereinek, típusainak szinte valamennyi elemét, modellszerű ismérvét.

A távközléssel összefüggő állami szerepkör egyes változatainak bonyolult és összetett tartalma, sok esetben a gazdasági közigazgatáson belül elsőként megvalósított, „úttörő” jellege egyfelől tehát fontos alapját, mintáját képezheti a piaci közszolgáltatásokkal összefüggő állami funkciók rendszerének, illetve a közszektor-reform közérdekű módszereinek. Másfelől a közszolgáltatások tartalmi jellemzőit és típusait tekintve egyértelműen a távközlés mutatja a legszorosabb összefonódást a piacgazdaság szerkezetével, amelyből következően sajátos, elhatárolható átmenetet képez a „magánszektor” gazdasági verseny alapján működő piaci területei és a közszektor tisztán közfeladatként, állami feladatként megszervezett közszolgáltatásai között.

A magánszektor és a közszektor, valamint a gazdasági verseny és az állami monopóliumként biztosítandó közszolgáltatások közötti határterületnek minősülő távközlési szolgáltatási rendszer így olyan sajátosságokkal, szabályozási tartalommal

rendelkezik, amely teljesen elhatárolható önálló ismérveket, általános érvényű elveket közvetít a vonatkozó tudományos elemzések számára.

Közigazgatási szervezeti szempontból a piaci alapú közszolgáltatások liberalizációjának alapvető eleme a vállalatirányítás keretében működtetett állami funkciók, feladatok, hatáskörök elválasztása a piac szerkezetétől, működésétől és a piaci szereplőktől.

A piaci viszonyokat tekintve a távközlési liberalizáció folyamatában is elsőrendű szempontot jelentett az állam tulajdonosi hatalmának és a hatósági, gazdasági igazgatási funkcióinak éles elhatárolása. E két szerepkör elválasztása általános alapelvi jelentőségű követelménynek minősíthető a távközlési piac működésében mind a piaci verseny, mind a liberalizáció és a privatizáció alapján a piacon megjelenő és kiterjedt magántulajdon, mind a befektetők és a befektetések, mind a piaci szereplők védelme, mind pedig a liberalizáció folyamatának kibontakozása és a liberalizált piaci keretek közérdekű fejlődése szempontjából.

Általánosan megállapítható tehát, hogy a távközlési piaci szerkezetváltás és a liberalizáció is alapvető és általános hatást gyakorol az állami funkciókra, tevékenységekre és ebből következően az állami beavatkozást érvényesítő szervezeti rendszerre.

A liberalizáció folyamatában ugyanis az állam szerepe döntően átalakult, mégpedig a közszolgáltatást, az ellátórendszert működtető tulajdonos szerepéből „átkerült" a közhatalmi, piacszabályozói, gazdasági igazgatási „szerepkörbe", amelynek keretében immár az állami szervezeti rendszertől elkülönült külső jogalanyok, piaci szereplők irányában szükséges garantálnia a piaci verseny fejlődését, működését és védelmét. Megváltozott tehát az állami befolyás, beavatkozás alapja: míg korábban az állam a távközlési piac egészében tulajdonosi hatalommal bírt, addig a liberalizált távközlési piac szerkezetében már kizárólag közhatalmi típusú, gazdasági igazgatási befolyással rendelkezett/rendelkezik.

Megszűnt tehát a korábbi strukturálatlan intézményrendszer, amelyben az állam négy fő alapvető funkciót, szerepkört gyakorolt egységes keretekben a távközlési piacon:

a) tulajdonos (az ellátást nyújtó szolgáltató és az ellátás, a távközlési feladat „tulajdonosa" is általában),

b) ágazat- és vállalatirányító,

c) a távközléssel összefüggő hatósági típusú állami feladatokat, funkciókat gyakorló és

d) - amennyiben elválasztásra került a távközlési közszolgáltatás „állami tulajdona” és az ellátást nyújtó szolgáltató tulajdona - a koncessziós jogviszony alanya[9].

A liberalizált távközlési piac keretében tehát világszerte kialakultak a piaci szereplőktől függetlenített távközlési igazgatás hatásköreit gyakorló állami szervezeti keretek.

A távközlés közigazgatási intézményrendszere országonként és a liberalizáció folyamatának kibontakozása mentén is változatos struktúrát és szabályozást mutat. A közhatalmi típusú feladatokat ellátó állami szervezetek kialakítása, működése és a kormányzati rendszerben történő elhelyezése ugyanis *a)* egyrészt az állami szuverenitás egyik legfontosabb alapja, *b)* másrészt minden országban jellegzetesen a nemzeti sajátosságokhoz, hagyományokhoz igazodik, *c)* harmadrészt pedig folyamatos átalakításoknak volt kitéve a távközlési piaci viszonyok folytonos változását előidéző liberalizációs folyamat, illetve a távközlés rohamos ütemű gazdasági és műszaki fejlődése alapján.

1. A hírközlési igazgatás közigazgatási szervezeti rendszerének legfontosabb modelljei

Általánosan minden gazdasági ágazatban, így a távközlés körében is megállapítható, hogy a szervezeti rendszerrel összefüggő szabályozásban és azon belül a szervezeti, valamint a feladat- és hatáskört rendező normák tartalmában egyértelműen visszatükröződnek a szektor-specifikus anyagi jogi rendelkezések sajátosságai.

A távközlési igazgatás *szervezeti keretét* tekintve *többféle modell* létezik, amelyek közül kizárólag a *távközlési szabályozó hatóság* minősíthető világszerte

[9] BACHE, Ian - George, Stephen: Politics in the European Union. Oxford, OX: Oxford University Press, 2006., 16., 419-420. o.; ELIASSEN, Kjell A. - Sjovaag, Marit (szerk.): European Telecommunications Liberalisation. London: Routledge, 1999., 24., 55-57., 60-62., 94-96., 110-112., 126. o.; HUDSON, Heather E.: From Rural Village to Global Village: Telecommunications for Development in the Information Age. Mahwah, New Jersey, Lawrence Erlbaum Associates, Inc., 2006., 118., 127. o.; MARSDEN, Christopher T. (szerk.): Regulating the Global Information Society. London, Routledge, 2000., 128-143., 145-152. o.; MILLWARD, Robert: Private and Public Enterprise in Europe: Energy, Telecommunications and Transport, 1830-1990. Cambridge, CB: Cambridge University Press, 2005., 244-254. o.; Heller Krisztina: A távközlés állami szabályozása. Közgazdasági Szemle, 1990. 4. sz., 485 - 499. o.;Heller Krisztina: Távközlési reformok. Közgazdasági Szemle, 1995. 3. sz., 301-319. o.; Grupp, Hariolf - Schnöring, Thomas: Research and development in telecommunications. National systems under pressure. Telecommunications Policy, Vol. 16. No. 1. (January-February 1992), 46-66. o.; Snow, Marcellus S.: Telecommunications literature: A critical review of the economic, technological and public policy issues. Telecommunications Policy, Vol. 12. No. 2., (June 1988), 153-183. o.; Drake, William J.: Restructuring the international telecommunication regulations. Telecommunications Policy, Vol. 12. No. 3., (September 1988), 217-233. o.; Thompson, Samme: Telecommunications privatizations and international capital markets. Telecommunications Policy, Vol. 16. No. 9., (December 1992), 732-737. o.; Carney, M. G.: Strategy in the telecommunications market The effects of liberalization and competition. Telecommunications Policy, Vol. 10. No. 3., (September 1986), 245-257. o.;

általánosan alkalmazott szervezeti megoldásnak. A fontosabb szervezeti modellek köréből *kiemelendő*:

a) A távközlési állami funkciók ellátása kizárólagosan a *minisztériumi* struktúrába tagozódik, vagyis minisztérium vagy minisztérium szervezetén belül elkülönített szervezeti egység gyakorolja a távközléssel összefüggő hatósági és nem hatósági feladatokat.

b) A *gazdasági verseny* általános *igazgatását* ellátó (gazdasági versenyhatóság, versenyfelügyelet, gazdasági versennyel összefüggő állami feladatokat ellátó szabályozó hatóság, stb.) szervezeti rendszer által gyakorolt távközlési állami funkciók.

c) A távközléssel összefüggő állami funkciók, közhatalmi jogérvényesítő feladat- és hatáskörök, illetve a nem hatósági típusú feladatok legszélesebb körben elterjedt, világszerte általánosítható *szervezeti modellje*, szervezeti kerete: *a távközlési szabályozó hatóság*. Kiemelendő, hogy az *Európai Közösség* 2003-ban hatályba lépett elektronikus kommunikációra vonatkozó *keretszabályozási rendszere*, azon belül a Keretirányelv[10] az Európai Közösségen belül is létrehozta a szervezetében, államszervezeti elhelyezésében ugyan *változatos* (tehát tagállami hatáskörben kialakított), de tevékenysége, függetlensége, felelőssége és a piaci szereplők garanciális védelme (pl.: döntések bírósági felülvizsgálata) szempontjából *egységestávközlési szabályozó hatóságok „hálózatát"* (National Regulatory Authority - NRA).

A *szervezeti modellekkel* összefüggően fontos hangsúlyozni, hogy a távközlési piac közérdekű működése és a liberalizáció folyamata szempontjából a távközlési igazgatási funkciók *államszervezeten belüli elhelyezésének* alapvetően nincs különösebb jelentősége *három* általában kiemelhető *lényeges feltétellel:*

1) A köztulajdon és a magántulajdon egyenlőségének messzemenő garantálása mellett *sem „szerencsés"* a távközlési igazgatási, jogérvényesítési funkciókat a távközlési piacon esetlegesen fenntartott *állami tulajdont* kezelő *közigazgatási szervezetkeretébe*, vagy *hierarchikus irányításaalá* helyezni.

Ebben az esetben ugyanis óhatatlan, hogy az állam tulajdonosi hatalmát, jogait gyakorló állami szervezet (általában a minisztérium)[11] az állami feladatokat elfogultan, mégpedig az inkumbens szolgáltatónak alaptanul kedvező, a távközlési piaci verseny fejlődését nem egyértelműen garantáló módon fogja ellátni.

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[10] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), OJ L 108/33, 2002. április 24. (Az Európai Parlament és a Tanács 2002. március 7-i 2002/21/EK irányelve az elektronikus hírközlő hálózatok és elektronikus hírközlési szolgáltatások közös keretszabályozásáról - „Keretirányelv")

[11] A liberalizált távközlési piacon általában az inkumbens szolgáltató tulajdoni szerkezetében stratégiai, vagy egyéb okból fennmaradt állami tulajdont, tulajdonosi jogokat leggyakrabban valamely minisztérium kezeli.

2) A liberalizált távközlési piac fejlődése, sajátos működése és a piaci verseny jellegzetes szempontjai alapján kiemelten fontos *mind szervezeti, mind szakmai* értelemben egymástól *elválasztani:*

a) a *távközlés-politikai*, stratégiai döntések meghozatalát, a *jogalkotási* tevékenységet, a *nemzetközi* koordinatív funkciókat, a távközlés közszolgáltatási tartalmával kapcsolatos alapvető állami feladatokat, a szociális szempontokat, illetve a *távközlés-fejlesztési, támogatási* funkciókat

b) az *egyedi jogérvényesítéstől*, jogalkalmazástól, hatósági felügyelettől (az egyedi közhatalmi, hatósági feladat- és hatáskörök ellátásától).[12]

Az állami feladatellátás megszervezése körében *e két fontos funkciócsoport elválasztásának* legfontosabb *indokai* az alábbiak szerint foglalhatók össze.

A távközlési piaci verseny „törékenységére", fontosságára, kiemelt közérdek tartalmára, valamint összetett állami funkciókat igénylő szerkezetére tekintettel *a)* a távközlés-politikai feladatok, a távközlési jogalkotás és *b)* az egyedi hatósági típusú jogérvényesítés ellátásának egyetlen állami, közigazgatási szervezet „kezében" történő összpontosítása olyan állami „felelősség-koncentrációt" eredményez, amelynek felvállalása nem ajánlatos. A jogalkotás és a jogalkalmazás egy szervezetre (pl.: minisztérium vagy sajátos jogalkotó hatáskörrel rendelkező szabályozó hatóság) telepített hatáskörében komoly *visszásságokat* okozhat a jogalkotás, a távközléspolitika, a stratégia és a jogérvényesítés, a jogalkalmazási gyakorlat között szükségszerű „*fékek és ellensúlyok*", illetve kölcsönhatások hiánya.

A távközlés-politika „műhelyétől" és a jogalkotástól *elkülönített* jogalkalmazó szervezet továbbá azért is fontos, mert így a nagy nehézségek árán kiforrott *jogalkalmazói gyakorlat* és tapasztalat független szervezet részéről *csatornázódhat* a jogalkotás folyamatába[13]. Nem beszélve arról, hogy *egyrészt* a jogérvényesítő hatóság a jogalkotóhoz képest egészen más alapokon nyugvó *kapcsolatokat* épít ki a *piaci szereplőkkel*, amelyben egyre fontosabb szerepet kap a megfelelő döntéshozatal érdekében történő *együttműködés.Másrészt* a jogalkotási-jogalkalmazási hatáskör *egységes szervezeti* keretében a *jogalkotás* során elkerülhetetlenül érvényesülő piaci

[12] Az elválasztás „sajátossága" azt jelenti, hogy a jogalkotást és a jogérvényesítést ellátó szervezeti rendszerek szoros együttműködésben gyakorolják tevékenységeiket. A liberalizált piaci alapú közszolgáltatások ugyanis más gazdasági igazgatási területekhez képest határozottabb, erősebb szakmai alapú együttműködést igényelnek a jogalkotó és a jogalkalmazó szervezetek között az adott szolgáltatás piaci verseny kereteiben is megfelelő fejlődése érdekében. Ennek kifejeződése a liberalizáció folyamatában és a liberalizált piaci működésben is széleskörben alkalmazott - jellegzetes . közigazgatási tevékenységfajták megjelenése, különösen: a) a piacszabályozás, b) piacfelügyelet, c) nyilvános egyeztetések, d) piaci szereplők sajátos bevonása a közhatalmi hatáskör-gyakorlás keretében, e) különleges (az állam, a piaci szereplők, illetve a fogyasztók irányában is fennálló) felelősségi rendszerek és az érvényesítésükre vonatkozó hatósági hatáskörök, f) piacvédelem, g) sajátos jogvita-rendező eljárási keretek.

[13] A távközlési piaci versennyel összefüggő közigazgatási jogalkalmazási tevékenység napjainkra általánossá vált fogalma világszerte az ún.: piacszabályozás. A piacszabályozás fogalma elnevezésével ellentétben kizárólag jogalkalmazási tevékenységet jelent és nem foglal magában jogalkotó hatáskört.

„lobby” egy az egyben érvényesül a jogérvényesítés, a jogértelmezés körében is, *míg*ennek veszélye a *függetlenített jogalkalmazás* esetében csekély. (Legalábbis egészen más típusú és általában szűkebb körű piaci befolyás, „lobby-tevékenység” figyelhető meg a jogérvényesítést gyakorló hatóság irányában.)

3) A távközlési igazgatási funkciók *elvileg elhelyezhetők*, de *nem működtethetők* hatékonyan a *gazdasági verseny igazgatását* ellátó állami szervezetben vagy az ún. *multi-szektorhatóság* keretében[14].

Ez alól *némi kivételt* jelenthet a távközlési hatóság és a versenyhatóság, illetve a multi-szektor hatóság pusztán *szervezeti összevonása*, amelyben a *távközlési hatóság* szervezete mind szervezeti tagoltságában, mind feladat- és hatásköreiben *változatlanul* működik tovább. Vagyis amennyiben az *összevonás eredményeként* csak annyi változik, hogy a távközlési hatóság egy másik közigazgatási hatóság *szervezeti egységeként* folytatja alaptevékenységét. E szervezeti modell azonban minden közigazgatás-szervezési és elméleti *ésszerűséget nélkülöz*, hiszen a távközlési igazgatási feladatok olyannyira elhatárolhatók és sajátosak, hogy szakmai értelemben nem lehetne *racionalizálható párhuzamos* funkciókat találni. Az pedig *minden alapot és ésszerűséget nélkülöző* (sőt felháborító) módszernekminősíthető, ha két elkülönült feladat- és hatásköri rendszert megtestesítő hatóságot kizárólag azon az alapon vonnak össze, hogy *megspórolják* a járulékos költségeket (pl.: humánpolitika, gazdálkodás, stb.) Ez ugyanis nem közigazgatási reform vagy racionalizálás, hanem a közigazgatási feladatellátás megcsúfolása, sőt továbbmenve a *jogállam sérelme*. Ilyen típusú összevonások keretében ugyanis az elkülönült szakmai funkciók *összeegyeztethetetlenné* teszik a hatósági eljárások közérdekű ellátását, a speciális eljárási szabályok és hatáskörök megfelelő szabályozását, elhatárolását, érvényesítését, és a jogorvoslati rendszer garanciális működését. Továbbá *óhatatlan* az egybevont, de egyébként tartalmában elkülönült közigazgatási feladatok és hatáskörök, illetve szervezeti egységek *„versengése”*, amelyben mindenképp sérül a közigazgatási funkciók közérdekű ellátása. (Pl.: Az Amerikai Egyesült Államokban az Interstate Commerce Commission (Államközi Kereskedelmi Bizottság - ICC) szervezetéhez és hatásköreihez csatolt[15] távközlési feladatok ellátásának alapvető hiányosságai)[16].

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[14] A nem túl találó, illetve nem szerencsés elnevezéssel illetett „multi-szektor hatóság” általában a piaci hálózatos közszolgáltatások egységesen megszervezett „gyűjtő” közigazgatási szervezetét jelöli. Ebben az esetben a hálózatos közszolgáltatásokkal összefüggő állami funkciókat (azon belül általában a jogérvényesítést) egyetlen egységesen megszervezett közigazgatási szerv gyakorolja. A tapasztalatok szerint nem igazán hatékony, nem eredményes szervezeti megoldás.

[15] Vagyis az Egyesült Államok távközlésének kezdeti fejlődése során a vasúti és a távközlési hatósági feladatok összevonása.

[16]PAGLIN, Max D. (szerk.): The Communications Act: A Legislative History of the Major Amendments, 1934-1996. Silver Spring, Maryland, Pike & Fischer, Inc., 1999., 34. o.; RABIN, Jack - Hildreth, W. Bartley - Miller, Gerald J.: Handbook of Public Administration. (Public Administration and Public Policy/65), New York, NY: Marcel Dekker, Inc., 1998., 609., 619-620. o.; LAFFONT, Jean-Jacques - Beato, Paulina (szerk.): Competition Policy in Regulated Industries: Approaches for Emerging Economies. Washington D.C.: Inter-American Development Bank, 2002., 13. o.; CHERRY, Barbara A.: The Crisis in Telecommunications Carrier Liability: Historical Regulatory Flaws and Recommended Reform. Norwell,

Kiemelendő az is, hogy számos ilyen esetben a hatósági működés *áttekinthetetlenné*, a jogalkalmazói gyakorlat pedig *következetlenné* válhat, illetve a *piaci szereplőkkel* kialakítható együttműködési keretek sem biztosíthatók.

A liberalizált távközlési piac sajátos szektor-specifikus, aszimmetrikus, ex ante versenyszabályozási rendszere, valamint egyéb szabályozási tárgykörei (pl.: fogyasztóvédelem, nemzetközi koordinációs, stb.) tehát *nem működtethetők* eredményesen, a *közérdeknek megfelelően* a versenyhatósággal összevonva.

A távközlés szempontjából a *multi-szektor hatóságsem* minősíthető *hatékony* szervezeti megoldásnak, mert a liberalizált távközlés nagyjából annyi hasonlóságot mutat más hálózatos közszolgáltató rendszerekkel, hogy hálózati infrastruktúra alapján működik[17].

Általánosan és egyértelműen megállapítható azonban, hogy *minden szempontból nélkülözi* az *ésszerűséget,* a közérdekű *garanciákat* és a hatékony állami feladatellátást, ha a *távközlés szektor-specifikus szabályozásának hiánya* miatt kerül a távközlési igazgatás a gazdasági verseny „általános igazgatását" ellátó „versenyhatóság" szervezetébe[18].

Massachusetts: Kluwer Academic Publishers, 1999. 18. o.; NAGEL, Stuart S. (szerk.): Encyclopedia of Policy Studies. (Public Administration and Public Policy/53), New York, NY: Marcel Dekker, Inc., 1994., (2. kiadás), 455. o.; NOAM, Eli M.: Interconnecting the Network of Networks. Cambridge, Massachusetts, MIT Press, 2001., 214. o.;

[17] Fontos mintát jelenthet a *német szövetségi multi-szektor hatóság* számos jogalkalmazási és működési problémája.

[18] Lásd Új-Zéland távközlési liberalizációjának folyamatában, amely igen szemléletes „negatív" példát, modellt jelent. Új-Zéland ugyanis más országokhoz képest szinte egyedülállóan „teljes verseny" szerkezetében nyitotta meg a távközlési piacot, mégpedig a piaci viszonyoknak megfelelő távközlési szektor-specifikus szabályozás, valamint a távközlési piac felügyeletét ellátó elkülönült hatósági szervezeti struktúra és hatáskörök kialakítása nélkül. A távközlési liberalizációt tehát a versenyjogi alapú állami beavatkozás, kereteiben folytatta és a távközlésre - alapvetően - mindmáig az általános versenyjogi, azaz a szimmetrikus szabályozás vonatkozik. (2001 óta kiegészülve a távközlési piaci viszonyok vonatkozásában még mindig kidolgozatlan és a megfelelő jogérvényesítésre nagyrészt alkalmatlan távközlési törvénnyel.) Az új-zélandi piacnyitás alapján valódi verseny, illetve a távközlési piac fejlődése még csak részeiben sem tudott kibontakozni. Új-Zéland távközlése így a távközlési piac egészét tekintve igen kezdetleges, fejletlen állapotban van, amelyben az inkumbens szolgáltató a piacnyitás és a magántulajdoni viszonyok ellenére is képes volt fenntartani monopolhelyzetű berendezkedését. (A magánmonopólium viszont a távközlés valamennyi részét érintő általános zavarokat, óriási problémákat, valamint fejlesztési nehézségeket eredményezett.) Mindennek legfőbb oka a távközlési ex ante típusú szektor-specifikus és szektorsemleges szabályozás hiánya, illetve a 2001-ben elfogadott jogi szabályozás kezdetlegessége, a távközlési piaci viszonyok rendezésére való alkalmatlansága. Új-Zéland távközlés-szabályozási modellje tehát alapvető mintául szolgál a távközlés területén az általános versenyjogi szabályok elégtelenségére. Az általános versenyigazgatás keretében ugyanis nemhogy nem alakult ki a távközlési piaci verseny, hanem el sem indult a verseny működése felé vezető úton. Új-Zéland távközlésének fejlődése így messze elmaradt a fejlett országoktól, amely súlyos gazdasági problémákat, illetve - a távközlési ellátás színvonalát tekintve - a közérdekkel ellentétes általános minőségromlást okozott. Pl.: A távközlési szolgáltatások egyik legfontosabb területének, a szélessávú internet-szolgáltatásnak máig ható óriási nehézségeit jelzi, hogy a legnagyobb, szinte monopolhelyzetű szolgáltatónak minősíthető Telecom Xtra (szélessávú) adatátvitel-szolgáltatása 2007. január végén az összes kategória alapján „elnyerte" az egyik legnagyobb új-zélandi fogyasztóvédelmi non-profit társadalmi szervezet (Consumers' Institute) által alapított legrosszabb szolgáltatás díját („Supreme Ass Award"). (Egyértelművé vált továbbá, hogy a szabályozatlan és a magántulajdoni alapokon működő monopólium a közérdek szempontjából hátrányosabb piaci szerkezetet jelent a közszektor és az állami tulajdonú távközlési közszolgáltatási ellátórendszer kereteinél.) Lásd erről,

2. A szabályozó hatóságról általánosságban

A szabályozó hatóság más típusú „hatóságoktól" való *elhatárolási ismérvenem* a *szervezeti függetlenségben* és *nem is a jogszabály-alkotási* hatáskörben keresendő. (Lásd az alábbiakban részletesen.) Sőt számos esetben az *elnevezésen kívülnem* is tekinthető *önálló közigazgatási szervtípusnak*.

A szabályozó hatóság *önálló szervezeti kategóriájával* összefüggésben kiemelendő, hogy a szabályozó hatóság fogalma, szervezeti jellege, működésének sajátos modellje az *angolszász* jog- és közigazgatási rendszerekből eredeztethető. Innen terjedtek el világszerte, különösen a liberalizált piaci alapú közszolgáltatások és meghatározott gazdasági igazgatási ágazatok szervezeti modelljeként[19].

A szabályozó hatóságok általános térhódításában jelentős szerepet képviselt továbbá, hogy a liberalizációt átfogóan támogató és ösztönző nemzetközi szervezetek[20] (Világbank, Nemzetközi Valutaalap, OECD (Organization of Economic Co-operation and Development, Gazdasági Együttműködési és Fejlesztési Szervezet), WTO) határozottan támogatták, sőt számos esetben elvárták, illetve a gazdasági, pénzügyi fejlesztési program vagy a támogatás *feltételéül* szabták a szabályozó hatóságok létrehozását, működtetését.

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[19]HORVÁTH M. Tamás: Közmenedzsment. Bp.-Pécs, Dialóg Campus Kiadó, 2005., 98. o.; OECD: Distributed Public Governance. (Agencies, Authorities and Government Bodies), Paris, 2002., 9-31. o.; BETTER REGULATION TASK FORCE: Independent Regulators. London, 2003., 5-10. o.; GILARDI, Fabrizio: Evaluating Independent Regulators. 2-21. o., OECD: Designing Independent and Accountable Regulatory Authorities for High Quality Regulation. Expert Meeting London, 10-11 January 2005.; MOORE, Michal C.: Maintaining Efficient and Effective Relations Between Regulatory Authorities. 4-8., 16-17. o.; OECD: Designing Independent and Accountable Regulatory Authorities for High Quality Regulation. Expert Meeting London, 10-11 January 2005.; KESSIDES, Ioannis: Crafting Regulation for Privatized Infrastructure. 2-23., 32-33. o., OECD: Designing Independent and Accountable Regulatory Authorities for High Quality Regulation. Expert Meeting London, 10-11 January 2005.; VAGLIASINDI, Maria: Regulation of Infrastructure Services. In.: Transition Report on Infrastructure. Office of the Chief Economist (OCE) - European Bank for Reconstruction and Development (EBRD), 2004., (Chapter 3), 53-65. o.; THATCHER, Mark: Independent Regulatory Agencies and Elected Politicans in Europe. OECD: Designing Independent and Accountable Regulatory Authorities for High Quality Regulation. Expert Meeting London, 10-11 January 2005., 2-15. o.; GILARDI, Fabrizio - Braun, Dietmar: Delegation in Contemporary Democracies. Abingdon, Oxon: OX, Routledge, 2006. 99-110., 125-144. o.;

[20] CSIKÓS-NAGY Béla: Közgazdaságtan a globalizáció világában. II. kötet, (Szerkesztő: Glatz Ferenc), Bp., MTA Társadalomkutató Központ, 2002., 64. o.; GULYÁS Gyula - Jenei György: Összehasonlító közpolitika. Bp., Aula Kiadó Kft., 2002., 376. o.; THE WORLD BANK: Entering the 21st Century. (World Development Report 1999/2000), New York, N.Y.: Oxford University Press, 2000., 17., 21-22. o.; STIGLITZ, Joseph E.: The Roaring Nineties: A New History of the World's Most Prosperous Decade. New York, NY: W.W. Norton & Company, Inc., 2004., (87., 91-101., 113.), 202., 205-209., 220-221., 226., 229-230., 292. o.; STIGLITZ, Joseph E. - Charlton, Andrew: Fair Trade for All: How Trade Can Promote Development. New York, NY: Oxford University Press, 2005., 34., 80-81., 89., 94., 205. o.; HELD, David - McGrew, Anthony: Globalization Theory: Approaches and Controversies. Cambridge, CB: Polity Press, 2007., 106., 113., 190., 194. o.;

Részben tehát az „eredetre” és a sajátos nemzetközi „ösztönző erőkre” vezethető vissza, hogy a szabályozó hatóságok ugyan világszerte *elterjedtek*, de legtöbb esetben *csak elnevezés* szintjén, a szervezet típusát jelölő elnevezés *„egyszerű lefordítása”* mentén.

A szabályozó hatóságokat állami szervezeti rendszerükbe „csatornázó” *országok többségében* ugyanis a szabályozó hatóság fogalma az elméletben *kidolgozatlan*, a jogalkalmazói gyakorlattól *idegen* és a nemzeti sajátosságokat tükröző szerves fejlődéssel kialakult, „hagyományos” állami intézményrendszer keretében jogállását tekintve *értelmezhetetlen* szervezeti modellt, kategóriát jelent. Ezekben az országokban (a „modern kontinentális jogrendszerek” többségében is) a szabályozó hatóság egyrészt eredeti szervezeti és működési rendszere szerint általában beilleszthetetlen, másrészt jogállását, fogalmi elemeit, működését, függetlenségét, hatékony közjogi eszközeit tekintve - többségében - kidolgozatlan szervezeti rendszert képez.

Mindebből következően a szabályozó hatóság *számos államban* a *szóhasználaton kívülnem minősíthető önálló* szervtípusnak, elhatárolható és elfogadott terminológiának.

A *angolszász* jogrendszerekben megszervezett szabályozó hatóságok azonban mind *a)* a tevékenység *b)* a szervezet *c)* a működés *d)* a függetlenség, mind pedig *e)* a közszolgáltatási tartalmú szabályozói funkciók körében *valódi sajátosságokkal* rendelkeznek. Mindezek közül azonban egyedül a *„tevékenység”* minősíthető a szabályozó hatóságok tekintetében világszerte *egységesen* és általánosan érvényesülő meghatározó és elhatárolást megalapozó tartalmi ismérvnek. A tevékenység is *csak* azért, mert a piaci alapú hálózatos közszolgáltatások több jellemzőjüket tekintve világszinten egységes működést mutatnak. Vagyis a liberalizált piaci közszolgáltatások széleskörben elterjedt szabályozó hatóságainak *egyetlen* világszerte *általánosítható*, valódi jellegzetes ismérve *sajátos tevékenységében* jelentkezik, amely az állami berendezkedésektől és a jogrendszerektől is nagyobbrészt függetlenül megalapozza a szabályozó hatóság más közigazgatási szervezet-típusoktól való elhatárolását.

A sajátos *tevékenységeinek rendszerét* azonban még *részelemét* tekintve *sem a jogi szabályozás*, a jogalkotási hatáskör tölti ki, hanem *különösen:a)* a piacszabályozás, *b)* a piacfelügyelet, *c)* a jogvitarendezés, *d)* a piacvédelem, *e)* a piaci verseny közérdekű „működtetése”, fenntartása, hatékony fejlődésének biztosítása, *f)* a sajátos fogyasztói jog- és érdekvédelem, *g)* a tudományos, statisztikai, stratégiai, döntéselőkészítési alapú piacelemzés, *h)* a szolgáltatási versenyben fennálló közérdek, illetve közszolgáltatási tartalom sajátos garantálása, *i)* a piaci szereplőkkel való hatékony együttműködés kialakítása, *j)* a jogszabályelőkészítés, *k)* a nemzetközi együttműködés, koordináció előkészítése vagy - meghatározott körben - ellátása, *l)* a nem hatósági típusú piaci elemző-értékelő funkciók, szolgáltatási tevékenységek.

3. A távközlési szabályozó hatóság szervezetének és tevékenységének általánosítható modelljei

Ahogy a fentiekben említésre került a távközlési szabályozó hatóság az igazgatási területek terjedelme, hatóköre szempontjából megfelelő ésszerűségek és garanciák mentén rugalmasan alakítható.

Az igazgatási funkciók, területek szempontjából tehát a *távközlésiszabályozó hatóságok* megszervezésének változatos *modelljei* alakultak ki világszerte, amelyek - döntően - az alábbi főbb típusokban rendszerezhetők:

a) Kizárólag a *szűk értelemben vett távközlés*, távközlési piac igazgatását, közigazgatási feladatait és hatásköreit ellátó, illetve szervezetében, jogállásában, költségvetésében önálló távközlési szabályozó hatóság.

b) A *postai és a távközlési* igazgatási feladatokat összevont szervezetben ellátó szabályozó hatóság.

c) A *távközléssel*, *az informatikával*, illetve a szűk értelemben vett távközlés fogalmán kívül eső *elektronikus kereskedelemmel*, *aláírással* és *egyéb elektronikus szolgáltatásokkal* összefüggő kiterjedt szabályozó hatósági funkciókat ellátó szervezeti rendszer.

d) Liberalizált vagy a liberalizáció folyamatában lévő *hálózatos közszolgáltatások igazgatását* egységes szervezeti keretben ellátó szabályozó hatóság. (Különösen a posta, a távközlés, a gáz-, az energia-, illetve a közlekedési, szállítási (azon belül általában a vasúti) ágazatok igazgatását tömörítő hatósági szervezet.) - Multi-szektor hatóság

e) Napjainkban a *legáltalánosabban alkalmazott*, illetve a távközlési közigazgatási intézményrendszer *fejlődési irányát* jelentő *szervezeti modell: a* távközlés fejlődése és a kiterjedt konvergencia alapján az *elektronikus-digitális médiával*, a *médiaigazgatással*, a *frekvenciagazdálkodással* és a *távközléssel* (bizonyos esetekben pedig még az *informatikával és a postával*) összefüggő igazgatási funkciók *egységes* szervezeti rendszereként működő szabályozó hatóságok[21].

[21] Ez utóbbi (- e) -) modellbe tartozó szabályozó hatóságok elsőként megszervezett, igen eredményes és hatékony „modellszerű" („úttörő" jellegű) alapvető intézményének az Egyesült Államokban 1934-ben létrehozott Federal Communications Commission (FCC) tekinthető, amely igen széles: a műsorterjesztésre, meghatározott körben a műsorszolgáltatásra, a távközlésre és a „kommunikáció", az információátvitel valamennyi infrastruktúrájára is kiterjedő hatáskörrel rendelkezik. A hírközlési igazgatási funkciók egységes szervezeti rendszereként Európában pedig kiemelendő az Egyesült Királyságban működő szabályozó hatóság az Office of Communications – Ofcom.

4. A távközlési szabályozó hatóság függetlensége

A távközlési szabályozó hatóságok függetlenségének alapjait tekintve *elhatárolható* egymástól:

1) a *piaci szereplők*, a *piaci viszonyok* irányában érvényesítendő,
2) az *államszervezeten belüli*,
3) a hatóság *szervezetét és tevékenységét* illetően biztosítandó *függetlenség* rendszere,továbbá
4) sajátosan *a szervezet anyagi alapjának, pénzügyi „függetlenségének" biztosítása.*

1) Mindenekelőtt általánosan megállapítható, hogy a távközlési szabályozó hatóságok - mind a szervezet, mind a tevékenység értelmében vett - függetlenségének *elsődleges* alapja és szempontja a *piactól, a piaci szereplőktől való függetlenség* teljeskörű és garanciális biztosítása a szabályozás keretében.

2) A piactól való függetlenséghez képest másodlagos jelentőségű a távközlési szabályozó hatóságok *államszervezeten belüli - szervezeti* értelemben vett - függetlenségének garantálása.

Kivéve az esetlegesen fenntartott távközlési állami tulajdont kezelő szervektől való függetlenséget.

A távközlési igazgatási feladatok jellege, jogérvényesítési tartalma, „hatóköre" tehát alapvetően *nem igényli* a *szervezeti autonómiát* elérő függetlenséget. A távközlési szabályozó hatóság függetlenségének jelentősége ugyanis *nem éri el* az államhatalmi ágak, az alkotmányos garanciák szintjét, fontosságát, elvi alapját.

Ebből következően a szabályozó hatóságok szervezeti függetlenségének „legmagasabb foka" általában a *minisztériumoktól*, illetve viszonylag ritkán a *kormánytól* való *függetlenség* biztosítása. Ezekben az esetekben a távközlési szabályozó hatóságot teljes egészében kivonják a miniszter, vagy a kormány irányítása és a legtöbb esetben felügyeleti jogköre alól is.

A távközlési igazgatási funkciók ellátásának *szervezeti függetlensége* tehát **a)** az *alkotmányjogi* összefüggéseket elérő *szervezeti autonómia* és **b)** az *államigazgatási hierarchiaközött* helyezkedik el.

a) A *szervezeti értelemben* vett közigazgatási-alkotmányjogi *autonómia* szintjének elérését *a következő okok miatt nem* szükséges biztosítani a távközlési szabályozó hatóságok tekintetében: *a)* A távközlés igazgatás nem a gazdasági verseny egészének igazgatását, hanem egy sajátos és elhatárolható szektorának igazgatását jelenti. *b)* Alapvetően gazdasági és műszaki igazgatás, tehát alapesetben annak ellenére, hogy napjainkra a legtöbb alkotmányos alapvető jog érvényesülésének egyfajta hátterét, alapinfrastruktúráját képezi, az alapvető jogok lényeges tartalmával közvetlen összefüggést nem mutat, az alapvető jogokkal kapcsolatos szabályozást érdemben nem érinti, továbbá nem is befolyásolja az alapvető jogok tartalmát. *c)* Az állami,

kormányzati, gazdasági berendezkedés egészét, a közszektor teljes szerkezetét meghatározó jelentőséggel nem rendelkezik. *d)* A gazdasági és társadalmi viszonyok valamennyi rendszerére kiható befolyással, hatással nem bír. *e)* Nem rendelkezik olyan tartalommal, amelyet a kormány érdekeivel szemben szükséges érvényesíteni. *f)* A alapesetben és jogállamban nem indokolt a kormány irányítási befolyásától, gazdaságpolitikai befolyásától védeni. (*Ide nem értve* a hatóság *tevékenységeinek, hatásköreinek gyakorlását*, a *tevékenység értelmében* vett *függetlenséget*.)

b) Az államigazgatási hierarchia, azon belül is döntően a kormány „alatti" központi közigazgatás (általában minisztériumok) *hierarchikus (szervezeti és szakmai) irányítási befolyása* alól viszont szükséges „kiemelni" a távközlési szabályozó hatóságot, mégpedig az alábbi okok miatt: *a)* Napjaink gazdasági és társadalmi viszonyainak egészében jelentős hatást gyakorol. *b)* Különösen érinti a gazdasági alkotmányosság elveinek megfelelő érvényesülését, az ország gazdasági versenyképességét, a gazdaság és a kereskedelem működésének és fejlődésének (szinte) teljes struktúráját. *c)* Alapvető és meghatározó részét képviseli a piacgazdaság szerkezetének. *d)* Az esetlegesen fenmaradt távközlési állami tulajdont általában a távközlésért felelős ágazati minisztérium kezeli (és e tulajdonosi hatalomtól elválasztandó a szabályozó hatóság irányítása). *e)* Információátviteli tartalma közvetett összefüggést mutat a társadalmi viszonyok fejlődésével és az alapvető jogokkal. *f)* Kiemelten igényli (pl.: az óriási „elsüllyedt" befektetési költségek, a lassú megtérülés, az intenzív verseny alapján) a gyors, szakmailag független és megalapozott döntéshozatalt, illetve különösen a szervezeti stabilitást a döntések következetességét, továbbá a piaci egyensúly folyamatos szakmai és nem politikai alapú biztosítását. *g)* Óriási gazdasági súlyából és állami bevételi (pl.: frekvenciák) forrásaiból eredő hangsúlyos szerepe. *h)* A globalizáció és az „információs társadalom" alapvető hálózati és szolgáltatási rendszerét képezi. *i)* Fokozott nemzetközi jelentőség és világszinten egységes működési követelmény-rendszer jellemzi. *j)* Meghatározó eleme a globalizálódó világgazdaság és nemzetközi kereskedelem fejlődésének.

A távközlési szabályozó hatóság *szervezeti,* államszervezeten belüli *függetlensége,autonómiájának garantálása* abban az esetben szükséges, ha

- egyrészt a *médiaigazgatással* és azon belül különösen az *elektronikus műsorszolgáltatással*, továbbá azon belül is a *műsorok tartalmával* kapcsolatos hatásköröket, államigazgatási funkciókat is ellátja.

- Másrészt, ha a távközlés igazgatása a gazdasági verseny igazgatását gyakorló szabályozó hatóság szervezeti kereteiben, a *versenyigazgatással egységesen* kerül megszervezésre.

Ezekben az esetekben *a)* a médiaigazgatás alapjait kijelölő véleménynyilvánítás szabadságával, illetve *b)* a gazdasági verseny igazgatásán belül a gazdasági verseny szabadságával összefonódó alkotmányos elvek, alapvető jogok, alkotmányjogi

jelentőségű jogintézmények és garanciális elvek *„visszahatnak”* a távközlési gazdasági igazgatásra és *szervezeti függetlenségének* alkotmányjogi alapú szükségességére.

Fontos hangsúlyozni, hogy *a)* a *távközlési igazgatás és a médiaigazgatás* szervezetének, valamint közigazgatási tevékenységeinek összefonódása egyre gyakoribb, sőt *tendenciának* minősíthető, míg *b)* a *távközlési igazgatás és a versenyigazgatás* egységes szervezete *nagyon ritka* megoldás.

Bár részletesebb elemzés nélkül úgy tűnhet, hogy a médiaigazgatás távolabbi összefüggést mutat a távközlési igazgatással a gazdasági versenyjoghoz képest. Alaposabb vizsgálatok alapján azonban általánosan megállapítható, hogy a közigazgatási beavatkozás, jogérvényesülés szempontjából a távközlési igazgatás közigazgatási hatósági és nem hatósági hatásköreinek rendje sokkal szorosabb kapcsolatban áll a médiaigazgatással, mint a gazdasági verseny igazgatásával.

A médiaigazgatással való szorosabb összefüggés legfontosabb szempontjai, indokai: a) A digitális átállás, illetve a konvergencia kapcsán a műsorterjesztés, a műsorszolgáltatás és a távközlési hálózatok, távközlési szolgáltatások közötti határok fokozatosan eltűnnek. b) A digitális fejlődéssel egyre jelentősebb a távközlési hálózatokon történő műsorszolgáltatási, műsorterjesztési típusú digitális jelátvitel. c) A rádiófrekvencia tekintetében világszerte szoros és érdemi együttműködési rendszer érvényesül a média- és a távközlési hatásköröket ellátó hatóságok között (hacsak a napjainkban általánosítható tendencia alapján a két szervezet nem került összevonásra). d) Az elektronikus média infrastrukturális alapjára vonatkozóan a távközlési jog és a médiajog egyaránt telepít közigazgatási feladat- és hatásköröket. e) A társadalom széles körét érintő kábeltelevízió és műholdas távközlés útján terjesztett műsorszolgáltatásra mindkét igazgatási ágazat szabályozási rendszere kiterjed (e szabályozást azonban komoly hiányosságok jellemzik, különösen Európában). f) Míg - az említés szintjén - a távközlési- és a versenyigazgatás keretében a közigazgatási jog ugyanúgy a piaci verseny hatékony működése érdekében avatkozik be a távközlési gazdasági folyamatokba és az azokhoz kapcsolódó társadalmi viszonyokba csak a közigazgatási jogérvényesülés, jogérvényesítés más-más módszerével. Vagyis teljesen eltérő alapokon nyugvó közigazgatási tevékenység és közhatalmi hatásköri rend szerint. Ebből következően a gazdasági verseny igazgatása és a távközlés igazgatás között (szükségképpen) éles határvonal érvényesül, amelyet az ún.: ex ante, a gazdasági verseny kialakulását, működését elősegítő, garantáló szektor-specifikus és aszimmetrikus versenyserkentő szabályozás, továbbá kizárólag a távközlési igazgatásra jellemző - piaci versenyre vonatkozó - jogintézmények jelölnek ki.

A média- és a távközlési igazgatás közötti szoros összefüggésben működő és számos esetben szinte azonos tárgykört érintő párhuzamos vagy megosztott hatásköri rendszerből következően általános tendenciának minősíthető a média- és a távközlési igazgatási feladat- és hatáskörök közigazgatási szervezeti szintű összevonása, amelyben

a két igazgatási struktúra ellátásáért az egységesen megszervezett közigazgatási szerv felel.

A szervezeti keret is fontos különbséget jelent tehát a távközlés és a versenyjog, illetve a távközlés és az elektronikus média összefüggéseit tekintve. A párhuzamos hatáskörök és egyéb sajátosságok alapján egységes közigazgatási szervezet keretében kialakított távközlési igazgatási és a médiaigazgatási funkciórendszer ugyanis hatékonyan működő közigazgatási szervezeti modell, míg a távközlési igazgatást ellátó hatóság és a gazdasági verseny igazgatását ellátó hatóság ésszerűen - a közérdekű működés szándékával, közigazgatás-tudományi szempontból megalapozottan - nem vonható össze.

Mindezek alapján a médiaigazgatás és a távközlési szabályozó hatóságok tevékenységének, szervezetének néhány összefüggését indokolt kiemelni.

A szervezetrendszer vonatkozásaiban - részletes ismertetés nélkül - egyik oldalról *megállapítható*, hogy a konvergencia, a digitális technológiai fejlődés és ebből következően az *elektronikus média*, azon belül a *műsorterjesztési platformok* területén általánossá vált *„digitális átállás”* alapvetően *átrendezi* mind a *média-*, mind a *távközlési piac* szerkezetét. Így a médiapiac és a távközlési piac *infrastrukturális* alapokon (pl.: műsorterjesztés) számos elemében összefonódik, sőt határozottan egységesülő tendenciát mutat. Másik oldalról viszont változatlan maradt, hogy a média (főleg a „tartalom”, a műsorszolgáltatás) és a távközlés társadalomtudományi, gazdasági, szabályozási szempontból általánosan és *lényeges szerkezeti tartalmát* tekintve is világszerte *élesen elkülönült*, elhatárolható struktúrát mutat.

A fejlődési folyamat e kettőssége *döntő hatást* gyakorol a távközlés és az elektronikus médiaigazgatás közigazgatási típusú intézményrendszerére, *szervezeti kereteire* is.

A *korábbiakban* egyértelműen elkülönülő *két önálló* igazgatási terület (amely alól az Egyesült Államok képez általános és igen sajátos kivételt) *egységes szervezeti keretének kialakítása körében* mind a *tevékenységek*, a közhatalmi, illetve egyéb feladat- és hatáskörök, mind a *jogérvényesítési* módszerek, *eljárási* mechanizmusok, mind pedig a *szervezet függetlensége* szempontjából *alapvető és döntő „kérdés”, hogy:*

a) kizárólag a *műsorterjesztés igazgatása, infrastrukturális alapja* és a távközlési piac igazgatása kerül közigazgatási szervezeti szintű *egységesítésre* az adott országban *vagy*

b) e szervezeti egységesítéshez még kapcsolódik a műsorterjesztéssel szorosan összefonódó *műsorszolgáltatás, műsortartalom igazgatásának*, szabályozási keretének és kiterjedt, sajátos állami funkcióinak egységesítése, becsatornázása is.

Ez utóbbi (**b)** pontban foglalt) esetben ugyanis az egységesített (távközlés-média) szabályozó hatóság szervezete az államszervezeti fékek és ellensúlyok elvi szintjét elérő alkotmányos súlyú függetlenséget és garanciális kereteket tesz szükségessé.

Az egységes szervezeti autonómia alól *talán* eredményesen megszervezhető *kivételt* jelenthet, ha a szervezeten belül *szervezeti egységként* (önálló közjogi és magánjogi jogalanyiságú szervezeti egységként) *elválasztásra* kerülnek a médiaigazgatási és a távközlési igazgatási funkciók. A szervezet e formájában *elvileg megoldható*, hogy *csak a médiaigazgatás* tekintetében érvényesüljön az autonómia, az alkotmányjogi szintű, „teljeskörű" *szervezetifüggetlenség* (amelyben a legfontosabb garanciális szempont általában a kormánytól, a végrehajtó hatalomtól való függetlenség biztosítása). Bár ez igen sajátos szervezeti megoldásokat, módszereket igényel (pl.: az elkülönített szervezeti egységek saját belső igazgatása, vezetése, tehát akár két testület egy szervezet élén, stb).

A *médiával* összefüggő *közigazgatási* típusú *hatásköri struktúra* és *szervezeti rendszer* kialakítását *alapvetően meghatározza*, hogy az *elektronikus médiapiac gazdasági viszonyai* teljes egészében összefüggésben állnak a műsorkészítéssel, a *műsorszolgáltatástartalmával* és a műsorterjesztés szerkezetével. A *műsortartalommal* összefüggő *médiahatósági feladatok* ellátásában és a *szervezeti rendszer* jogállásában meghatározó szereppel bír a média alkotmányos alapvető jogokkal, nemzetközi szabályozással összefüggő sajátos struktúrája is, amelyek különösen indokolják az autonóm, alkotmányjogi elveken alapuló szervezeti függetlenséget. A műsorszolgáltatással összefüggő közigazgatási funkciókat gyakorló nemzeti hatóságok ugyanis alapvető hatással rendelkeznek a kulturális örökség, a kulturális értékek megőrzésében, műsorszolgáltatással szorosan összefüggő emberi jogok és demokratikus intézmények védelmében, fejlesztésében is.

A médiahatóság feladat- és hatáskörei azon az alapon is sajátosak, hogy a médiatartalom körébe történő közigazgatási beavatkozás jogállami keretek között minden részletében alkotmányos garanciákat tesz szükségessé, továbbá a beavatkozás tartalmát a nagyfokú óvatosság és az arányosság határozza meg. Ezen túlmenően a médiaigazgatás szabályozásában sajátos társadalmi és gazdasági viszonyok érvényesülnek, különösen: *a)* a véleménynyilvánítás szabadsága, *b)* a közszolgálati média szektora, *c)* a tömegkommunikáció társadalmi, kulturális hatásai, politikai szerepe, meghatározó gazdasági ereje, funkciói, valamint *d)* a médiapiac gazdaság egészében gyakorolt jelentősége, szerkezete.

A távközléssel ellentétben tehát a média műszaki és gazdasági háttere nem teljes egészében határozza meg a médiára vonatkozó jogszabályok rendjét, ugyanis a média esetében külön óriási szerepet kap annak tömegkommunikáció tartalma és társadalmi hatásmechanizmusa. Azaz bár műszaki és gazdasági szempontból a média is hasonlóan jelentős terület, mint a távközlés, mégis a médiapiac szerkezetében - a távközlési piachoz képest - egészen más típusú gazdasági folyamatok zajlanak és a jogi szabályozás is teljesen eltérő szabályozási módszereket, tartalmi sajátosságokat mutat. (Ennek legfontosabb okai közül - ismét - megemlítendő, különösen: a média tömegkommunikáció tartalma, társadalmi hatása, kulturális és politikai szerepe, illetve

az, hogy a médiapiac és a médiaszabályozás legáltalánosabb kereteit az ún.: első generációs emberi jog, vagyis a szabadságjognak minősülő véleménynyilvánítás szabadsága jelöli ki.) Ezért nem valósult meg nemzetközi keretekben az egyes országok médiapiacának liberalizációja, a médiapiacban meghúzódó gazdasági lehetőségek teljes kiaknázása. Ehhez kapcsolódik még a rádiózás és a televíziózás frekvenciaigénye, amely korlátos erőforrásként jelentősen behatárolja a műsorszolgáltatás, a kiegyensúlyozott tájékoztatás és a véleménypluralizmus kiteljesedését. (Napjaink digitális fejlődése azonban ez utóbbi szempontot lassanként túlhaladottá teszi, hiszen a „digitális átállás" jelentősen enyhíti a frekvencia-szűkösséget.)

A fenti szempontok döntő hatást gyakorolnak a távközlési szabályozó hatósági szervezet kialakítására, a feladatellátás megszervezésére (amennyiben a távközlési igazgatás és a médiaigazgatás, azon belül a műsorszolgáltatás közigazgatási feladat- és hatáskörei egységesítésre kerülnek).

3) A távközlési szabályozó hatóságok függetlensége elengedhetetlenül szükséges és garanciális szabályozási kereteket igényel *tevékenységeinek* gyakorlása, megfelelő ellátása körében.

Alapvetően fontos szabályozási követelmény a *szabályozó hatóság tevékenységeire* vonatkozó államszervezeten belüli, különösen a *kormánytól*, a *„politikától" való függetlenség* biztosítása. A távközlési szabályozó hatóságok ugyanis a gazdasági és társadalmi viszonyok szinte teljességét, illetve a távközlési verseny közérdekű tartalmát érintő, igen sajátos tevékenységeket gyakorolnak, amelyekben kiemelten fontos a *feladatellátás* és a *döntéshozatal* függetlenségének garanciája.

Az államszervezeten belül országonként változóan érvényesülő *szervezeti és szakmai irányítási viszonyok* keretéből tehát általánosan szükséges kivonni a távközlési szabályozó hatóság *tevékenységeit*.

Különböző *módszerekkel*, amelyek közül *a legfontosabbak*:

a)Az irányító szerv jogosultságai körében korlátozandó vagy teljesen kizárandó *aa)* a konkrét utasítási jog, *ab)* a tág mérlegelést biztosító aktus-felülvizsgálati jogkör, *ac)* a jogszabálynak nem minősülő (és ebből következően a jogalkotással összefüggő garanciákat nem tartalmazó), de normatív típusú irányítási, szabályozói eszközök alkalmazása.

b) Fontos garantálni, hogy a hatóság alkalmazottai tevékenységük ellátása keretében nem irányíthatók, nem utasíthatók.

c) Mindezzel összefüggésben ugyanúgy általános, alapvető szabályozási tárgykörnek minősíthető a szabályozó hatóság hatásköreinek rögzítettsége, „elmozdíthatatlansága", elvonhatatlansága.

4) A hatóság *anyagi alapjának*, finanszírozásának *pénzügyi, költségvetési típusú függetlensége*.

A szabályozó hatóságok függetlenségének kiemelt biztosítéka a *szervezet anyagi, pénzügyi függetlensége*. A pénzügyi függetlenség *nem az állami költségvetéstől* való függetlenséget, hanem a hatóság garanciális *védelmét* jelenti *anyagi alapjainak* - egyedi gazdasági, politikai érdekek mentén történő - *kiüresítésétől*.

A hatóság működésének pénzügyi alapjai ugyanis jelentősen befolyásolják a hatóság hatékony feladatellátását és önállóságát. A hatóságok finanszírozására vonatkozó szabályok keretében tehát pontosan kell meghatározni a hatóság feladatainak, hatásköreinek független és maradéktalan ellátásához szükséges költségvetést, pénzügyi alapokat.

Kiemelten fontos garanciális elv a hatóság *finanszírozási rendszerét biztosító* állami vagy egyéb *szervezetek* (akár piaci szereplők) *eseti* döntéseitől való *függőséget kizáró* finanszírozási eljárások, módszerek szabályozása a hatóság működésének anyagi alapjai körében.

Általánosan alkalmazott módszer, hogy a jogi szabályozásban részletesen meghatározott feltételek mentén a *piaci szereplőkre* kirótt *díjfizetési kötelezettség* biztosítja a távközlési szabályozó hatóság finanszírozását, anyagi alapját. Ebben az esetben olyannyira objektív, pontosan meghatározott, továbbá „egyszerű", hatékonyan érvényesíthető és átlátható *díjfizetési rendszer* kialakítása szükséges, amely *nem veszélyezteti* a hatóság *piaci szereplőktől* való *teljeskörű függetlenségének* érvényesülését, garanciális kereteit.

5) A távközlési szabályozó hatóságok *szervezetének* („szervezeti"), illetve *tevékenységének* („szakmai") *függetlensége* körében fontos összefoglaló jelleggel *meghatározni* azokat az alapvető és általánosítható szabályozási *követelményeket*, amelyek garantálják, biztosítják a hatóság valóban független működését.

A) A feladatellátás és a „függetlenség" *garanciáinak*, kereteinek *jogi szabályozásban* (azon belül általában törvényi szinten) történő rendezése. A hatóság szervezetét és működését meghatározó jogszabályokban *világosan, egyértelműen* szükséges *rögzíteni* e hatóságok *a)jogállását*, *b)feladat- és hatásköreit*, *c)jogérvényesítési* módszereit, eszközeit, *d)eljárási* mechanizmusait és annak részletes szabályait, *e)* sajátos *felelősségét*, *f)tagjai, alkalmazottai* kinevezésére és elmozdítására, összeférhetetlenségére, valamint *g)* a szervezet *anyagi forrásaira*, finanszírozására, költségvetésére vonatkozó rendelkezéseket.

B) Kiemelten fontos a hatóság „függetlenítése" a *politikai befolyástól egészében*, míg a *kormány gazdaságpolitikai* befolyásától *részlegesen*. (A leghatékonyabb módszer már a befolyás lehetőségének kizárása.)

A gazdaságpolitikai befolyás körében a *részlegesség* azt jelenti, hogy a kormány „mindennapi", egyedi gazdaságpolitikai befolyásától szükséges garantálni a

függetlenséget (és nem a kormány általános, a nemzetgazdaság egészére kiterjedő gazdaságpolitikai programjától, döntéseitől, eszközeitől, irányaitól).

C) A hatóságok független működése körében a hatóságok *vezetőjének/vezetőinek, tagjainak kinevezését* átlátható, a szakmaiságot garantáló módon (pl.: pályázat, érdekképviseleti szervek bevonása, szigorú képesítési feltételek, stb.) és részletes jogi szabályozás keretében szükséges biztosítani.

Szervezeti és szakmai szempontból is fontos garanciája lehet a hatóság függetlenségének a *testületi vezetés* és a *testületi döntéshozatal* meghatározása, szabályozása.

D) A szabályozó hatóság függetlenségének fontos biztosítéka a hatóság *vezetőjének/testületi vezetőinek határozott idejű*, illetve a választási cikluson túlnyúló megbízatási időtartamra történő kinevezése.

(Fontos garanciális módszer továbbá, hogy a szabályozó hatóság vezetőjének/vezetőinek kinevezési jogkörét nem a kormány tagja gyakorolja.)

A függetlenség teljeskörű érvényesülése érdekében a hatóság vezetőinek, tagjainak elmozdítását, „megbízatásuk visszavonását" garanciálisan szükséges szabályozni, amelyben biztosítani kell a politikai alapú döntések, eszközök és a függetlenség csorbítására alkalmas gyakorlatok kizárását.

E) A hatóság tagjaira vonatkozó *összeférhetetlenségi* szabályok, amelynek a hatóság szakmai függetlensége szempontjából legfontosabb funkciója, hogy megalapozza a hatóság tagjainak objektív, „külső" befolyás-mentes tevékenységét (vagyis kizárja a politikai, gazdaság, piaci szereplők és érdekképviseleti szervek közvetlen befolyását, a lobbi tevékenység eredményes érvényesítését).

Az összeférhetetlenség szabályozásában alapelvi szintű, általánosan alkalmazott garanciális, tartalmi elemek, különösen: a hatóság tagja, különösen vezetője nem lehet egyidejűleg tagja a törvényhozásnak, illetve nem lehet tagja a kormánynak, a pártoknak. Nem láthat el politikai jellegű megbízatást. Nem létesíthet jogviszonyt és nem rendelkezhet érdekeltséggel, befolyással a távközlési piaci szereplők, gazdálkodó szervezetek vagy azokkal szorosan összefonódó szervezetek körében (a piaci szereplőktől való függetlenség kiemelt garanciája).

5. A távközlési szabályozó hatóság „szabályozási", jogalkotási hatásköre

Általánosan megállapítható, hogy a távközlési szabályozó hatóság *nem rendelkezikjogalkotási hatáskörrel*, jogszabályok létrehozására és jogforrási szintű normaalkotásra vonatkozó jogosítványokkal. Általában tehát élesen *elválasztva* működik a távközléssel összefüggő *jogalkotó* és a távközlési szabályozó hatóságok feladatát kijelölő *jogérvényesítő* feladat- és hatáskör.

Ahogy már említésre került a szabályozó hatóság más típusú „hatóságoktól" való *elhatárolási ismérvenem* a *szervezeti függetlenségben* és *nem is a jogszabály-alkotási* hatáskörben keresendő.

1) A jogszabály-alkotási hatáskörrel összefüggésben kiemelendő, hogy számos országban, még ott is, ahol a szabályozó hatóság viszonylag „idegen" intézménynek számít, a szabályozó hatóságok a *piacszabályozási funkción* belül *széleskörű normatív típusú*, „általános érvényességű" *döntéshozatali* hatáskörrel is rendelkeznek. Továbbá szintén széles körben kapnak felhatalmazást a vonatkozó jogszabályok autentikus, az egyedi ügyek terjedelmén kívüli értelmezésére általában különféle *normatív eszközökkel* (pl.: ajánlás, iránymutatás, közlemény, elvi döntés).

A szabályozó hatóságok egyedi jogérvényesítéshez képest tágabb körű *a)* normatív típusú általában ajánlás, iránymutatás tartalmú jogköreinek illetve *b)* általános, elvi, szabályozói jellegű döntési hatáskörének bevezetése, illetve terjedelme szinte valamennyi liberalizációt folytató országban folyamatos „napirendi" pontot képez.

A szabályozó hatóságok *normatív típusú aktusaival*, eszközeivel összefüggésben az egyes országok jelentős változatosságot mutatnak *egyrészt* abban, hogy egyáltalán *biztosított-e* a normatív aktus-kibocsátási jogkör, *másrészt* pedig - amennyiben biztosított - a normatív aktusok, eszközök típusainak *szabályozása, tartalma*, garanciái tekintetében. A normatív, „szabályozási" eszközök közül néhányat *példaként* megemlítve: ajánlás, útmutató, iránymutatás, jogalkalmazási szempontból általános elvi jelentőségű döntés, közlemény, különböző formanyomtatványok, „iratminták", tájékoztatás.

A piaci folyamatokkal, a piaci verseny gyorsan változó fejlődésével összefüggő normatív típusú (nem egyedi, hanem) általános jogértelmezési hatáskör vitán felül álló *alapvető* és jogállami keretekben nélkülözhetetlen *eleme,* hogy kizárólag *a)* a jogalkotás egyértelműen meghatározott *felhatalmazásán* keresztül és *b)* annak *terjedelmi határaiban* biztosítható, továbbá *c)* pontos kidolgozást és *garanciálisszabályozást* igényel tartalma, meghozatalának eljárási menete-struktúrája, esetleges kötelező jellege, a jogorvoslat rendszere és *d)* a - közigazgatási szervezethez képest - elkülönült külső jogalanyokat, piaci szereplőket érintő jogi hatása.

Kiemelten fontos, hogy a szabályozó hatóság hatásköreit rendező jogi szabályozás keretében a normatív jellegű hatáskörök kizárólag a *piaci verseny* fejlődése, a megfelelően megalapozott *jogérvényesítés* és a *közérdekű* garanciák érdekében biztosíthatók, amelyben kifejezett és részletező rendelkezésekkel szükséges védeni a piaci szereplők jogait.

A *piaci szereplők* jogainak *garanciális védelmét* biztosító rendelkezések közül *kiemelhető a)* az előzetes konzultáció, *b)* a piaci szereplők, illetve az érintett jogalanyok bevonása a döntés-előkészítésbe, *c)* vonatkozó együttműködési, koordinációs viszonyok a piaci szereplőkkel, *d)* a normatív aktus közvetlen kötelezettséget nem telepít, vagyis a

külső jogalanyok jogainak és kötelezettségeinek meghatározása a normatív aktus szerinti tartalommal is egyedi aktust igényel, amely ellen többfokú jogorvoslat biztosított, *e)* a „szabályozó hatáskör" kötelező tartalom nélkül kizárólag a piaci jogalanyok önkéntes jogkövetését segíti, a közhatalmi jogérvényesítés elkerülése céljából, *f)* kötelező figyelembe venni az átfogó, minden szolgáltatóra kiterjedő konzultációk körében beérkezett véleményeket, észrevételeket, stb.

2) A szabályozó hatóság normatív aktusok kibocsátására vonatkozó felhatalmazása számos előnyt is magában hordoz, amelyek közül - általánosítható értelemben - az alábbiakat szükséges kiemelni:

a) A szabályozó hatóságok egyedi ügyektől elvonatkoztatott általános jellegű, normatív tartalmú aktusai megfelelő garanciák mentén kellően alkalmazkodnak a távközlési piac rohamosan fejlődő, folyamatosan változó működéséhez, a távközlési szolgáltatások összetett technológiai, gazdasági alapjaihoz, sajátos jogérvényesítési módszereihez.

b) A szabályozó hatóságok jelentős szakértelemmel, jogalkalmazói tapasztalattal rendelkeznek a távközlési piac egészének bonyolult szerkezetét tekintve, különösen a piacszabályozás, a piacvédelem, a piaci verseny közérdekű fejlődése és közszolgáltatási tartalom garantálása szempontjából.

c) Biztosítja az általános jogértelmezést olyan társadalmi és gazdasági viszonyok tekintetében, amelyek kialakulására, működésére a távközlésre vonatkozó jogszabályok megalkotása idején nem lehetett számítani vagy olyan összetett, újszerű elemeket tartalmaznak, amelyekre a jogi szabályozás még alapos, körültekintő jogalkalmazás, jogszabály-értelmezés alapján sem adhat egyértelmű megoldást.

d) Hatékonyabban garantálhatja a távközlés piac - utólag korrigálhatatlan - alapvető stratégiai irányainak kijelölését, közérdekű fejlődésének védelmét, illetve szerteágazó gazdasági és társadalmi hatásait.

3) A távközlési szabályozó hatóságok *normatív típusú* aktusainak, eszközeinek *fontosabbtartalmi* elemei*, modelljei, garanciális elvei* az alábbiak szerint rendszerezhetők.

A) Alapvetően kizárólag a *távközlési tevékenységekre* vonatkoznak, vagyis a távközlési *piaci szereplők* tevékenységét befolyásolják általánosabb tartalmi keretekben. A fogyasztók, felhasználók, *előfizetők* (tehát a távközlési előfizetői szolgáltatásokat igénybevevők) tekintetében *általában nem* alkalmazhatók, nem irányadók. A normatív aktusok hatálya tehát az *előfizetőkre közvetlenül nem* terjedhet ki.

B) A távközlési *piaci szereplők* vonatkozásában *sem* bírnak - általában - *közvetlenül kötelező* tartalommal, hanem *közvetett* módon érvényesülnek.

Vagyis kifejezetten a szabályozó hatóság jogalkalmazásának fő tartalmi elemeit, a jogérvényesítésben figyelembe veendő, értékelhető releváns piaci magatartásokat, a mérlegelési szempontokat, a vonatkozó jogszabályok értelmezésének alapvető elveit határozzák meg, amelyek *csak egyedi jogalkalmazás* útján, az egyedi *eljárás* garanciális keretében érvényesülnek a szolgáltatók tekintetében. A normatív típusú szabályozói aktus azonban ily módon *közvetetten befolyásolhatja* a piaci szereplők tevékenységét, rugalmassá teheti a piacszabályozást, ugyanis számos egyedi jogalkalmazás, közhatalmi beavatkozás elkerülhető, ha a *szolgáltatók előzetesen megismerik* a szabályozó hatóság *a)* egyes ügyekkel, jogszabályokkal összefüggő következetes jogértelmezésének irányát, szempontjait, *b)* az esetlegesen jogszabálysértésként értékelt magatartásokat, és *c)* azok piaci súlyát, továbbá *d)* a valószínűsíthetően alkalmazásra kerülő szankcionálás gyakorlatát, elvi alapját.

Egyes országokban következetesen *helytelennek tartják* az ilyen típusú piaci befolyást, azon az alapon, hogy az adott normatív eszköz ugyan egyedi jogalkalmazás eredményeként válik kötelezővé és így általában többfokú jogorvoslat garantálja a piaci szereplők védelmét, mégis *előzetesen befolyásolja* a piaci szerkezetet, a szolgáltatók magatartását, amely ellen *nem* biztosított a *„jogorvoslat”*. A szolgáltatók magatartására vonatkozó esetlegesen *téves hatósági befolyás* a jogállamban beláthatatlan *következményekkel* járhat, ugyanis ha a szolgáltatók *követik* a normatív típusú aktusban foglalt hatósági jogértelmezést (pl.: a jogszabálysértés, a szankció elkerülése érdekében) és ebből következően *nem is kerülnek* a hatósági jogalkalmazás közhatalmi jogviszonyainak keretébe, akkor a vonatkozó tárgykörben *egyedi aktus sem* keletkezik a szolgáltató irányában, amellyel szembeni *jogorvoslat* során megállapításra kerülhet a hatóság téves jogalkalmazási gyakorlata. Ez esetben tehát a garanciákkal védett egyedi közhatalmi hatáskörökön kívüli általános normatív típusú hatósági aktus „nyomására”, hatására kvázi *önkéntes magatartások* útján akként érvényesül a közjogi norma, hogy a hatóságok jogértelmezésének tartalmával szemben a szolgáltatók *jogvédelmét* nem töltik ki garanciális biztosítékok.

Más megközelítés szerint viszont megfelelő garanciákkal *e hátrányok kizárhatók,* illetve olyannyira csökkenthetők, hogy a normatív típusú hatósági aktus rugalmasságában, piaci viszonyokhoz igazíthatóságában, a piaci verseny szerkezetére is kiható jogsértések megelőzésében rejlő *előnyei meghaladják* annak hátrányait.

A *„kettő közötti” egyensúlyt képező* megoldásnak tekinthető, ha a *szabályozás nem* biztosítja a *normatív* típusú *piacszabályozási aktusok* kibocsátásának jogosítványát, de *más módszerek* alapján lehetővé teszi általános piaci hatások elérését, esetleges kiváltását. Ilyen *módszereknek* minősíthetők, pl.:

a) Az egyedi ügyekben hozott határozatok, illetve a jogorvoslati eljárásokban hozott döntések - megfelelő adatvédelem mentén történő - *nyilvánosságra* hozatala,

b) esetleg az egyedi döntésekben foglalt jogalkalmazási gyakorlatot meghatározó jogszabály-értelmezés általános *elvi alapjainak hangsúlyozása*, kiemelése.

c) A szolgáltatókkal széleskörben folytatott *konzultatív mechanizmusok*, együttműködési keretek, eszközök.

d) Részletes garanciák és megfelelően kidolgozott szabályozás mentén egyes egyedi jogerős döntések utólag „általános döntéssé", *jogalkalmazási gyakorlatot meghatározó*, kiemelt döntéssé nyilvánítása.

e) A szabályozó hatóság *piaci elemző, értékelő tevékenységének*, dokumentumainak széleskörű nyilvánossága, esetleg megvitatása, illetve *szakmai, tudományos fórumok* szervezése a piaci szereplők részvételével.

C) Általánosan érvényesülő modellnek tekinthető az egyedi, konkrét *eljárások megfelelő lefolytatásához* szükséges *eljárási cselekmények* vonatkozásában biztosított normatív típusú aktus-kibocsátási jogosultság a szabályozó hatóság számára.

Az ilyen tartamú „szabályozási" jogkör - akár közvetlenül kötelező jelleggel - az egyes piacszabályozási, piacfelügyeleti eljárásokhoz szükséges és általában valamennyi piaci szereplőre egységesen kiterjedő követelmények formai, tartalmi elemeinek, konkrét tárgyának meghatározására vagy esetleg formális („formanyomtatványok", „minták", adatszolgáltatási táblázatok, stb.) előírására vonatkozó normatív jellegű hatásköröket foglalja magában. Alkalmazása, szabályozási módszere minden esetben egyedi, konkrét hatósági hatáskörökhöz és eljárásokhoz kötött.

Az ide sorolható normatív eszközök, aktus-típusok tekintetében az *egyedi eljárások garanciái*, így *jogorvoslati rendszere* is érvényesül, ezért *széleskörben* alkalmazott és elfogadott módszer. Alapvetően a piaci szereplők *eljárási jogait és kötelezettségeit* határozza meg általánosabb értelemben és a piaci szereplők érdekében, azaz a piaci szereplők egyes eljárásokban való részvételének könnyítését, segítését, egyszerűsítését célozza.

(Léteznek olyan modellek, ahol pontos szabályozási garanciák mentén a szabályozó hatóságok ilyen típusú normatív hatáskörei, aktusai közvetlenül kötelezőek a piaci szereplők számára.)

D) Szintén a normatív eszközök körébe sorolhatók a piaci szereplők *tájékoztatása*, egyes bonyolult *eljárásokra* való *„felkészülésének"* elősegítése, illetve az *önkéntes jogérvényesítés* ösztönzése érdekében kiadott *közlemények, iránymutatások, tájékoztatások* kibocsátása a szabályozó hatóságok részéről.

(Pl.: jelentősebb és összetett piacszabályozási hatáskörök menetét, a vizsgálat szempontjait, módszereit, a releváns adatköröket, a vonatkozó piaci tevékenységeket, a jogalkalmazás elveit ismertető közlemények, továbbá a piacfelügyelet vizsgálati szempontjait képező főbb piaci magatartásokra, szankcionálási politikára vonatkozóan kiadott tájékoztatások.)

Előkészítésük általában a piaci szereplők bevonásával és a piaci szereplők véleményének figyelembevételével történik. E tájékoztatások, közlemények tartalma „ránézésre" nem normatív jellegű, hiszen a piaci szereplők magatartását tekintve

általánosabb értelmű jogi hatást nem váltanak ki, mégis a normatív jellegű közhatalmi aktusok típusába sorolhatók, hiszen kifejezett *jogi hatással* rendelkeznek az *eljárási jogviszonyok* keretében. Vagyis az eljárási jogviszonyokban a felek eljárási jogait és kötelezettségeit tekintve jogi hatást váltanak ki az eljárás elveinek, menetének értelmezésével és a jogalkalmazás eljárásjogi alapjainak elemzésével.

6. A távközlési szabályozó hatóság alapvető jellemzője és fő elhatárolási ismérve: a közigazgatási tevékenységeinek rendszere

Mint ahogy már említettem a szabályozó hatóságok tevékenységének rendszere képezi a szabályozó hatóság önálló elhatárolási ismérveinek, szervezeti sajátosságainak legfontosabb alapját.

Mint ahogy az állami *funkciók*, az állami *feladatok* struktúrája *alapvető hatást* gyakorol a feladatot ellátó közigazgatási *szervezet* felépítésére, megszervezésére, ugyanúgy a távközlés állami beavatkozást, állami feladatellátást igénylő viszonyai is alapjaiban meghatározzák a *távközlési szabályozó hatóság* szervezetét, funkcióit, működését. A liberalizált távközlési piac sajátos szerkezete, jellemzői alapján tehát a távközlési szabályozó hatóságok *egyrészt* általában a *távközlési piac* működésének *teljességét* érintő beavatkozási, igazgatási hatáskörökkel rendelkeznek, *másrészt* feladat- és hatáskörük általánosságban is igen jellemző sajátosságokat mutat. A távközlési szabályozó hatóság *közigazgatási tevékenységeinek* általánosítható *sajátos jellemzői* közül *kiemelendő:*

1) Alapvető a konkrét *piaci szereplők* egyedi „ismerete" és a velük kialakított *szoros együttműködési* típusú kapcsolat.

2) A közhatalmi beavatkozás mellett kiemelten fontos a távközlési szabályozó hatóság *„szolgáltató"* típusú feladatellátása, a piaci szereplőkkel közösen kialakított távközlési versenyben betöltött *stratégiai szerepe*.

3) A piacfelügyelettel összefüggő egyedi jogérvényesítés, különösen a *szankcionálás* lehetőségek szerinti *elkerülése* a jogszabályban biztosított „alternatív" módszerek alapján.

A távközlési piaci verseny kiemelten fontos gazdasági és társadalmi hatása, illetve a szolgáltatási rendszer folyamatos és megfelelő működése érdekében a hatóság a *piacszabályozási* jogalkalmazási hatáskörökön *kívül* - a lehetőségek szerint - konzultációk, széleskörű együttműködési eszközök, továbbá szolgáltató, operatív, szervező tevékenységek mentén is „próbálja" biztosítani a piac működését, közérdekű fejlődését és a piaci szereplők *önkéntes jogkövető* magatartását. Különösen a *piacfelügyelet* keretében a szabályozó hatóság általában minden jogszabályban biztosított eszközzel a jogsértések *megelőzésére* törekszik és nem a közhatalmi eszközök egyedi alkalmazására.

4) A szabályozó hatóság távközlési *piaci verseny* biztosításával, fejlesztésével, intenzitásának növelésével összefüggő közhatalmi hatásköreinek és egyedi

jogérvényesítési módszereinek kiemelten fontos és alapjaiban sajátos tevékenysége: a *piacszabályozás*. Nemzetközi összehasonlításban is általánosítható fontosságára, illetve a tanulmány tárgykörét alapvetően érintő jelentőségére tekintettel lásd önálló (*6.1.*) alpontban.

5) A távközlési igazgatás egyik legalapvetőbb és „nélkülözhetetlen" tevékenysége a távközlés *közösségi típusú ellenőrzésével* összefüggő sajátos *piacfelügyelet* (illetve az egyéb elnevezésekkel meghatározott, de tartalmában piacfelügyeleti típusú tevékenység).

6) A távközlési szabályozó hatóságok a *piacszabályozási* és *piacfelügyeleti* tevékenységeken *kívül* is kiterjedt *közhatalmi funkciókat* gyakorolnak, így különösen:

a) A *piacralépés feltételeinek* biztosítása.

A piacralépés szabályozási és jogérvényesítési módszerei igen változatosak, amelyek közül példa-szinten hangsúlyozandó:

a) A piacralépés hatósági *engedélyhez* kötött.

b) A piacralépés ún.: *általános engedélyhez* kötött, amelyben a jogszabály határozza meg a piacralépés feltételeit és azok teljesítése esetében a hatóság *nem mérlegelheti* az engedély, illetve egyéb aktus meghozatalát („jogilag teljesen kötött", kógens, azaz mérlegelési jogkört nem biztosító szabályozáson alapuló aktus).

c) A piacralépés sajátos „engedélyezése" a meghatározott feltételek teljesítése esetében történő *konstitutív típusú nyilvántartásba* vétel.

d) A piacralépés tekintetében *nem* érvényesül formális *hatósági eljárás*. A hatóság tehát a piacralépés tényét (bejelentését) kizárólag bejegyzi *deklaratív típusú* nyilvántartásba. Ilyen esetben a nyilvántartásba vételi deklaratív aktus *nem* rendelkezik *döntéstartalommal*.

(A közérdek, a távközlési szolgáltatások kiemelt fontossága, a speciális felelősség alapján a *szabályozás minden esetben* rendezi - még a piacralépéssel összefüggő jogalkalmazási hatáskörök hiányában is - a piacralépés hatóság általi „tudomásulvételének" módszereit, mégpedig általában *nyilvántartásba vétellel* összefüggő hatáskörök keretében. A kiterjedt és erős beavatkozást biztosító piacfelügyeleti és piacszabályozási tevékenységek megfelelő ellátásához ugyanis a szabályozó hatóságnak „ismernie" kell a piaci szereplőket.)

b) Az *egyedi engedélyezésre* vonatkozó közhatalmi hatáskörök.

A piaci viszonyok keretébe előzetesen, egyedi jogosítás, engedélyezés útján beavatkozó jogalkalmazási tevékenység viszonylag *szűk körre* szorult vissza a liberalizált távközlés igazgatásán belül. Általánosan egyedi hatósági engedélyezési hatáskörben maradtak a *korlátos erőforrások*, különösen a frekvenciákkal, azonosítókkal, illetve azok kiosztásával, megfelelő használatuk biztosításával összefüggő jogalkalmazó hatáskörök.

Az általánosabb szintű *frekvenciagazdálkodás és azonosítógazdálkodás* állami feladatait, illetve a vonatkozó nemzetközi koordinációt a távközléspolitikát kidolgozó,

távközlési ágazat-szintű jogalkotási tevékenységet ellátó állami szervezet gyakorolja vagy - számos országban - e feladatokat is a távközlési szabályozó hatóság látja el (nem közhatalmi típusú tevékenységként).

Ide sorolhatók továbbá - országonként igen változatosan - a távközlési *infrastruktúra építési engedélyezésével* összefüggő építési igazgatási hatáskörök.

Az egyes országokat vizsgálva, a távközlési korlátos erőforrásokkal és szűk keresztmetszetekkel összefüggő egyedi közhatalmi hatáskörök közül leggyakrabban a távközlési építési igazgatást utalja szabályozás a távközlési szabályozó hatóságon kívüli más közigazgatási szervezet (általában az általános építéshatósági jogkört gyakorló szervezet) hatáskörébe.

c) Az *egyetemes szolgáltatással* összefüggő hatósági feladat- és hatáskörök ellátása, különösen a „megfizethető árakkal" összefüggő árszabályozás, az egyetemes szolgáltatási kötelezettségek, fejlesztések érvényesítése, ellenőrzése, az egyetemes szolgáltatás finanszírozásával kapcsolatos hatáskörök, stb.

d) A szolgáltatók közötti *jogvita-rendezési eljárások*, eljárás-típusok.

(Ennek keretében jelentős jogintézményeknek tekinthetők a különféle közvetítő-, egyeztető-, előzetes döntéshozatali- és egyezséget jóváhagyó eljárások, továbbá a jogvitával összefüggő közhatalmi jogalkalmazási hatáskörök, eljárási modellek.)

e) A távközlési szolgáltatásokkal összefonódó széleskörű és jellegzetes *fogyasztóvédelmi* hatáskörök, *minőségvédelmi* feladatok.

f) A *hálózati és előfizetői eszközök*, készülékek minőségével, biztonságával, együttműködő-képességével kapcsolatos hatósági hatáskörök.

7) A távközlési szabályozó hatóságoknak a piaci verseny fejlődése, működése, a távközlési szolgáltatások biztosítása szempontjából alapvetően fontos tevékenységét jelenti a *nem közhatalmi, nem hatósági típusú* feladatellátás. Ide sorolhatók:

a) A piaci szereplők irányában vagy nemzetközi szinten, nemzetközi és nem kormányközi szervezetekben, illetve az államszervezeti rendszeren belül folytatott kiterjedt egyeztetési, *koordinatív funkciók*, operatív, szervező tevékenységek és szolgáltató feladatok.

b) *Távközlés-politikai*, távközlés-stratégiai feladatok.

c) Kiemelten fontos szabályozó hatósági feladat - a jogalkotáshoz kapcsolódóan is - a *nem hatósági piaci elemző, értékelő* tevékenység.

(A nem közhatalmi, nem hatósági piaci elemző, értékelő tevékenység tehát élesen elhatárolandó a piacszabályozási hatáskörök keretében szabályozott és a piaci erő megállapításához kötődő piacelemzési hatósági hatáskörtől.)

A szabályozó hatóság *piaci elemző, értékelő tevékenysége* döntő jelentőségű *központielemea)* a távközlési *jogszabály-előkészítési* tevékenység megfelelő ellátásának, *b)* a *távközléspolitika előkészítésének,* kidolgozásának, *c)* a stratégiai *távközlésfejlesztés* struktúrájának, *d)* a piaci verseny élénkítésével összefüggő

támogatási programok, infrastrukturális *fejlesztési célú* keretek elosztásának, *e)* távközlési piaci *közhatalmi hatáskörök,* különösen a piacszabályozási hatáskörökmegfelelő gyakorlásának is. A piaci elemzés, értékelés és annak nyilvánosságra hozatala továbbá alapvetően fontos *f)* a távközléssel foglalkozó *tudományos, kutatási* tevékenységek körében és *g)statisztikai* szempontból különösen a piaci szereplők számára. Egyes elemzések *h)* a *fogyasztók* számára is lényeges információtartalmat hordoznak.

Az adott ország szabályozó hatósága által megfelelően ellátott piaci elemzés, értékelés számottevő jelentőséget kap a *nemzetközi koordináció* körében, a nemzetközi *szabványosítás* rendszerében, illetve a nemzetközi szervezetek által ellátott nemzetközi szintű, különösen *összehasonlító elemzésekben*.

d) Ahogy már említésre került a piaci viszonyok teljes szakmai ismerete alapján a szabályozó hatóság tevékenységeit „áthatja" a széleskörű *döntéselőkészítő funkció*, azon belül különösen: *a)* a jogszabály-előkészítés (amelyen keresztül a hatóság jogalkalmazási, piacfelügyeleti tapasztalatai, szakmai ismeretei, piaci elemző tevékenységei közvetlenül becsatornázódnak a jogalkotásba), *b)* a távközlés-politika, stratégia előkészítése, *c)* a távközléssel összefüggő alapvető irányok meghatározása, előkészítése, *d)* a távközlés-fejlesztési programok, támogatások véleményezése, előkészítése, *e)* nemzetközi koordináció, nemzetközi szerződések, dokumentumok előkészítésében való közreműködés.

e) A közvetlen *szolgáltató funkciók* a hatóság egyes nyilvántartásaiból, statisztikai adatbázisából, nemzetközi kapcsolatainak dokumentumaiból.

f) A jogszabályokban a szabályozó hatóság számára kijelölt és kifejezetten meghatározott *nemzetközi koordinatív* és *egyéb* nemzetközi feladatok.

g) A *piaci szereplőkkel* kialakított *együttműködési viszonyok*, nyilvános konzultációk, egyeztetések, fórumok. A piaci szereplők véleményének közhatalmi tevékenységekbe történő becsatornázásának mechanizmusai.

6.1. A piacszabályozási tevékenység

A tanulmány tárgya szempontjából a szabályozó hatóság sajátos tevékenységei közül a piacszabályozási funkciót szükséges kiemelni.

A piacszabályozás fogalma és jellemzői a távközlés szektor-specifikus működésére és ebből következően a távközlési *aszimmetrikus szektor-specifikus* szabályozásra vezethetők vissza. A *távközlési versennyel* összefüggésben ugyanis az állami beavatkozás nemcsak a *verseny „tisztaságát"* védi, hanem alapvető feladata a *verseny* kialakulásának, *feltételeinek*, fenntartásának, közérdekű fejlődésének biztosítása is.

Hiszen a távközlési szolgáltatási piac szerkezeti jellemzői (a piacralépés magas költség-szintje, az „elsüllyedt" beruházási költségek, a szűk keresztmetszetek, az infrastrukturális erőforrások, stb.) alapján egyértelműnek mondható, hogy hatékony

gazdasági igazgatás nélkül a liberalizált távközlési piac könnyen a közösségi érdekekkel ellentétesen működő „magánmonopólium" piaci szerkezetébe torkollik, amelynek az állami monopóliumokhoz képest a közérdek szempontjából vett hátrányosabb működését a vonatkozó elméletek is egyöntetűen bizonyítják.

A liberalizáció közérdekű, közösségi érdekeknek megfelelő valódi értékei csak és kizárólag a piaci verseny hatékony működésével garantálhatók. Ebből következően a távközlési szabályozás a jogszabály-módosítás rendszeréhez képest jelentősen gyorsabb, hatékonyabb és a piaci viszonyokhoz igazítható jogérvényesítési módszerek alkalmazására jogosítja fel a távközlési szabályozó hatóságokat. A távközlési *aszimmetrikus versenyszabályozás* tehát alapvetően *keretszabályozás*, amely általában tág *mérlegelési jogkört* biztosít a hatóság számára. E szektor-specifikus keretszabályozás piaci viszonyoknak megfelelően „kitölthető részleteinek" felhatalmazásán alapuló jogérvényesítési módszer a *piacszabályozás*.

A félreértésekkel és félreértelmezésekkel övezett piacszabályozási hatáskörrel kapcsolatban fontos hangsúlyozni, hogy egyértelműen *közhatalmi és egyedi jogalkalmazási* hatáskört jelent. Ebből következően a piacszabályozás tekintetében is érvényesülnek a közhatalommal összefüggő jogállami *garanciális elvek*. Miután a piacszabályozás a hatósági, állami szervezetrendszertől elkülönült *külső jogalanyok* irányában beavatkozó *hatósági hatáskör*, ezért *alkotmányos garanciákat* igényel *eljárásainak,* az eljárások eredményeként hozható *aktusok* tartalmának, típusának és az igénybevehető *jogorvoslatok* meghatározásának szabályozása.

A közigazgatás egyedi közhatalmi jogalkalmazása keretében a *piacszabályozás sajátosságai* közül kiemelendő:

a) A tág mérlegelési jogkör.

b) A piacszabályozási döntések folyamatos jellegű ex officio anyagi jogi felülvizsgálatának és új piacszabályozási döntések meghozatalának lehetősége.

c) Az egyedi jogalkalmazással összefüggően a piaci szerkezet teljességére kiterjedő jogalkalmazási, piacelemzési, „tényfeltárási" egyedi hatáskörök. Vagyis az egyedi ügyek konkrét jogalanyaira vonatkozó jogalkalmazás keretében a teljes piac és számos más piac vizsgálata is szükséges, amelyet a hatásköri szabályozás lehetővé tesz.

Pl.: meghatározott szolgáltatók piaci erejének vizsgálata a piac valamennyi szereplőjére kiterjedő hatósági eljárást igényel.

d) A piacszabályozás eredményeként hozott aktus a teljes piaci versenyre, a piac működésének egészére kihat, bár konkrét és közvetlen jogi hatást csak az aktus címzettjeinek viszonyaiban vált ki.

e) Számos távközlés-szabályozási modellben a piacszabályozási hatáskörben hozott egyedi közhatalmi döntés alapoz meg, keletkeztet további hatósági típusú eljárásokat.

Vagyis nem a jogi szabályozás, hanem piacszabályozási döntésből ered számos közhatalmi, általában szintén piacszabályozási típusú eljárás, jogérvényesítési hatáskör.

Fontos azonban megjegyezni, hogy a piacszabályozási hatáskörökön alapuló eljárási mechanizmusokat a piaci szereplők jogainak védelmében legalább keretjelleggel szabályozni szükséges. Ilyen típusú általánosan alkalmazott piacszabályozási funkció a távközlési piaci erő meghatározására vonatkozó hatáskör, ugyanis a piaci erőfölény, a meghatározó piaci „szerep" hatóság általi megállapítása az adott piaci szereplő tekintetében számos újabb közhatalmi típusú eljárást eredményez, pl.: hálózati együttműködéssel, a hozzáférés biztosításával, árszabályozással kapcsolatban (jóváhagyásra benyújtandó árak, stb).

f) A piacszabályozási döntések továbbá azon kívül, hogy a teljes piaci működést érintik, általában szoros összefüggést mutatnak a távközléssel összefüggő nemzetközi koordinációval, a távközlési szolgáltatások és infrastruktúra országhatáron átnyúló piaci viszonyaival, működésével is.

A *piacszabályozási* közhatalmi beavatkozás körébe sorolható legfontosabb és világviszonylatban általánosan érvényesülő *aszimmetrikus versenyszabályozási hatáskörök*, *tevékenységek* különösen: *a)* A távközlési *piaci erő* meghatározása, azonosítása. *b)* A jogszabályokban keretjelleggel rendezett *hálózati együttműködés* rendszerének igazgatása, azon belül a hálózati összekapcsolás, hozzáférés, helyi hurok átengedésének „szabályozása", egyedi jogérvényesítés kereteiben történő biztosítása a piaci verseny hatékony fejlődése, működése érdekében. *c)* A távközlési *szolgáltatások egységes rendszerét*, együttműködését, folyamatosságát és a *közérdekű* garanciáit, minőségét biztosító hatáskörök. *d)* A teljes piac szerkezetét befolyásoló kiterjedt *árszabályozási* hatáskörök. *e)* Kifejezetten a *piaci verseny korlátozásának* megakadályozására, megelőzésére vonatkozó feladat- és hatáskörök.

Взыскание налогов с физических лиц, не являющихся индивидуальными предпринимателями, в судебном порядке в Российской Федерации

(Collecting Taxes on the Non-individual Enterpreneur Physical Persons in the Judicial Order of the Russian Federation)

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Аннотация: В данной статье речь идет о налогах, взыскиваемых с физических лиц, не являющихся индивидуальными предпринимателями, в Российской Федерации. Акцент сделан на процедурных вопросах, а именно, на судебном порядке взыскания налогов с указанной категории физических лиц. В статье исследуются последние изменения, внесенные законодателем в Налоговый кодекс Российской Федерации, касающиеся порядка взыскания налогов в судебном порядке с физических лиц, не являющихся индивидуальными предпринимателями. Автор анализирует проблемы, возникающие в судебной практике, связанные с взысканием в судебном порядке налогов с физических лиц, а также предлагает пути их решения.

Ключевые слова: Налоги, бюджет, взыскание, судебный порядок, мировые судьи, суды, налоговое законодательство Российской Федерации, физические лица, не являющиеся индивидуальными предпринимателями.

Abstract: In given article it is a question of the taxes collected from physical persons, not being individual businessmen, in the Russian Federation. The accent is made on points of order, namely, on a judicial order of collecting of taxes from the specified category of physical persons. In article last changes brought by the legislator in the Tax Code of the Russian Federation, collectings of taxes concerning an order in court are investigated. The author analyzes the problems arising in judiciary practice, connected with collecting in a judicial order of taxes from physical persons, and also offers ways of their decision.

Keywords: Taxes, the budget, collecting, judicial order, world judges, tax laws of the Russian Federation, the physical persons who are not individual businessmen.

Статья 57 Конституции Российской Федерации[1] гласит, что каждый обязан уплачивать законно установленные налоги и сборы. Это положение распространяется и на физических лиц, не являющихся индивидуальными предпринимателями[2]. Так, в соответствии со ст.19 Налогового кодекса Российской Федерации[3] (далее - НК РФ) налогоплательщиками и плательщиками сборов признаются организации и физические лица, на которых в соответствии с НК РФ возложена обязанность уплачивать соответственно налоги и (или) сборы.

Физические лица, не являющиеся индивидуальными предпринимателями, в Российской Федерации уплачивают следующие налоги:

1) налог на доходы физических лиц (НДФЛ),
2) транспортный налог;
3) земельный налог;
4) налог на имущество физических лиц.

Также физические лица, не являющиеся индивидуальными предпринимателями, могут быть плательщиками сборов:

1) государственной пошлины;
2) сбора за пользование объектами животного мира и за пользование объектами водных биологических ресурсов.

Если оценивать налоги и сборы, уплачиваемые физическими лицами, с точки зрения их количественной характеристики и места, занимаемого в доходах бюджетной системы Российской Федерации, то оно незначительно. Наибольшее количество денег в бюджет поступает от уплаты НДФЛ (в настоящее время в России он составляет 13% за некоторыми исключениями, однако, готовится реформа о введении прогрессивной шкалы налогообложения доходов физических лиц, которая существовала ранее до принятия НК РФ в 1998г.). Доля остальных налогов - транспортного (относится к региональным налогам), земельного налога и налога на имущество физических лиц (местные налоги) - малозначительна в доходах как региональных, так и местных бюджетов. Однако, несмотря на невысокий уровень доходности для бюджетной системы, права физических лиц при взыскании с них налогов дополнительно защищены законодателем: с физических лиц, не являющихся индивидуальными предпринимателями нельзя взыскать недоимку по налогам в бесспорном порядке, как с организаций и индивидуальных предпринимателей, а можно только – в судебном[4]. Так, в соответствии с ч.1 ст.48 НК РФ «Взыскание налога, сбора, пеней, штрафов за счет имущества налогоплательщика (плательщика сборов) - физического лица, не

[1] Принята всеобщим голосованием 12.12.1993г./ Российская газета от 25.12.1993г.
[2] В данной статье фразы «физические лица, не являющиеся индивидуальными предпринимателями» и «физические лица» используются как равнозначные.
[3] Налоговый кодекс Российской Федерации (часть первая) от 31.07.1998г. № 146-ФЗ/ Собрание законодательства Российской Федерации, 03.08.1998, № 31, ст. 3824.
[4] На это обращали также свое внимание Зарипов В., Резник В., Васильев Ю., Журбин Б. Налоги без суда не взыщут. Пока…/ ЭЖ-Юрист, 2009, №25.

являющегося индивидуальным предпринимателем» в случае неисполнения налогоплательщиком (плательщиком сборов) - физическим лицом, не являющимся индивидуальным предпринимателем, в установленный срок обязанности по уплате налога, сбора, пеней, штрафов налоговый орган (таможенный орган), направивший требование об уплате налога, сбора, пеней, штрафов, вправе обратиться в суд с заявлением о взыскании налога, сбора, пеней, штрафов за счет имущества, в том числе денежных средств на счетах в банке и наличных денежных средств, данного физического лица в пределах сумм, указанных в требовании об уплате налога, сбора, пеней, штрафов, с учетом особенностей, установленных настоящей статьей.

НДФЛ – это основной налог, уплачиваемый всеми физическими лицами, получающими доход на территории Российской Федерации; это - федеральный налог, то есть все элементы налога установлены НК РФ, но несмотря на это, НДФЛ зачисляется не в федеральный бюджет, а в региональные и местные бюджеты. Судебных споров с участием физических лиц, не являющихся индивидуальными предпринимателями, по НДФЛ практически нет, так как обязанность по исчислению, удержанию и перечислению НДФЛ в бюджет возложена на налоговых агентов, прежде всего, работодателей, которые и несут ответственность за неисполнение своих обязанностей как налоговых агентов, а не сами налогоплательщики – физические лица, работники организаций. Налоговые споры по НДФЛ с участием работодателей рассматриваются арбитражными судами.

Судебных споров по взысканию с физических лиц сборов также нет, что вытекает из сущности сборов как обязательных взносов, уплата которого является одним из условий совершения в отношении плательщиков сборов государственными органами, органами местного самоуправления, иными уполномоченными органами и должностными лицами юридически значимых действий, включая предоставление определенных прав или выдачу разрешений (лицензий) (ч.2 ст.8 НК РФ).

Как правило, судебные споры с участием физических лиц, не являющихся индивидуальными предпринимателями, возникают по поводу уплаты транспортного, земельного налога и налога на имущество физических лиц и рассматриваются судами общей юрисдикции[5].

В разных регионах России сложилась разная практика по определению подсудности налоговых споров в судах общей юрисдикции. В большинстве регионов России все налоговые споры, независимо от цены иска, рассматриваются федеральными судами, однако в Москве сложилась другая практика: из-за перегруженности федеральных судов налоговые споры при цене

[5] К такому же выводу приходит Буньков А.С. Рассмотрение дел о взыскании налогов и сборов судами общей юрисдикции/ подготовлено для системы КонсультантПлюс в 2009г.

иска, не превышающей 50000 рублей, рассматриваются мировыми судьями, а при цене иска, превышающей 50000 рублей – федеральными судами.

Как показывает практика, подавляющее большинство налоговых споров в судах общей юрисдикции рассматриваются мировыми судьями, в связи с чем уместно уделить немного внимания этому сравнительно новому для России институту судебной власти.

Мировые судьи – новое звено судебной системы Российской Федерации, функционирующее чуть более десяти лет, но успевшее положительно зарекомендовать себя. В то же время мировые судьи не являются принципиально новым звеном для судебной системы России в целом, с точки зрения исторической ретроспективы. Так, впервые в судебную систему России мировые суды были введены «Судебными уставами», обнародованными 20.11.1864г.[6] Одной из главных задач возрождения института мировой юстиции было снижение нагрузки на федеральные суды. Статистика показывает, что сегодня мировые судьи рассматривают более 81% гражданских дел, 43% уголовных дел и 96% дел об административных правонарушениях[7]. Председатель Верховного Суда В.М. Лебедев в своих высказываниях высоко оценивает работу мировых судей. Так, на Интернет-конференции «Реформирование процессуального законодательства в Российской Федерации» В.М. Лебедев отметил, что «давая оценку деятельности мировых судей, сказал бы, что она выше, чем «хорошо»… Порядка 2,5% решений мировых судей отменяется, а жалоб на их решения – только около 10%. Это и есть тот самый показатель, исходя из которого я оцениваю деятельность института мирового правосудия…»[8]

В настоящее время полномочия и порядок деятельности мировых судей установлены Федеральным законом №188-ФЗ от 17.12.1998г. «О мировых судьях в Российской Федерации»[9] (далее – Закон о мировых судьях), принятым в соответствии со ст.118 Конституции РФ и Федеральным конституционным законом от 31.12 1996г. №1-ФКЗ «О судебной системе Российской Федерации»[10], в ч.2 ст.4 которого закреплено, что в Российской Федерации действуют федеральные суды, конституционные (уставные суды) и мировые судьи.

Согласно ст.3 Закона о мировых судьях мировой судья рассматривает в первой инстанции гражданские дела:

1) о выдаче судебного приказа;

2) о расторжении брака, если между супругами отсутствует спор о детях;

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[6] См. подробнее: официальный сайт Управления по обеспечению деятельности мировых судей города Москвы/ www.ums-mos.ru

[7] «Российская газета-Неделя»-Урал №5282, 09.09.2010г./ www.rg.ru/2010/09/09/reg-ural/sudy. html

[8] «Парламентская газета», 2003-05-24/ www.garweb/ru/conf/supcourt/20030410/smi.html

[9] Собрание законодательства Российской Федерации, 21.12.1998, №51, ст.6270.

[10] Собрание законодательства Российской Федерации, 06.01.1997, №1, ст.1.

3) о разделе между супругами совместно нажитого имущества при цене иска, не превышающей 50 тысяч рублей;
4) иные возникающие из семейно-правовых отношений дела, за исключением оспаривания отцовства, о лишении родительских прав, об ограничении родительских прав, об усыновлении (удочерении) ребенка, других дел по спорам о детях и дел о признании брака недействительным;
5) по имущественным спорам, за исключением дел о наследовании имущества и дел, возникающих из отношений по созданию и использованию результатов интеллектуальной деятельности, при цене иска, не превышающей 50 тысяч рублей;
6) об определении порядка пользования имуществом.

Значительное место в практике мировых судей г.Москвы занимают гражданские дела, вытекающие из налоговых правоотношений. Представляется, что в связи с принятием Федерального закона от 29.11.2010г. №324-ФЗ «О внесении изменений в часть первую Налогового кодекса Российской федерации» (далее ФЗ № 324)[11], которым внесены изменения в ст.ст.48, 104, 105, 115 НК РФ, количество таких дел, рассматриваемых мировыми судьями, значительно увеличится.

Первая проблема, с которой сталкивается мировой судья, принимая к производству заявление налогового органа о взыскании недоимки по налогу, пеням с физических лиц - это определение производства по данной категории дела: приказное или исковое? Согласно ст.122 Гражданского процессуального кодекса РФ (далее – ГПК РФ)[12] судебный приказ выдается, в том числе, если заявлено требование о взыскании с граждан недоимок по налогам, сборам и другим обязательным платежам. Здесь возникает вопрос, что понимает законодатель, под другими обязательными платежами, и, что нас особо интересует, относится ли к ним пеня по налогам и сборам, поскольку, как правило, налоговые органы направляют в суд заявления о выдаче судебного приказа о взыскании с физических лиц не только недоимок по налогам, но и пеней. В соответствии со ст.75 НК РФ пеней признается денежная сумма, которую налогоплательщик должен выплатить в случае уплаты причитающихся сумм налогов или сборов в более поздние по сравнению с установленными законодательством о налогах и сборах сроки; учитывая это положение НК РФ, а также возможность принудительного взыскания пеней, можно прийти к выводу, что пеня – это тоже обязательный платеж при наступлении определенных законодательством о налогах и сбора условий. Поэтому представляется, что

[11] Собрание законодательства Российской Федерации, 06.12.2010, №49, ст.6420.
[12] ГПК РФ от 14.11.2002г. №138-ФЗ/ Собрание законодательства Российской Федерации, 18.11.2002, №46, ст.4532.

судебные приказы могут выноситься не только о взыскании недоимки по налогам, но и пеней. Данный вывод подтверждается и ФЗ №324, которым были внесены соответствующие изменения в ст.48 НК РФ: так, налоговый орган вправе обратиться в суд с заявлением о взыскании не только налогов, но и пеней и штрафов.

До принятия ФЗ №324 существовала коллизия между ст.122 ГПК РФ, позволяющей судам выносить судебные приказы о взыскании с граждан недоимок по налогам, сборам и другим обязательным платежам, и ст.48 НК РФ, устанавливающей право налоговых органов обращаться в суд исключительно с иском. Поэтому до 2011 года судебная практика шла по пути рассмотрения гражданских дел, возникающих из налоговых правоотношений, в исковом порядке. С принятием ФЗ №324 ситуация изменилась в лучшую сторону, поскольку была устранена коллизия между ст.122 ГПК РФ и ст.48 НК РФ. Однако, надо учитывать, что действие ст.48 НК РФ (в редакции ФЗ №324) распространяется на правоотношения по взысканию налогов, сборов, пеней, штрафов, требования об уплате которых были направлены после дня вступления в силу ФЗ № 324, то есть после 3 января 2011г. Заявления от налоговых органов с требованиями, направленными налогоплательщикам после 03.01.2011г., начали поступать в суды с сентября 2011 года.

Также мировой судья, решая вопрос о принятии заявления налогового органа о взыскании недоимки по налогу, пеням с физических лиц, сталкивается со второй проблемой – проблемой подсудности: какие суды – мировые или федеральные - должны рассматривать иски налоговых органов о взыскании недоимок и пеней с физических лиц? Как мы выше уже указывали, судебная практика в разных субъектах РФ складывается по-разному. Так, в г.Москве иски налоговых органов о взыскании недоимок и пеней с физических лиц при цене иска, не превышающей 50 тыс. руб. рассматривают мировые судьи, исходя из того, что такие дела можно отнести к категории дел по имущественным спорам. В других субъектах РФ иски налоговых органов о взыскании недоимок и пеней с физических лиц независимо от цены иска рассматриваются федеральными судами; здесь суды исходят из того, что данная категория дел относится к делам, возникающим из публичных правоотношений, по аналогии с правилами, установленными Арбитражным процессуальным кодексом Российской Федерации (далее АПК РФ)[13], в котором нормы о взыскании обязательных платежей и санкций помещены в раздел III «Производство в арбитражном суде первой инстанции по делам, возникающим из административных и иных публичных отношений». На наш взгляд, ни судебная практика г.Москвы по

[13] АПК РФ от 24.07.2002г. №95-ФЗ/ Собрание законодательства РФ, 29.07.2002, №30, ст.3012. Эта проблема рассматривается и в научной литературе: см., например, Грикевич О.А. Взыскание обязательных платежей и санкций в суде общей юрисдикции/ Адвокат, 2010г, №2.

данным делам, ни других регионов, не противоречит гражданско-процессуальному законодательству, поскольку в перечне дел, возникающих из публичных правоотношений (ст.245 ГПК РФ) отсутствует прямое указание на то, что дела о взыскании обязательных платежей и санкций - это дела, вытекающие из публичных правоотношений. Поэтому, до тех пор, пока не будет уточнен ГПК РФ в этой части, или не будут даны рекомендации Верховным Судом РФ, так и не будет единообразия в судебной практики в судах общей юрисдикции по налоговым спорам[14].

Возвращаясь к изменениям в ст.48 НК РФ, внесенным ФЗ №324, хочется отметить еще один очень важный момент, чего так долго ждали суды. Дело в том, что в подавляющем большинстве случаев налоговые органы обращаются в суд с исковыми заявлениями о взыскании с налогоплательщиков - физических лиц недоимок по налогам и пени на «копеечные суммы». Так, например, МИФНС России №6 по Архангельской области и Ненецкому автономному округу обратилась с заявлением о выдаче судебного приказа по налогу на имущество с физических лиц на сумму 9руб.99коп. и пени в размере 3руб. 56коп, а всего – 13руб. 55коп.; МИФНС России №8 по Оренбургской обл. обратилась в суд с иском о взыскании с Л.В. недоимки по земельному налогу в размере 226 руб. 62 коп. и пени в размере 1руб. 76коп.; ИФНС России №17 по г.Москве обратилась в суд с иском о взыскании с В.П. недоимки по транспортному налогу в размере 525 руб. и пени в размере 5руб 83коп.; или МИФНС России №11 по Тверской области обратилась в суд с иском о взыскании с С.В. недоимки по земельному налогу в размере 322 руб. 37 коп. и пени в размере 22 руб. 14коп. и т.д. В результате получается, что размер взысканной судом недоимки в разы меньше тех затрат, которые несет бюджет при рассмотрении и исполнении таких дел. К примеру, стоимость только одного бланка исполнительного листа составляет порядка 600 рублей, а по таким решениям, выписывается, как минимум один бланк, а если еще учесть почтовые расходы, работу судьи и аппарата суда?

В связи с чем следует оценить положительно и следующую новацию НК РФ. Так, по новым правилам, установленным ст.48 НК РФ (в ред. ФЗ № 324), налоговые органы не вправе обращаться в суд с заявлением, если сумма взыскиваемой недоимки, пеней, штрафов менее 1500 рублей, исключение составляют только те заявления, если в течение трех лет со дня истечения срока исполнения самого раннего требования об уплате налога, сбора, пеней, штрафов, сумма не превысила 1500 руб. Это положение также относится только к тем заявлениям, которые основаны на требованиях, направленных налоговым органом налогоплательщику, не ранее 03.01.2011г.

[14] Эта проблема рассматривается и в научной литературе: см., например, Грикевич О.А. Взыскание обязательных платежей и санкций в суде общей юрисдикции/ Адвокат, 2010г, №2.

Еще одна новация НК РФ, заслуживающая внимания и одобрения, заключается в том, что увеличен срок налоговым органам для обращения в суд.[15] По правилам, действовавшим до вступления в силу ФЗ №324, налоговые органы должны были обращаться в суд с заявлением о взыскании недоимки с физического лица, не являющегося индивидуальным предпринимателем, в течение шести месяцев после окончания срока уплаты недоимки, указанного в требовании. Как показывает практика, налоговые органы, как правило, не укладывались в этот шестимесячный срок, направляя в суд одновременно с заявлением ходатайство о восстановлении пропущенного срока. В связи с этим возникало немало споров.

По новым правилам, установленным ФЗ №324, сроки и порядок обращения в суд налоговыми органами изменены в сторону увеличения и зависят от суммы взыскания. Так, налоговые органы могут обратиться в суд только в том случае, если сумма недоимки превышает 1500 рублей. Заявление о взыскании подается в суд общей юрисдикции налоговым органом (таможенным органом) в течение шести месяцев со дня истечения срока исполнения требования об уплате налога, сбора, пеней, штрафов, если иное не предусмотрено настоящим пунктом.

Если в течение трех лет со дня истечения срока исполнения самого раннего требования об уплате налога, сбора, пеней, штрафов, учитываемого налоговым органом (таможенным органом) при расчете общей суммы налога, сбора, пеней, штрафов, подлежащей взысканию с физического лица, такая сумма налогов, сборов, пеней, штрафов превысила 1 500 рублей, налоговый орган (таможенный орган) обращается в суд с заявлением о взыскании в течение шести месяцев со дня, когда указанная сумма превысила 1 500 рублей.

Если в течение трех лет со дня истечения срока исполнения самого раннего требования об уплате налога, сбора, пеней, штрафов, учитываемого налоговым органом (таможенным органом) при расчете общей суммы налога, сбора, пеней, штрафов, подлежащей взысканию с физического лица, такая сумма налогов, сборов, пеней, штрафов не превысила 1 500 рублей, налоговый орган (таможенный орган) обращается в суд с заявлением о взыскании в течение шести месяцев со дня истечения указанного трехлетнего срока.

Пропущенный по уважительной причине срок подачи заявления о взыскании может быть восстановлен судом.

Итак, изменения в НК РФ, внесенные ФЗ № 324, мы бы оценили исключительно положительно: во-первых, процедура рассмотрения заявлений налоговых органов о взыскании недоимки по налогам, пеням, штрафам с налогоплательщиков упрощается, а, во-вторых, удешевляется.

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[15] На данное обстоятельство обращает внимание в своей статье Шершавин А. Недоимка гражданина. Порядок взыскания/ Современный предприниматель, 2011, №1.

Однако, не стоит забывать, что в случае поступления возражений от налогоплательщиков на судебный приказ или в случае наличия спора о праве, дела о взыскании недоимок по налогам, пеней, штрафам, должны рассматриваться в исковом порядке в соответствии со ст.ст.125, 129 ГПК РФ.

Решая вопрос о вынесении судебного приказа, мировые судьи сталкиваются со следующей проблемой. Дело в том, что судебный приказ является одновременно исполнительным документом (ч.1 ст.121 ГПК РФ), соответственно, в нем должно быть обязательно указано дата и место рождения должника, однако, ст.124 ГПК РФ, устанавливающая требования к заявлению о выдаче судебного приказа, не содержит такого обязательного пункта, как указание взыскателем даты и места рождения должника. При таких обстоятельствах мировой судья не имеет права отказать в принятии заявления о вынесении судебного приказа (ст.125 ГПК РФ), но и не имеет возможности направить судебный запрос в соответствующие органы для выяснения места жительства должника, поскольку – это приказное, а не исковое производство: судебный приказ должен быть вынесен мировым судьей в течении пяти дней со дня поступления заявления о вынесении судебного приказа; судебный приказ выносится без судебного разбирательства и вызова сторон для заслушивания объяснений (ст.126 ГПК РФ). Выходом из сложившейся ситуации могло бы стать внесение дополнений в ст.124 ГПК РФ, чтобы в заявлении о вынесении судебного приказа взыскатель указывал также дату и место рождения должника.

И еще хотелось бы обратить внимание на одно новшество, которое коснется судей, рассматривающих дела о взыскании обязательных платежей. С 01 января 2010 года за Пенсионным фондом РФ и его территориальными органами закреплены функции администрирования страховых взносов на обязательное пенсионное и медицинское страхование[16]. В соответствии с п.1 ст. 5 Федерального закона от 24.07.2009г. №212-ФЗ «О страховых взносах в Пенсионный фонд Российской Федерации, Фонд социального страхования Российской Федерации, Федеральный фонд обязательного медицинского страхования и территориальные фонды обязательного медицинского страхования» (далее - ФЗ № 212) плательщиками страховых взносов являются страхователи - организации, индивидуальные предприниматели и физические лица, не признаваемые индивидуальными предпринимателями. Согласно ст.18 ФЗ №212 и п.2 ст.14 Федерального закона от 15.12.2011г. № 167-ФЗ «Об обязательном пенсионном страховании» (далее – ФЗ №167)[17] страхователи обязаны своевременно и в полном объеме уплачивать страховые взносы в

[16] Ч.1 ст.3 Федерального закона от 24.07.2009г. №212-ФЗ «О страховых взносах в Пенсионный фонд Российской Федерации, Фонд социального страхования Российской Федерации, Федеральный фонд обязательного медицинского страхования и территориальные фонды обязательного медицинского страхования»/ Собрание законодательства РФ, 27.07.2009, №30, ст.3738.
[17] Собрание законодательства РФ, 17.12.2001, №51, ст.4832.

Пенсионный фонд РФ и вести учет, связанный с начислением и перечислением страховых взносов в указанный фонд. В случае неуплаты или неполной уплаты страховых взносов в установленный срок производится взыскание недоимки по страховым взносам в порядке, предусмотренном ФЗ №212. На основании ст.ст.13, 14, 57 ФЗ №212, ст.28 ФЗ №167 индивидуальные предприниматели обязаны уплачивать суммы страховых взносов в размере, определяемом исходя из стоимости страхового года в порядке, установленном ФЗ №212. Согласно ст.16 ФЗ №212 страховые взносы за расчетный период уплачиваются плательщиками страховых взносов не позднее 31 декабря текущего календарного года.

В силу чч.6, 8 ст.16 ФЗ № 212 в случае прекращения деятельности физического лица в качестве индивидуального предпринимателя до конца расчетного периода плательщики страховых взносов обязаны до дня подачи в регистрирующий орган заявления о государственной регистрации прекращения физическим лицом деятельности в качестве индивидуального предпринимателя представить в орган Пенсионного фонда РФ расчет по начисленным и уплаченным страховым взносам за период с начала расчетного периода по день представления казанного расчета включительно.

Согласно п.13 постановления Пленума Верховного Суда РФ №6 и Пленума Высшего Арбитражного Суда №8 от 01.07.1996г. «О некоторых вопросах, связанных с применением части первой ГК РФ» с момента прекращения государственной регистрации гражданина в качестве индивидуального предпринимателя, в частности, в связи с аннулированием государственной регистрации, дела с участием указанных граждан, в том числе и связанные с осуществлением ими ранее предпринимательской деятельностью, подведомственны судам общей юрисдикции»[18].

Таким образом, в практике судов общей юрисдикции появляется новая категория дел по искам Пенсионного фонда РФ к гражданам, утратившим статус индивидуального предпринимателя, о взыскании недоимки по страховым взносам на обязательное пенсионное и медицинское страхование.

В заключении хотелось бы отметить, что, с одной стороны, изменения налогового законодательства РФ положительно влияют на осуществление гражданского процесса, так как упрощают и удешевляют его, но, с другой стороны, повышается риск вынесения судебных приказов в отсутствии надлежащих сведений о должниках, что может повлечь нарушение интересов должников. Разрешение этой проблемной ситуации видится в дальнейшем совершенствовании налогового и гражданско-процессуального законодательства РФ, а также в улучшении организации работы по сообщению в налоговые органы обязанными органами и организациями необходимых сведений, связанных с учетом налогоплательщиков.

[18] Бюллетень Верховного Суда РФ, 1996, №9.

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Public Finances and the Autonomy of Institutions of Higher Education in Poland

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Any analyses of the relation between the autonomy of the higher-education sector in Poland and its public financing (co-financing) must include a discussion of the principles of autonomy of institutions of higher education and the principles of their financing. Such principles are largely defined in the Constitution of the Republic of Poland and, at least with regards to finances, apply solely to public institutions of higher education. Non-public institutions do have the possibility to obtain public funding for such purposes as scholarships and studies of handicapped persons; however, they function as economic entities and finance their basic operations with the fees paid by their students. Thus, the most important matter to be discussed is the relation between the autonomy of institutions of higher education and their financing by the government. The autonomy of public institutions of higher education in their decision-making process and their financial autonomy are separate issues. The latter is significantly limited by the objectives and the so-called public mission of institutions of higher education, and by the amount of funds received from the government.

In the colloquial sense, the word "autonomy" means independence, setting of standards by those who are bound by them and the right of a collective entity to decide on its internal matters (a nation, a city, or an institution)[1]. In law, "autonomy" means "the possibility to determine one's own rules of conduct or, with regards to an entity that became autonomous, the possibility to exist outside of the rules that had applied to it previously."[2]

The principle of autonomy of institutions of higher education, as the one defining their functioning within a larger system in Poland, is established in art. 70 (5) of the Constitution of the Republic of Poland. The notion of autonomy in education is not new.In art. 117, the so-called March Constitution (adopted on 17 March 1921) introduced a degree of independence of institutions of higher education by providing that "scientific research and dissemination of its results shall not be subject to any restrictions. Every citizen shall have the right to teach." Nevertheless, these provisions pertained to freedom of scientific research and teaching in the meaning of the current art. 73 of the Constitution, as opposed to a broadly-defined autonomy of institutions of

[1] See: Nowa Encyklopedia PWN [New encyclopedia of the PWN], Vol. 1, Warsaw 1995, p. 290; and E. Sobol (ed.), Słownik wyrazów obcych PWN [Dictionary of foreign words], Warsaw 1995, p. 94.
[2] J. Boć, ed., Prawniczy słownik wyrazów trudnych [Dictionary od difficult legal terms], Kolonia Limited 2005, p. 41.

higher education. The constitutions adopted after the March Constitution did not include similar provisions, until the Constitution of 1997. According to art. 70 (5) of the Constitution, "autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute," which means that autonomy is the basic principle of their functioning and its permissible boundaries must be established in a statute. This principle is also partly defined in another constitutional norm, i.e. the provisions of art. 73 of the Constitution which assure the freedom of artistic creation, scientific research and dissemination of its results, and which introduce the principle of freedom of teaching. These principles are also stipulated in art. 4 (1) and (2) of the Act on Higher Education[3], which will be discussed further in this paper. The above-mentioned legal provisions mean that the notion of autonomy of institutions of higher education is manifested in the high degree of their self-governance which, as is generally accepted, covers most of all:

1) the right of the institution's authorities to define the content and the form of their teaching;
2) the right to define the subjects and the methods of scientific research;
3) the right to define the course of the teaching;
4) the right of the teachers, the students, and the employees who are not teachers, to elect the school's decision-making and executive authorities;
5) the presence of a system of disciplinary responsibility covering the employees and the students;
6) the school's right to conduct commercial activities aimed to cover the school's expenditures;
7) the right of institutions of higher education, teachers, and students to establish institutions and organizations to represent their interests before public authorities;
8) the right of students to form associations and to establish their self-government entities[4];
9) the right to distribute the public funds received.

Autonomy, defined as self-governance, should not be considered as equal to independence, as in its essence autonomy pertains to *ad intra* relations, i.e. matters pertaining to the internal relations within institutions of higher education, while independence pertains to *ad extra* relations, i.e. purely external relations, especially those with other entities[5]. A comprehensive analysis of the provisions of Poland's Constitution demonstrates the importance of the principle of autonomy of the institutions of higher education. This is because the Constitution establishes such a

[3] Act of 27 July 2005, Act on Higher Education, Journal of Laws no. 164, item 1365, as amended.
[4] See: P. Winczorek, Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r. [A commentary to the Constitution of the Republic of Poland of 2 April 1997], Warsaw 2000, p. 94-95.
[5] See: Z. R. Kmieciak, Prawo studenta do sądu a autonomia szkół wyższych [A student's right to a trial and the autonomy of institutions of higher education], "Przegląd Sądowy" 2003, No. 3, p. 65.

broadly defined autonomy in the case of only two categories of entities – churches and other religious organizations (art. 25 (3) and institutions of higher education[6]. Such a great emphasis on the autonomy of institutions of higher education appears to be justified,as both public and non-public institutions of higher education perform the same scientific and didactic tasks[7]. A similar opinion on the principle of autonomy was expressed by the Constitutional Tribunal in one of its verdicts that were important to clarification of this matter. According to the Tribunal's construction of the Constitution, autonomy is to be defined as "the constitutionally protected sphere of freedom of conduct of scientific research and of teaching within the framework of the applicable legal order. This means that the Constitution assumes the existence of internal acts of law at those institutions and that those acts regulate the rights and duties of the students"[8]. Moreover, notably, the Tribunal pointed out that the right to have such internal acts of law is to be enjoyed by all institutions of higher education, so as to enable them to achieve their public objective of educating students and conducting scientific research. Due to its detailed nature, this principle must be reflected in the provisions of statutes; these, however, must not unreasonably limit it, in particular to purely academic matters[9]. Thus, statutes must observe the autonomy of institutions of higher education stipulated in art. 70 (5) of the Constitution. As far as financing of institutions of higher education with public funds is concerned, the principle of autonomy pertains most of all to their internal acts and activities, which are manifested in the right to define and regulate their own investment policies, the right to charge fees for some educational services, the right to undertake commercial activities provided for in their statutes and in applicable laws (e.g. art. 86a of the Act on Higher Education) as well as to dispose of their own property and deposit their funds in interest-bearing bank accounts. As is often emphasized, the autonomy of institutions of higher education should be assured by a guarantee of the integrity of their property and the power to define and implement their own remuneration systems, taking into account all their sources of financing[10].

In the current legal system, the guarantees aimed to assure the observance of the principle of autonomy of institutions of higher education have been introduced directly in the statute that regulates operation of the higher-education sector. According to art. 4 (1) and (2) of the statute, institutions of higher education are autonomous in all

[6] Ibidem, p. 64.
[7] See: Z. Czeszejko-Sochacki, Wnioski de lege lata i de lege ferenda na tle orzeczenia Trybunału Konstytucyjnego z 8 listopada 2000 r. sygn. akt SK 18/99 [*De lege lata* and *de lege ferenda* conclusions on the background of the verdict of the Constitutional Tribunal of 8 November 2000, file no. SK 18/99], in: E. Ruśkowski, H. Święczkowska, eds., Procedury podejmowania rozstrzygnięć i inne istotne problemy prawne w szkolnictwie wyższym [Decision-making procedures and other legal problems in the higher education system], Białystok-Siedlce 2001, p. 44ff.
[8] Verdict of the Constitutional Tribunal of 8 November 2000, Sk 18/99, OTKZU, No. 7, item 258.
[9] J. Woźnicki, ed., Model zarządzania publiczną instytucją administracyjną [The model of managing a public administrative institution], Warsaw 1999, p. 32.
[10] Ibidem, p. 34.

areas of their activities in accordance with the principles defined in the statute and they follow the rules concerning the freedom of teaching, scientific research, and artistic creation[11]. A certain extension of the principle of autonomy and a guarantee of independence is also provided for in sub-section 5 of the aforementioned act which allows for interference of the central government authorities and the units of local and regional government in decisions of institutions of higher education solely in cases provided for in relevant statutes.It must be noted that the provision of art. 4 (2) of the Act on Higher Education is basically literarily copied from art. 73 of the Constitution which, in my opinion, defines much more narrow limits of autonomy of institutions of higher education by establishing only freedom of research, freedom artistic creation, and freedom of teaching.It does not refer to the organization of institutions of higher education or to the right of their authorities to make decisions pertaining to them.After all, such a right to make decisions is unquestionably the most important manifestation of the autonomy of institutions of higher education.Consequently, autonomy should be defined broadly, as does art. 70 (5) of the Constitution which does not establish any limitations of the autonomy and leaves it up to the legislator to establish them.Nevertheless, the right of institutions of higher education to make autonomous decisions regarding the use of their funds, even though they are subject to statutory limitations, must be considered as important.The broad scope of authority of institutions of higher education with regards to their internal sovereignty concerning the use and distribution of their funds is established in the provisions of chapter 4 of the Act on Higher Education and in the provisions of the Regulation of the Council of Ministers of 22 December 2006 on the principles of financial management of public institutions of higher education[12]. According to those provisions, public institutions of higher education enjoy a certain degree of freedom with regards to disposing of their property and funds, which is manifested in the fact that:

1) they enjoy the right to receive subsidies from the state budget for their activities in accordance with the principles defined in other laws defining the principles of distribution of subsidies for full-time studies[13];
2) they collect their own revenues in separate bank accounts[14];
3) they do not have to obtain the permission of the competent minister for the State Treasury to dispose of fixed assets whose market value in Polish zlotys is not greater than EUR 250.000 – starting on 1 January 2012;

[11] This wording of the act will become effective on 1 October 2011. However, its essential meaning has not been changed.
[12] Journal of Laws no. 246, item 1796, as amended.
[13] These matters are regulated in the Regulation of the Minister of Science and Higher Education of 9 May 2008 on the principles of distribution of subsidies from the state budget among public and non-public institutions of public education, Journal of Laws no. 89, item 544, as amended.
[14] The requirement to open separate bank accounts for own revenues will become effective on 1 January 2012.

4) they may use the subsidies received for material assistance to students to co-finance repairs of student dormitories and dining facilities;
5) their rectors determine the fees connected with acceptance to the school, provided that the fees may not be larger than the costs to be borne in relation to the activities related to acceptance to the school at a given faculty and a given level of education;
6) the funds that are not spent in a given year remain at the disposal of the institution of higher education;
7) the institutions may charge fees for their educational services connected with teaching students in part-time undergraduate and doctoral studies and, starting on 1 January 2012, also for full-time studies, if such studies are a second or subsequent major taken by a student and if the studies involve courses that go beyond the additional limit of ECTS points – the amount of the fee is to be defined by the schools' rectors;
8) they may charge fees for repeating certain classes due to unsatisfactory grades, for courses in foreign languages, for classes that are not included in the curriculum, as well as for post-graduate studies and supplementary courses;
9) the rules for charging fees for the payable educational services are established by the schools' senates and they are binding on the rectors when signing contracts with students;
10) the schools' senates also define the course and conditions for exemption from the charges mentioned above;
11) the institutions conduct their own financial management on the basis of a material and financial plan approved by the schools' senates;
12) the schools may establish their development funds – starting on 1 January 2012;
13) the schools may establish their own funds for providing material assistance to graduate and doctoral students, provided that no money from the full-time studies subsidy is transferred to this fund.

As far as the freedom of financial activities of institutions of higher education in the area of obtaining funds is concerned, of note are the regulations concerning the establishment of the so-called special-purpose entities. The relevant regulations will become effective on 1 October 2011. According to art. 86a, the rector of an institution of higher education, with the senate's approval, may establish a special-purpose entity, taking the form of a limited-liability company or a joint-stock company. The purpose of the entity is, most of all, to commercialize the results of scientific research and development studies. The basis objectives of the entity include buying shares in corporations or forming corporations in order to implement the results of scientific research or development studies conducted at the institution of higher education. This certainly enables institutions of higher education to obtain additional funds, not originating in the state budget, to be used for their functioning, in particular for their

statutory activities. The source of the funds is the dividend paid by the special-purpose entity.

The above-mentioned regulations, which are discussed here only in general terms due to the nature of this paper, confirm the significant scope of freedom of institutions of higher education in disposing of their funds. However, what is important is that this freedom pertains mostly to internal decisions of the institutions of higher education regarding acquired or potentially acquired funds that do not come from the state budget. Autonomy of public institutions of higher education with regards to the way they spend public funds is another matter. It is so for two reasons. First, public institutions of higher education must observe the constitutional principle of free education and, second, they are a part of the public finance sector as defined in art. 9 of the Act on public finances[15]. Consequently, their main source of funds is the state budget and they are subject to the restrictions applicable to public finances, to include the principles of accounting.

One of the basic regulations that define the systemic area of functioning of public institutions of higher education is the principle of free and partly payable education. The laws that establish this principle can be found in two sentences of art. 70 (2) of the Constitution, which provide that the legal principle is, in essence, that education in public institutions of higher education is free, while introducing, in the next sentence, an important exception which allows charging fees for certain educational services provided by public institutions of higher education. Nevertheless, these provisions must be regarded as a single principle due to the strict cause-and-effect relationship between them. The partial payment, also referred to as co-payment, for some educational services, could not be in place not only without the constitutional permission but also without the main principle of free education as the basic social right of individuals, as the former is the exception to the latter and is determined by the latter. Therefore, I believe that it is reasonable to regard these norms as one. The principles of free education and partial payment for education at the level of higher education are integral parts of another basic constitutional norm provided for in art. 70 (4) of the Constitution, which establishes the requirement to assure everyone's equality and universal access to education. This principle also guarantees the basic social right, i.e. the right to education, established in art. 70 (1) of the Constitution (as discussed in the first part of this paper).

The constitutional principle of free education is one of the most controversial ones and the practice of its observance in Poland's system of higher education has been the source of a large number of conflicting opinions. However, like the principle of autonomy, this is not a new principle. Poland's earlier constitutions did introduce the notion of free education; however, in most cases its meaning was different than the

[15] Act of 27 August 2009 on public finances, Journal of Laws no. 157, item 240, as amended.

contemporary one. As an example, the March Constitution[16], in art. 119, introduced the principle of free education in schools run by the central government and by the local and regional government.However, this provisions was repealed in art. 81 (2) of the Constitution of 23 April 1935[17]; as a result the constitutional principle of free education was missing for many years and a system of paid higher education studies was introduced into the Polish legal system. The current Constitution introduced the principle of free education by stating directly that education in public schools is free and a statute may permit provision of certain educational services by public schools for a fee. The first sentence of art. 70 (2) is quite clear.It states that education in all public schools, thus also in public institutions of higher education, is free which, *a contrario*, leads to the permissibility of charging fees at all non-public schools, of course including non-public institutions of higher education. It is unquestionable and beyond doubt that education in public elementary schools, middle schools, secondary grammar schools and secondary vocational schools is free. Also, beyond any doubt is the fact that the constitutional principle of free education is a kind of manifestation of the state's participation in the performance of the tasks defined in the Constitution, related to the formation of a strictly defined system of education that will provide equal opportunities to the broadest possible groups to start and continue their studies. Despite certain declarations within the whole system of higher education, free education does not in fact exist, as no studies are completely free. This is due mostly to the fact that in contemporary societies the demand for higher education is much greater than the total public funds available to pay for such education[18]. One must also remember that higher education, being a long-term process, is very expensive.Such costs, however, must be borne by certain entities.In a system that assures free higher education they are covered mostly by the state budget i.e. by public funds. Thus, it is the cost of higher education in public schools, covered by the public funds, that determines the principles of financing of institutions of higher education and significantly limits the freedom of use of public funds by such institutions. Yet, this is self-evident from the point of view of budget management and the funds made available for this purpose in the state budget; consequently, the scope of decisions that can be made regarding these funds is greatly limited. The restrictions are established mostly by the provisions of the Act on Higher Education and, as mentioned before, by the regulation on the financial management of institutions of higher education. Of importance is also the method of calculation of the so-called full-time study subsidy from the state budget intended to cover the regular costs of operation of public institutions of higher education. This method was defined in the regulation of the Minister of Science and Higher Education concerning the principle

[16] Constitution of the Republic of Poland of 17 March 1921, Journal of Laws of the Republic of Poland, no. 44, item 267, as amended.
[17] Journal of Laws of the Republic of Poland no. 30, item 227.
[18] J. Woźnicki, M. Wyrzykowski, Współpłatność za studia a Konstytucja Rzeczpospolitej Polskiej [Co-payment for studies and the Constitution of the Republic of Poland], Warsaw 1998, p. 16ff.

of distribution of the state budget subsidies among public and non-public institutions of higher education. The distribution is calculated using a certain algorithm and depends on many factors, to includethe amount of subsidy received in the previous fiscal year, the cost indicator of the different fields of studies, the number of full-time undergraduate students, the number of full-time students in doctoral programs, the number of schools in the different groups of schools, the number of employees (professors, doctors, and others), the research component, the license component, and many others. The system of distribution of subsidies is fairly complicated and the difficulty in understanding it is even greater due to the fact that the money intended to cover the costs of the statutory activities of institutions of higher education depends also on the so-called parametric evaluation of the institution, established in the regulation of the Minister of Science and Higher Education of 17 October 2007 on the criteria and procedure for granting and accounting for funds intended for statutory activities.[19] Particularly controversial, in this regard, is the number of points given for the number of peer-reviewed publications. Several restrictions on the use of funds from the state budget are established in the Act on Higher Education. The basic restriction is the purpose on which a subsidy from the state budget can be spent.According to art. 94 of the Act, public institutions of higher education receive subsidies for:

1) tasks related to education of full-time undergraduate students and full-time doctoral program students, education of their scientific staff, and maintenance of the institutions, to include repairs;
2) tasks related to non-returnable material assistance to undergraduate students and doctoral-program students (this pertains also to non-public schools);
3) co-financing or financing of the costs of investment projects, to include those intended for education of handicapped undergraduate and doctoral-program students;
4) tasks related to creation of conditions for participation in the didactic process for handicapped undergraduate and doctoral-program students (this pertains also to non-public schools).

The statute significantly limits the ability of institutions of higher education to charge additional fees for their administrative services. In accordance with art. 99a of the Act, institutions of higher education shall not charge fees for enrolment for another semester or year of studies, for examinations, to include repeated examinations, examinations conducted before examination boards, and final examinations, for issuing internship logs, for submission and grading of final papers, and for issuing diploma supplements. Institutions of higher education are also limited by the provisions of the regulation on the principles of financial management of public institutions of higher education, especially those pertaining to the formation and changing of their funds, and by the provisions of the statute pertaining to their remedial programs. The

[19] Journal of Laws no. 205, item 1489, as amended.

aforementioned provisions will become effective on 1 January 2012. According to art. 100a of the Act on Higher Education, institutions of higher education whose total net loss in a period that is not longer than the last 5 years is greater than 25% of the amount of the subsidy from the state budget received in the year before the current financial year, are required to prepare a remedial program within three months. The remedial program is to be prepared and adopted by the institutions' senates and is to be presented to the minister supervising the institutions. If the remedial program is not implemented or does not lead to satisfactory results, the minister is to appoint a person to perform the duties of a rector and the current rector is to be suspended. Moreover, the powers of collective entities of the institutions pertaining to the financial matters are to be suspended. Certainly, this provision significantly limits the freedom of decisions of institutions of higher education. However, it is needed to solve their financial problems and to restore their liquidity.

In conclusion, institutions of higher education enjoy significant freedom with regards to spending of public funds; however, this freedom is limited by the scope of the full-time student subsidy. Of course this statement makes sense when one keeps in mind that all money received by public institutions of higher education, to include fees for educational services, should be regarded as public funds. Thus, autonomy of institutions of higher education is not fictitious and is fully exercised within the legal framework defined in the applicable laws, and the impact of public finances on their autonomy, in the legal sense, is actually marginal.

Local Government Autonomy and Public Debt and the Deficit of Public Finance Sector on the Polish Example

Ewa Lotko, M.A.

Abstract: Limits of local government units financial autonomy are designated by legal regulations and by the need to balance public finance across a given local government unit (LGU) and whole country. The necessity to limit public debt and to balance a budget on the national and LGUs level determines their financial autonomy. In order to reduce the debt it is possible, and in critical situations even necessary, to implement additional restrictions of financial independence concerning public debt and public finance sector deficit but only on condition that constitutional and statutory principles that guarantee this independence will be upheld. Financial independence is influenced by financial situation including the level of budget deficit and the amount of debt. All restrictions in the form of debt limits for local units cause restrictions of financial independence in these units but also protect them from negative consequences of excessive debt.

Keywords: local government autonomy, deficit of public finance sector, public debt, local government unit, debt limits, refundable revenues, public debt forecast, financial independence, acceptable debt ratios.

1. Independence of local government units in debt

Financial independence of LGU is not and cannot be interpreted according to free will of local governments as a full autonomy in managing obtained funds. This independence cannot be absolute because in state under the rule of law its limits are defined by the Constitution and laws. Limitations concerning planning and funds management procedures, tax framing, public debt management, budget deficit financing, precise description of prudence and recovery procedures influence the stability of the whole public finance sector as well as LGUs.

The level of LGUs autonomy in debt is defined by binding law and regulations as well as by current situation in public finance. The scope of independence is confirmed in the Constitution of Poland[1], European Charter of Local Self-government[2] and statutes. Legal personality conferred according to Art. 165 section 1 of the

[1] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, later amended).
[2] European Charter of Local Self-government prepared and executed in Strasbourg on 15 October 1985 (Journal of Laws of 1994 No. 124, item 607, corrected: Journal of Laws of 2006 No. 154, item 1107).

Constitution of Poland conditions the possibility to access capital and banking market by these units. Pursuant to Art. 167 of the Constitution LGUs were given public funds adequate to tasks and statutory guaranteed sources of income. The Constitution guarantees LGUs specified rights and competence but also implements restrictions. According to Art. 216 section 5 of the Constitution of Poland borrowing loans or giving guarantees and sureties, regardless of statutory requirements, is subjected to law. These activities would be impossible to perform if public debt exceeded 3/5 annual GDP as a result of borrowings or given guarantees and sureties. This constitutional principle is to protect against excessive budget deficit which is a serious danger to a proper functioning of the country and its balance. The criteria of economic stability are also constitutionally specified public debt limit which amounts to 2/3 of annual GDP.

The participation of LGUs in capital market under binding law is a key element from the perspective of the sources financing deficit. It allows the implementation of one of the principles formed in European Charter of Local Self-government which in Art. 9 states that local communities should have the access within the law to a domestic capital market in order to finance investment expenditures. The possibility to use refundable revenues allows to pay current budget shortages and investment programmes planned for years but it is restricted mainly by conditions concerning current financial liquidity, minimizing costs of their service or the necessity to analyze current and plan future income and future liabilities. It needs to be emphasised these revenues should constitute supplementary financing source of mainly investment tasks.

Also statutes determine the scope of financial independence, in particular: Act on Commune Self-government[3], Act on Poviat Self-government[4], Act on Voivodship Government[5] and Act on Public Finance[6] which have given LGUs and their authorities e.g. the right to conduct financial management based on the budget (Art. 51 section 1 of the Act on Commune Self-government, Art. 51 of the Act on Poviat Self-government, Art. 61 of the Act on Voivodship Government and Art. 211 section 4 of the Act on Public Finance). Provisions of constitutional statutes confer LGUs legislative bodies the right to adopt resolutions on property issues exceeding the scope of ordinary management (Art. 18 section 2 item 9 of the Act on Commune Self-government, Art. 12 item 8 of the Act on Poviat Self-government, Art. 18 item 19 of the Act on Voivodship Government) and concerning in particular: borrowing long-term loans and credits, establishing maximum amount of short-term loans and credits borrowed by implementing body, the amount of loans and sureties given by implementing body in a financial year, and defining the amount up to which

[3] Act on Commune Self-government of 8 March 1990 (Journal of Laws of 2001 No. 142, item 1591, later amended).
[4] Act on Poviat Self-government of 5 June 1998 (Journal of Laws of 2001 No. 142, item 1592, later amended).
[5] Act on Voivodship Government of 5 June 1998 (Journal of Laws of 2001 No. 142, item 1590, later amended).
[6] Act on Public Finance of 27 August 2009 (Journal of Laws No. 157, item 1240, later amended).

implementing body can independently incur liabilities (Art. 18 section 2 item 10 of the Act on Commune Self-government, Art. 12 item 9 of the Act on Poviat Self-government) as well as borrowing credits and loans and issuing securities limited by authorization of legislative body or budget resolution (Art. 212 section 2 of the Act on Public Finance). The necessity of LGUs to be solvent and to protect the interest of local communities causes that the use of refundable revenues in the form of credits and loans has been legally limited by many requirements. These include: obligation to indicate in the budget the results of the incurred liabilities as well as their repayment; obligation of Regional Accounting Chamber (RAC) to issue opinions on the possibilities to repay incurred liabilities on the request of a lender or a given unit; obligation of the RAC to assess the possibilities of financing budget deficit which results from budget resolution and sources indicated there as well as from regularities of debt forecast attached to the budget; statutory description of acceptable debt limits of units[7].

According to Art. 89 of the Act on Public Finance financing sources of spending not covered in planned income of LGUs and of shortages during the year can be revenues from the sale of securities issued by a given unit or from credits and loans. The use of these sources is justified by the lack of adequacy between the tasks a unit does and designated amounts. Therefore it is natural for local governments to have the possibility to use the effective system of own income, subsidies, grants and different kinds of debt instruments. It is also essential that the legislator enumerated the purposes to which the money from loans, credits and issued securities may be assigned. These purposes include: financing temporary deficit and deficit planned in budget resolution, repayment of formerly incurred liabilities from obtained loans, credits and the necessity for redemption of issued securities as well as the possibility of advance financing of tasks financed from EU budget.

Provisions of the Act on Public Finance set limits on adoption of LGU budget, where planned spending cannot be higher than planned current income plus budget surplus from previous years and available funds. Essential are also restrictions connected with permissible debt amount of LGU resulting from setting the upper limit of debt based on income. According to Art. 86 of the Act on Public Finance the range between 50% - 60% and more causes the obligation to apply many limits and prohibitions in national and LGUs budgets as well as recovery plans implementation in order to reduce the public debt to GDP ratio. Local government debt is a part of national debt so in this case are vital provisions concerning LGUs. Therefore, for instruments which need to be applied within the so called II procedure, when public debt to GDP ratio exceeds 55% but will be lower than 60%, LGUs are obliged to pass for the next year a budget resolution in which budget spending may be higher than income by the amount of sources for the implementation of tasks co-financed by the European funds, whereas to budget incomes needs to be added possible surplus from

[7] J. Glumińska-Pawlic, Financial independence of local government units in Poland,Katowice 2003, p. 157.

previous years and available funds. On the other hand, if national debt exceeds III prudential threshold, meaning that the public debt to GDP ratio reaches or exceeds 60%, then budget expenses of LGUs stated in the next year budget resolution cannot be higher than budget incomes. In such a situation LGUs cannot give guarantees and sureties beginning from the 7th day after the Minister of Finance announces public debt to GDP ratio. Currently binding legal status broadens the scope of local governments debt allocation. According to Art. 89 section 1 item 4 of the Act on Public Finance refundable revenues may include also advance financing of tasks financed from EU budget. It needs to be emphasized that own finance contribution of a given LGU to a particular project implementation should be from budget incomes or from debt liabilities. Changes in aims of LGUs debts are also regulated in Art. 216 section 2 item 6 of the Act on Public Finance. According to these changes LGUs budget spending is designated to own tasks, to public administration tasks or other tasks ordered in a statutory manner, as well as tasks accepted by LGU as contracts or agreements, also aid in kind or financial aid for other LGUs, and tasks implementation within programs co-financed by EU budget, as well as non-refundable aid given by EFTA states, and other non-refundable funds from abroad. Additional advantage for local governments results from the provisions of Art. 90 of the Act on Public Finance stating that LGUs have the possibility to get loans from national earmarked funds in order to finance capital expenditures within the Long-term Financial Forecast (LFF)[8].

Statutory restrictions apply in both acceptable debt limit and its service, due to the fact that debt management and service are complicated multistage processes concerning amount of debt or the choice of the most profitable sources of refundable revenues[9]. According to Art. 212 section 1 item 6 of the Act on Public Finance it is necessary to establish liabilities limits of borrowed loans, credits or issuing securities referred to in Art. 89 section 1 and Art. 90 of the Act on Public Finance. These limits have to be set in budget resolution of a given unit in case of a need to incur some of the liabilities for a special purpose.

2. Limits of local government units independence in debt

According to Art. 121 section 2, 7 and 8 of the Act implementing the Act on Public Finance[10] to 2013 statutory debt limits stated in Art. 169 and 170 of the Act on Public Finance of 2005[11] are binding. This law introduced two debt ratios: the first one relating to the amount of annual debt repayment and the second to the global debt amount. Pursuant to Art. 169 of the Act on Public Finance of 2005 total amount of

[8] M. Poniatowicz, J. M. Salachna, D. Perło, Effective debt management in a local government unit, Warszawa 2010, p. 92-93.
[9] E. Ruśkowski, J. M. Salachna, Local finance after accession, Warszawa 2007, p. 200-201.
[10] Act on Implementing Provisions of the Act on Public Finance of 27 August 2009 (Journal of Laws No. 157, item 1241).
[11] Act on Public Finance of 30 June 2005 (Journal of Laws No. 249, item 2104, later amended).

liabilities in a given financial year cannot exceed as a matter of principle 15% (and in specific situations 12% - i.e. when public debt plus the amount of estimated payments from sureties and guaranties given by public finance sector to GDP ratio exceeds 55%) of LGU budget incomes planned for a given year. These liabilities include: repayment of credits and loans borrowed for financing budget deficit or debt rollover, meaning repayment of previously incurred liabilities or redemption of securities issued by LGUs; interest and discount on the above mentioned liabilities as well as interest on short-term credits and loans borrowed to finance temporary budget deficit in LGUs, and potential repayment of sureties and guaranties granted by LGUs. To calculate 15% ratio the following things are not taken into consideration: debt liabilities incurred in relation to contract with a unit having non-refundable sources form EU budget or aid from EFTA states or sureties and guarantees given to local government legal units implementing LGU tasks by using these funds. On the other hand Art. 170 of the Act on Public Finance of 2005 states that the LGUs amount of debt at the end of a financial year cannot exceed 60% of LGU actual revenues in this financial year. During the financial year the total amount of debt at the end of a quarter cannot exceeds 60% of the planned incomes in a given financial year. Issuing securities, credits or loans borrowed in relation to contracts with a units having non-refundable sources form EU budget or the aid from EFTA are not taken into consideration in calculating this ratio. But it is only binding till the end of the project or tasks implemented from aid funds and received refunds of expenses. According to provisions of the Act on Public Finance of 2009 in situation when aid funds specified in a contract will not be transferred or after the transfer their repayment will be adjudged then LGU cannot make debt or give sureties and guaranties until the requirement of staying below 60% is fulfilled.

Because of the fact that fixed debt ratios are insufficiently adequate to current financial situation of all local governments, that is why from 2014 will be binding debt ratio individualized for every LGU. New ratio limiting LGU budget burdens will replace current total debt limits (60%) and repayments of financial debts (15% of incomes). This solution referring to the concept of budget surplus cancels the limits currently binding LGUs, to whom incurring even significant liabilities may be the instrument of a safe investment and development policy but will discipline those units whose budgets are charged with repayments of liabilities and this causes carefulness and caution in borrowing next credits and loans or issuing securities. This will additionally prevent units which lost creditworthiness from incurring liabilities[12]. Operating surplus is information concerning finance left after financing spending on current running of a given unit. Regulation of Art. 243 of the Act on Public Finance in accordance with Art. 121 section 2 of the Act on Implementing Act on Public Finance may be applied for the first time to budget resolutions for 2014, however for the years 2011-13 LGUs are obliged to attach to LFF the information about the movements for a

[12] Justification on a draft Act on Public Finances of 20 October 2008, Sejm paper No. 1181, p. 39.

given year in the total amount the factors enumerated below will exceed the arithmetic mean for the 3 calculated years of its current incomes plus income from the sale of assets and minus current expenses to budget incomes ratio. These factors include: repayments of credits and loans instalments referred to in Art. 89 section 1 item 2-4 and Art. 90 together with due in a given year credits interests referred to in Art. 89 section 1 and Art. 90; redemption of securities issued for the purposes described in Art. 89 section 1 item 2-4 and Art. 90 together with due interest and discount on securities issued for the purposes stated in Art. 89 section 1 and Art. 90; potential repayments of the amounts from given sureties and guarantees to the planned budget incomes. This duty will show real possibilities and financial potential of a given local government and will simplify planning current and investing activities. Since 2011 LGUs have had the possibility to finance deficit with the surplus from previous years as well as with available funds. However, if a given local government plans to make debt liabilities or in case if it already has had such liabilities, their repayment will be in 2014 and in following years, than the data for calculation will not include the amount of surplus from previous years and available funds. Therefore, regardless of the balance in the current part of the budget due to the funding of its deficit with e.g. the surplus from previous years, will be impossible to achieve positive indicator allowing the repayment of debt liabilities. It is possible that local governments which will be financing the deficit of a current budget with the surplus from previous years or available funds may have positive ratio of the arithmetic mean from 3 years preceding financial year if in those years the unit obtained incomes from the sale of assets expanding current incomes which are taken to calculate the ratio. However, better results of the current section due to incomes from the sale of assets will have those units whose incomes from these sales are quiet big. It should be stated that in order for a unit to have the possibility to repay liabilities in 2014 it needs to have positive indicator calculated for the year 2011-13 and it should be higher than debt repayment with interest and discount to income in general ratio[13].

RAC plays an important part in applying for credits or loans by LGUs, because it states opinions on the repayments possibilities. Legislator in order to prevent excessive debt of LGUs obliged them to develop the amount of a given unit public debt. Generally, the provisions of the Act on Public Finance do not state any specific data which should be included in the debt forecast. However, as results of the regulations concerning acceptable debt threshold until 2013 the amount of debt and its repayment in the following years is referred to the amount of LGUs incomes (according to Art. 169 and 170 of the Act on Public Finance of 2005 in connection with Art. 121 section 7 and 8 of the Act Implementing the Act on Public Finance), but from 2014 in acceptable

[13] J. M. Salachna, Commentary on Art. 243 of the Act on Public Finance, in: E. Ruśkowski, J. M. Salachna (red.), New Act on Public Finance with the Implementing Act. Practical commentary, Gdańsk 2010, p. 782-783.

debt needs to be included regulation arising from Art. 243 of the Act on Public Finance which orders to include in calculation the amounts of incomes in general, current and property incomes as well as current spending. This means that from 2014 new debt limit according to Art. 243 of the Act on Public Finance will prevent from making debts those units which do not have current surplus. This limit will depend on the funds possessed by a given local government. Even when a unit has surplus from previous years, it will not be allowed to implement projects co-financed by refundable sources if current incomes do not cover current expenses. Therefore, debt forecast should also include information about the amount of current and capital incomes and expenses not only debt ratio and debt repayment[14]. According to Art. 230 of the Act on Public Finance planned debt amount of the LGU in assessed on the basis of debt forecast included in LFF and the budget resolution project. For the years 2011-2013 the forecast has to contain, for every financial year included in the forecast and LFF, the amount of debt at the end of previous year plus debt enlargement (incurring liabilities) minus debt reduction (repayment of liabilities) and the result of a given period in the form of the amount of debt at the end of the year. For every year included in the forecast should be calculated debt indicators at the end of the year to incomes and repayment in relation to planned incomes[15].

3. Current situation of local government units in debt

Debt is common and concerns every level of LGUs. The data of the Ministry of Finance show that LGUs debt in 2010 compared to 2009 increased by 12.677 million PLN. And the dynamic of debt increased in 2010 was: 49,4% in communes, 39,4% in poviats, 30,5% in cities with the right of Poviat and 40,3% in voivodships. In the structure of liabilities according to debt titles credits and loans have the biggest share – 89,2% (in communes – 94,2%, in poviats – 91,8%, in cities with the right of poviat – 84,4%, in viovodships – 89,9%), the second category are securities – 10,2% (in communes – 4,8%, in poviats – 7,4%, in cities with the right of poviat – 15,2%, in voivodships – 10%). At the end of the 2010, 2258 out of 2414 communes were in indebt, including 3 which exceeded the 60% debt threshold in relation to obtained incomes. In other 43 communes debt to income relation exceeded 50%. Also 310 out of 314 poviats were indebt and all of the cities with the right of poviat[16]. The most indebt cities are: Wrocław – 58,9%, Kraków – 58,1%, Toruń – 56%, Lublin – 55,5%, Łódź – 54,7%. Aggregate debt in the amount of planned incomes in all LGUs was about

[14] J. M. Salachna, Commentary on Art. 227 …, p. 722.
[15] J. M. Salachna, Commentary on Art. 230 …, p. 730-731.
[16] Ministry of Finance, Debt of local government units in III quarter 2010, Information from the Ministry of Finance web site: http://mf.gov.pl of 1 August 2011.

26,9%. Together with the debt increases also local governments spending on the debt service which currently exceeded 1,1% of all LGU expenses[17].

If asked about the causes of local governments debt, members of the local governments reply that it is necessary in order to satisfy the needs of local communities. This can be done in two ways. The first one is current consumption and its level is visible in current expenses to expenses in general ratio. The second one includes creating goods of a durable consumption, i.e. starting investment projects whose implementation time and most of all service life will exceed one financial year. The level of debt among LGUs is very diverse because the range of needs is different for every community[18]. They are differentiated by the level of infrastructure and the possibilities to use it as well as by the demand for goods or services. Diverse debt level may be connected with different activities of implementing bodies. But in cannot be stated that those which are the most active cause the highest debts. The merit is in the fact that when deciding on debt the bodies of a LGUs should take into consideration economic and legal aspects: binding laws, macroeconomic analysis, future incomes of a given LGU, debt service costs and its risk[19].

In most cases local government participation in debt is much lower than in financing tasks, at the same time financing a part of public investments.[20] When analyzing debt made by LGUs, focus should be placed on the purpose of borrowing. Both in professional literature and in practice it is believed that local governments not only can but should borrow loans for investments so that capital expenditures could be born during project implementation, because financing through credit effects that those who use the investment, will pay for it. This idea supports also the fact that the benefits from accelerated economy development may be bigger than debt service costs, that long-lasting and time-consuming investment is more expensive or that due to access to EU budget local governments can use many financing sources but in this case own contribution of 25% of investment costs is required.

[17] K. Polak, Communes implementing new tasks without support increase the debt, „Gazeta Prawna" 2011, No. 90.
[18] T. Dobek, Not All local government units can make new investments, „Gazeta Prawna" 2011, No. 77.
[19] J. Głumińska-Pawlic, op. cit., p. 164.
[20] K. Maj-Waśniowska, Local government debt procedures in European Union, „Zeszyty naukowe" 2008, No. 778, p. 235.

4. Additional actions of the Ministry of Finance as an attack on financial independence of local government units

4.1. Regulation of the Minister of Finance and its unconstitutional nature

Law-making activity should completely result from statute which is the basis of law sources. Statutory exclusivity rule establishes parliament monopoly, as a nation representative, to regulate systemic and socially important matters. Therefore, in Polish binding legal system cannon appear any substatutory regulations which are not based in statutes and which do not serve the execution of such a statute according to Art. 92 section 1 of the Constitution. There are no such matters in which it would be possible to provide substatutory regulations having commonly binging nature without previous statutory provision. Regulation as a secondary legislation is to specify statutory regulation and not to change binging provisions of a statute because in order to do so its amendment within legislative process is required. Therefore, it is questioned if paragraph 3 of the Regulation of the Minister of Finance[21] of 23 December 2010 is consistent with principles of proper legislation resulting from Art. 2 and Art. 92 section 1 of the Constitution.

According to Art. 72 section 1 item 3 and 4 of the Act on Public Finance legislator precisely describes components of public debt and isolates four debt titles categories: securities, borrowed credits and loans, received deposits and other liabilities resulting from statutes as well as legally binding court and administrative decisions but classification of the latter to public debt is conditional upon their maturity. However, delegation of legislative powers to carry out Regulation included in Art. 72 section 2 of the Act on Public Finance imposes on the Minister of Finance obligation to define the detailed way of categorizing debt titles classified as national public debt assuming basic objective and subjective debt categories and maturity periods. These categories were formulated in Art. 72 section 1 item 1-4 of the Act on Public Finance. The Minister of Finance was bound to this statutory category when he issued according to Art. 92 section 1 of the Constitution secondary law to the Act. Yet, in published Regulation without previous amendment of Art. 72 section 1 item 2 of the Act on Public Finance, the Minister of Finance considerably changed the scope of concepts of Art. 72 section 1 item 2 of the Act on Public Finance including (bank) credits and loans regulated in the Civil Code[22] and constituting in paragraph 3 of the Regulation that this category also includes: public-private partnership contracts influencing the level of public debt; securities with limited transferability; sales contracts with price paid in instalments; leasing agreements with producers or sponsors where the risk and benefits from the

[21] Regulation of the Minister of Finance of 23 December 2010 on detailed way of categorizing debt titles classified as national public debt and State Treasury debt (Journal of Laws No. 252, item 1692) – Regulation.
[22] Act of 23 April 1964 on Civil Code (Journal of Laws No. 16, item 93, later amended).

property are transferred to the user; as well as unnamed contracts with the payment deadlines longer than one year connected with financing services, supplies and construction works having effects similar to loan or credit contracts. Legislator transferred these titles from basic for them liabilities category specified in Art. 72 section 1 item 4 where in order to be classified as public debt they needed to fall due[23]. This change, made only by the Regulation, negatively influenced the financial situation of some LGUs. It may even mean getting close to or exceeding statutory debt limit. According to commune heads, mayors and city mayors the scope of debt titles changed by this Regulation violates not only LGUs autonomy principle and confirms unjustified state interference in local government affairs but also basic principle of legislative technique and causes contradictions between Regulation provisions and the Constitution. Owing to the new debt calculation debt in e.g. Wrocław increased by 350 million PLN and in Toruń by 50 million PLN. However, bigger units are able to deal with higher debt but for smaller it constitutes a serious problem. Słubice can be an example: debt buying agreements amounted to 7,5 million PLN but as a result of adding them to debt the latter increased in the first quarter up to 79,5%. So the town needs to economize on a large scale. Similarly Sadki commune was forced to enlarge debt by 10,3 million PLN because it increased from 14,6% up to 73,9% of incomes and this forced the commune mayor to make available funds intended for investments. Official debt of voivodship cities at the end of 2011 is estimated to be 19,7 billion PLN. But if debts of companies in which local governments have shares will be added to this sum, then total debt can increase to at least 27,4 billion PLN and 40%. Such results turned out to be especially disadvantageous for such cities as: Gdańsk, Łódź, Bydgoszcz, Toruń, Olsztyn, Wrocław, Zielona Góra and Kraków. According to members of local governments the Minister of Finance aims at limiting the deficit of public finance sector at all costs and consequently at limiting debt in order to fulfil EU obligations. In fear of public debt exceeding the limit of 55% of GDP government plans to impose restrictions on LGUs budgets. According to the Mayor of Poznań such actions are questionable because not all local governments are equally responsible for debt and their debt is much lower than debt in government sector and amounts to 8%[24].

In the analysis of Art. 72 section 1 and 2 of the Act on Public Finance should be answered the question if the concept of public debt and classification of public finance sector liabilities from Art. 72 section 1 and 2 of the Act on Public Finance including amendment of section 2 of this Art. by the Act Amending Act on Public Finance fulfil the regulations of the Constitution. It should be stated that provisions of Art. 72 section 1 and amended Art. 72 section 2 of the Act on Public Finance are consistent with Art.

[23] M. Mazurkiewicz, Problems with consistency of Art. 72 sections 1 and 2 of the Act on Public Finance with the above mentioned par. 3 of its executing Regulation with the Constitution – discussion, „Finanse Komunalne" 2011, No. 4, p. 10.
[24] A. Cieślak-Wróblewska, Local government vs. the Minister of Finance, „Rzeczpospolita" 2011, Internet edition of 19 July 2011.

216 section 1 and 5 of the Constitution of Poland and fulfil the requirements of exclusivity of the statute. Borrowing loans or giving sureties and financial guarantees by the state, and making public debt as a consequence, happens on the principles determined in the statute as well as does the manner of calculating annual GDP and public debt. Regulation included in the statute and concerning liabilities of LGUs as elements of public debt is also in accordance with Art. 16 section 2 and Art. 165 section 1 and 2 of the Constitution. Editing of the paragraph 3 of the Regulation as a secondary legislative to Art. 72 section 1 of the Act on Public Finances indicates its inconsistency with Art. 2 and Art. 92 section 1 in connection to Art. 163 and Art. 216 section 1 and 5 of the Constitution[25]. All matters concerning the change of objective and subjective scope of liabilities included in public debt are constitutionally guaranteed and legislator can and should react to current economic situation but only by way of legislation and within legislation correctness rules. If defining debt titles to public debt is of key importance for its calculation, then it is impossible to make any changes without alterations on the statutory level[26].

4.2. Local government expenditure principle

Poland is under the procedure of excessive deficit and therefore the Minister of Finance is obliged to correct the deficit of governments and local governments institutions sector below 3% of GDP till 2012. Binding since 1 January 2011 amendment of the Act on Public Finance defined the so called disciplinary expenditure principle whose aim is to limit the dynamic and the risk connected to excessive increase of state budget spending. According to the principle state budget spending can increase from year to year in 1 percentage point above the inflation. This procedure is to limit the increase of the so called flexible spending whose amount has not been determined in statutes as well as new fixed spending whose amount is specified in different legal regulations. This principle by supporting the process of public finance sector deficit reduction is to favour the implementation of target principle (stabilizing) ensuring permanent stabilization of public finance. It is estimated that applying disciplinary expenditure principle at flexible spending would make the following budget savings: in 2011 – 2,8 bn, in 2012 – 8,5 bn, in 2013 – 17,4 bn and in 2014 29,5 bn PLN. According to assumptions disciplinary expenditure principle will not be applied e.g. to liabilities resulting from domestic and international contracts, retirement benefits and disability pensions as well as other social benefits.

The Minister of Finance has decided to propose the implementation of limits in the LGUs capacity to generate debt because of the fast increase in LGUs deficit and the necessity to restrict the deficit of the whole public finance sector. According to the

[25] M. Mazurkiewicz, op. cit. p. 10.
[26] M. Bitner, M. Kulesza, New definition of public debt? Problems with interpretation of the Minister of Finance Regulation of 23 December 2010 on a detailed way to classify debt titles to public national debt and to State Treasury, „Samorząd Terytorialny" 2011, No. 7-8, p. 30.

proposal LGUs deficit could not in 2012 exceed 4% of income and in the following years should be reducing by 1 percentage point to achieve target level of 1% of LGUs income in 2015. These limits will also allow to decline LGUs deficit in 2012 in comparison with 2010 by 0,4% of GDP. According to members of local governments, additional restrictions will concern cities with the co far lowest debt, i.e. those which invested less and investment effort have planned for the years 2012-14. Indebt cities have to generate operating surplus so additional limits will not concern them. Absurdity lies in the fact that fight with excessive public debt will concern those who have not caused this debt. According to mayors of the biggest Polish cities associated in the Union of Polish Metropolises such intentions of the Minister of Finance is: meaningless, limiting development and investment possibilities, in many cases impossible to do, creating threat for transfer of EU sources, unfair and anti-privatisation. Such actions will be the most severe for cities like Łódź, Katowice and Szczecin which will have to significantly reduce investments[27].

In relation to discussion of this matter the Ministry of Finance together with local governments want to develop a program limiting LGUs debt and deficit increase. An instrument used to achieve this aim will be the new expenditure principle for local government sector. Work on this principle has not been ended yet but current information show that limits of acceptable deficit will concern local government sector as a whole and not particular units, as previously announced. According to the Ministry of Finance the implementation of the principle will not limit local governments actions on development and investments which local governments are afraid of. However, it is estimated that controlling and debt rate monitoring mechanisms will be tougher. It is important that information about possible exceeding of deficit level should be available as soon as possible so that reaction could also be as quick as possible. To do so the following actions are to be taken: take-over RAC supervision of local governments finance by the Minister of Finance and implementation of limiting mechanism acting in a situation when there is a threat that whole sector limit will be exceeded. However, local governments emphasise that every implementation of additional restrictions should be firstly consulted and discussed as well as legally regulated by statute within proper legislation process and never implemented in a hurry within unclear rules.

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Финансовая деятельность и экологическая функция Российскогогосударства

(Financial Activity and Environmental Function in Russian Federation)

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Аннотация: Статья посвящена анализу бюджетных расходов в Российской Федерации, выделяемых на реализацию экологической функции, и исследованию финансовой деятельности государственных органов в сфере экологии.

Ключевые слова: экологическая функция, финансовая деятельность, бюджет, расходы, государственный орган, компетенция.

Abstract: This paper is dedicated to the analysis of budget expenses in Russian Federation devoted to realization of environmental function and to research of state agency's financial activity in the region of ecology.

Keywords: environmental function, financial activity, state budget, budget expenses, state agency, competence.

Выполнение экологической функции Российским государством осуществляется неудовлетворительно. Это объясняется недостатком выделяемых средств, тем, что финансовые средства концентрируются не на главных направлениях, имеет место нецелевое использование финансовых средств, отсутствует четкое разграничение предметов ведения и полномочий в области природоохранительной деятельности между федеральными органами исполнительной власти и органами исполнительной власти субъектов РФ. Поэтому очень важно проанализировать: заложены ли в действующем законодательстве финансово-правовые основы осуществления этой функции.

Экологическая функция государства- это деятельность государства по установлению и соблюдению режима природопользования, по охране окружающей среды, созданию экологической безопасности для реализации права граждан на благоприятную окружающую среду.

Для обоснования правильности своей позиции по содержанию экологической функции государства обратимся к бюджету РФ и рассмотрим направления, по которым государство осуществляет финансирование деятельности государства в сфере экологии. Расходы бюджета теснейшим образом связаны с функциями государства, потому что они представляют собой денежные средства, направленные на финансовое обеспечение задач и функций государства и местного самоуправления.

В соответствии со ст. 6 БК РФ[1] бюджет – это форма образования и расходования бюджетных средств, предназначенных для финансового обеспечения задач и функций государства и местного самоуправления. Формирование и доходов, и расходов непосредственно связано с выполнением задач и функций государства и местного самоуправления.

Для упорядочивания формирования доходов и расходов проводится бюджетная классификация РФ. Она представляет собой группировку доходов, расходов и источников финансирования дефицитов бюджетов всех уровней бюджетной системы РФ, используемой для составления и исполнения бюджетов всех уровней бюджетной системы РФ и обеспечивающей сопоставимость показателей бюджетов всех уровней бюджетной системы РФ. Классификация расходов бюджетов – это группировка расходов бюджетов всех уровней и отражает направление бюджетных средств на выполнение единицами сектора государственного управления и местного самоуправления основных функций, решения социально-экономических задач[2].

Классификация расходов бюджетов содержит 11 разделов, отражающих направление финансовых ресурсов на выполнение основных функций государства. Один из разделов 0600 называется «Охрана окружающей среды». Но на реализацию экологической функции государства направлены частично и расходы по разделу 0400 «Национальная экономика».

Разделы детализированы 95 подразделами, конкретизирующими направление бюджетных средств на выполнение функций государства в пределах разделов. Так, например, раздел 0600 "Охрана окружающей среды" состоит из пяти подразделов и аккумулирует расходы на обеспечение экологического контроля, очистку сточных вод, сбор и удаление отходов, охрану объектов растительного и животного мира и среды их обитания, очистку атмосферного воздуха и другие расходы в области охраны окружающей среды. По подразделу 0601 "Экологический контроль" подлежат отражению расходы на проведение мероприятий по экологическому контролю и обеспечение деятельности учреждений, осуществляющих функции в сфере экологического контроля. По

[1] СЗ РФ. – 1998. - №31. – Ст. 3823.

[2] Приказ Минфина РФ от 25 декабря 2008 года № 145н «Об утверждении указаний о порядке применения бюджетной классификации РФ» // Финансовая газета(региональный выпуск). – 2009. - № 6-20.

подразделу 0602 "Сбор, удаление отходов и очистка сточных вод" подлежат отражению расходы на: организацию сбора и вывоза к месту переработки и утилизации всех видов промышленных, радиоактивных и опасных отходов (за исключением бытовых); их утилизацию (захоронение); управление оборудованием для откачки сточных вод, эксплуатацию, сооружение, ремонт или модернизацию таких систем (в части, не относимой к вопросам благоустройства), расходы на обеспечение деятельности учреждений, оказывающих данные услуги, а также расходы на предоставление субсидий юридическим лицам в указанной сфере деятельности. По подразделу 0603 "Охрана объектов растительного и животного мира и среды их обитания" подлежат отражению расходы на различные виды деятельности, связанные с охраной объектов растительного и животного мира и среды их обитания, а также контроль за состоянием почв и грунтовых вод, очисткой водоемов от загрязняющих веществ, выбросами парниковых газов и загрязняющих веществ, оказывающих негативное воздействие на состояние атмосферного воздуха, природоохранные мероприятия, предоставление субсидий в указанной сфере, а также обеспечение деятельности природоохранных учреждений .По подразделу 0604 "Прикладные научные исследования в области охраны окружающей среды" подлежат отражению расходы на выполнение научно-исследовательских, опытно-конструкторских и технологических работ по государственным контрактам в области охраны окружающей среды, а также на содержание и обеспечение деятельности государственных научных учреждений, осуществляющих прикладные исследования и разработки в указанной сфере деятельности. По подразделу 0605 "Другие вопросы в области охраны окружающей среды" подлежат отражению расходы на содержание и обеспечение деятельности органов исполнительной власти, осуществляющих надзор в сфере природопользования, расходы в области гидрометеорологии и смежных с ней областях, а также иные расходы в области охраны окружающей среды, не отнесенные к другим подразделам данного раздела.

Раздел 0400 «Национальная экономика» включает также подразделы, которые предусматривают расходы на реализацию экологической функции государства. По подразделу 0404 "Воспроизводство минерально-сырьевой базы" подлежат отражению расходы на обеспечение деятельности федеральных органов исполнительной власти, субъектов Российской Федерации и органов местного самоуправления, учреждений, осуществляющих руководство и управление в данной сфере, а также расходы, связанные с осуществлением мероприятий по геологическому изучению недр, воспроизводству минерально-сырьевой базы, поискам и разведке месторождений полезных ископаемых. По подразделу 0405 "Сельское хозяйство и рыболовство" подлежат отражению расходы на обеспечение деятельности федеральных органов исполнительной власти,

субъектов Российской Федерации и органов местного самоуправления, учреждений, осуществляющих руководство и управление в области сельского хозяйства, сохранение, мелиорацию пахотных земель, предоставление субсидий юридическим лицам в указанной сфере, сельскохозяйственное производство, в том числе обеспечение мероприятий по проведению закупочных интервенций продовольственного зерна, оказание ветеринарных услуг, услуг по борьбе с вредителями сельскохозяйственных растений и других. Данный подраздел также отражает расходы на обеспечение деятельности федеральных органов исполнительной власти, учреждений, осуществляющих руководство и управление в области рыболовства и охоты, охраны, рационального использования, сохранения и воспроизводства водных биологических ресурсов и среды их обитания, контроль за рыболовством в речных, прибрежных и морских водах, мониторинг водных биологических ресурсов, содержание аварийно-спасательного флота, обеспечивающего безопасность судов рыбохозяйственного комплекса, и прочие мероприятия в области рыбоводства и рыболовства. По подразделу 0406 "Водные ресурсы" подлежат отражению расходы на обеспечение деятельности органов государственной власти, учреждений, осуществляющих руководство и управление в данной сфере, а также на водохозяйственные и водоохранные мероприятия. По подразделу 0407 "Лесное хозяйство" подлежат отражению расходы на обеспечение деятельности органов государственной власти, учреждений, осуществляющих ведение лесного хозяйства, а также расходы на мероприятия в области лесного хозяйства. По подразделу 0412 "Другие вопросы в области национальной экономики" подлежат отражению расходы, связанные с обеспечением ядерной, радиационной и экологической безопасности, проведение топографо-геодезических, картографических и землеустроительных работ.

Итак, исходя из классификации расходов бюджетов, государство предусматривает выделение средств на охрану окружающей среды, природопользование и экологическую безопасность.

Указанные в содержании экологической функции отдельными авторами другие виды деятельности как самостоятельные среди расходов бюджета не выделяются. Финансирование деятельности государства по распоряжению природными ресурсами, находящимися в его собственности в интересах общества, осуществляется в рамках раздела 0400 «Национальная экономика», деятельность по соблюдению и защите экологических прав и законных интересов физических и юридических лиц - в рамках раздела 0100 «Общегосударственные вопросы», 0200 «Национальная безопасность и правоохранительная деятельность» и других. Но они не выделяются в качестве самостоятельных видов деятельности, на которые направляются финансовые средства.

Финансовая деятельность государства и муниципальных образований осуществляется государством и муниципальными образованиями в лице соответствующих органов. Для анализа этой деятельности государственными органами необходимо определить ее содержание.

Большинство определений финансовой деятельности государства, как правильно отмечает Соколова Э.Д., не содержит принципиальных различий[3]. Например, Горбунова О.Н. и Грачева Е.Ю. финансовую деятельность государства и органов местного самоуправления характеризуют как организационную деятельность уполномоченных органов по образованию, перераспределению и использованию централизованных и децентрализованных фондов денежных средств в целях бесперебойного функционирования государства и муниципальных образований на каждом этапе общественного развития[4].

Соколова Э.Д. отмечает, что финансовая деятельность государства и муниципальных образований – это действия их органов, направленные на реализацию финансовой политики государства путем создания, перераспределения и использования централизованных и децентрализованных денежных средств, необходимых для обеспечения их задач и функций[5]. Карасева М.В. определяет финансовую деятельность государства и муниципальных образований как процесс планомерного образования, распределения и использования государством и муниципальными образованиями финансовых ресурсов через свои денежные фонды для выполнения поставленных задач[6].

Содержание финансовой деятельности составляют следующие ее направления:

1) образование государственных и муниципальных денежных фондов,
2) распределение государственных финансовых ресурсов,
3) использование государственных и муниципальных финансовых ресурсов,
4) государственный и муниципальный контроль за движением финансовых ресурсов,
5) эмиссия денежных знаков[7].

Субъектом финансовой деятельности государства является государство в лице компетентных органов. Какие же органы государства осуществляют финансовую деятельность в целях обеспечения экологической функции государства?

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[3] Соколова Э.Д. Понятие и принципы финансовой деятельности государства и муниципальных образований / Э.Д. Соколова / Государство и право. – 2007. - № 5. – С. 95.
[4] Быля А.Б., Горбунова О.Н., Грачева Е.Ю. и др. Финансовое право. – М., 2008. – С. 7.
[5] Соколова Э.Д. Указ. соч. – С. 96.
[6] Финансовое право: учебник. Отв. ред. М.В. Карасева. – М., 2006. – С. 32.
[7] Финансовое право: учебник. Отв. ред. М.В. Карасева. – М., 2006. – С. 15.

Основанием для признания органов государственной власти субъектами, обеспечивающими финансовую деятельность государства по реализации экологической функции, является наличие у них компетенции в области финансовой деятельности государства. По понятию «компетенции» существуют разные точки зрения. По мнению Бялкиной Т.М., можно выделить три основных позиции по содержанию компетенции[8] Первая состоит в том, что компетенцию необходимо рассматривать как совокупность властных полномочий. Вторая заключается в том, что компетенция в качестве правовой категории включает в себя помимо полномочий такой элемент, как предметы ведения. Третья позиция выражается в том, что в содержание компетенции помимо предметов ведения, прав, обязанностей субъекта компетенции включаются и другие элементы. Несмотря на многообразие подходов к содержанию компетенции поддерживаем точку зрения Бялкиной Т.М., что компетенция органов государства определяется включением «в ее состав предметов ведения, то есть определенных сфер (областей) общественной жизни, а также полномочий, то есть меры возможного и должного поведения субъектов публичного управления в рамках данных предметов ведения»[9].

Государство осуществляет финансовую деятельность в лице компетентных органов на уровне как федерации, так и ее субъектов. Эту деятельность осуществляют органы государства всех трех ветвей власти, поскольку финансовая деятельность включает в себя и законодательную деятельность представительных органов власти в области финансов, и управленческую деятельность исполнительных органов власти, направленную на практическую реализацию нормативных актов в сфере финансовых отношений, а также деятельность судебных органов. Представительные органы государственной власти в лице Федерального Собрания осуществляют финансовое, валютное, кредитное, таможенное регулирование, денежную эмиссию, утверждают федеральный бюджет, федеральные налоги и сборы (ст. 71 и 106 Конституции РФ). Представительные органы в соответствии со статьей 153 БК РФ рассматривают и утверждают соответствующие бюджеты и отчеты об их исполнении, осуществляют последующий контроль за исполнением соответствующих бюджетов, формируют и определяют правовой статус органов, осуществляющих контроль за исполнением соответствующих бюджетов.

Президент РФ как глава государства обеспечивает согласованное функционирование и взаимодействие органов государственной власти в области финансовой деятельности, определяет основные направления внутренней и внешней политики государства в области финансов, подписывает и обнародует

[8] Бялкина Т.М. Компетенция местного самоуправления: проблемы теории и правового регулирования. Воронеж: Изд-во Воронеж. гос. ун-та, 2006. – С. 81-83.
[9] Там же. – С. 87.

федеральные законы по финансовым вопросам, обращается с ежегодными посланиями о положении в стране (ст. 80 и 84 Конституции РФ). Бюджетное послание, определяющее бюджетную политику РФ на очередной финансовый год и плановый период, Президент РФ направляет Федеральному Собранию РФ не позднее марта года, предшествующего очередному финансовому году.

Правительство РФ разрабатывает и представляет Государственной Думе федеральный бюджет и обеспечивает его исполнение, представляет отчет об исполнении федерального бюджета, обеспечивает проведение в РФ единой финансовой, кредитной и денежной политики (ст. 114 Конституции РФ). Исполнительные органы государственной власти (исполнительно-распорядительные органы муниципальных образований) согласно ст. 154 БК РФ обеспечивают составление проекта бюджета, вносят его на утверждение законодательных органов, разрабатывают и утверждают методики распределения и порядки предоставления межбюджетных трансфертов, обеспечивают исполнение бюджета и составление бюджетной отчетности, обеспечивают управление государственным (муниципальным) долгом. Финансовая деятельность государства осуществляется также и органами судебной власти (например, посредством предоставления отсрочек по госпошлине при подаче в суд исковых заявлений и жалоб), и Центральным Банком РФ, и Счетной палатой РФ, и органами Прокуратуры РФ.

Все органы законодательной, исполнительной и судебной власти РФ и субъектов РФ осуществляют разные виды финансовой деятельности для реализации природоохранной функции государства в пределах своей компетенции.

Наряду с органами исполнительной власти общей компетенции финансовую деятельность осуществляют и специальные органы.

Органы власти специальной компетенции в зависимости от степени участия в финансовой деятельности можно подразделить на 2 группы:

1) государственные органы специальной компетенции, для которых финансовая деятельность является основной;
2) государственные органы, осуществляющие финансовую деятельность в связи с выполнением своих основных функций и задач[10].

Все государственные органы специальной компетенции, для которых финансовая деятельность является основной, осуществляют разные виды финансовой деятельности по реализации экологической функции(Министерство финансов РФ, Федеральная налоговая служба ,Федеральное казначейство, Федеральная служба финансово-бюджетного надзора).

Непосредственными субъектами, осуществляющими финансовую деятельность государства по реализации ее природоохранной функции, являются:

[10] А.Б. Быля, О.Н. Горбунова, Е.Ю. Грачева и др. Финансовое право. – М., 2008. – С. 15-16.

- главный администратор и администратор доходов бюджета;
- главный администратор и администратор источников финансирования дефицита бюджета;
- главный распорядитель и распорядитель бюджетных средств;
- получатель бюджетных средств.

В таком виде финансовой деятельности государства как образование государственных и муниципальных денежных фондов ее обеспечивают главные администраторы (администраторы) доходов бюджета и источников финансирования дефицита бюджета. В соответствии со ст. 6 БК РФ главный администратор доходов бюджета – это определенный законом (решением) о бюджете орган государственной власти (государственный орган), орган местного самоуправления, орган местной администрации, орган управления государственным внебюджетным фондом, Центральный банк Российской Федерации, иная организация, имеющие в своем ведении администраторов доходов бюджета и (или) являющиеся администраторами доходов бюджета. Администратор доходов бюджета – это орган государственной власти (государственный орган), орган местного самоуправления, орган местной администрации, орган управления государственным внебюджетным фондом, Центральный банк Российской Федерации, бюджетное учреждение, осуществляющие в соответствии с законодательством Российской Федерации контроль за правильностью исчисления, полнотой и своевременностью уплаты, начисление, учет, взыскание и принятие решений о возврате (зачете) излишне уплаченных (взысканных) платежей, пеней и штрафов по ним, являющихся доходами бюджетов бюджетной системы Российской Федерации. Их полномочия определены в ст. 160.1 БК РФ.

Согласно Федерального закона от 13.12.2010 № 357-ФЗ "О федеральном бюджете на 2011 год и на плановый период 2012 и 2013 годов[11]" главными администраторами доходов федерального бюджета от использования природных ресурсов являются Министерство энергетики РФ (например, плата за договорную акваторию и участки морского дна, полученная при пользовании недрами на территории РФ), Федеральная служба по надзору в сфере природопользования (например, денежные взыскания (штрафы) за нарушения земельного законодательства), Федеральное агентство по недропользованию (разовые платежи за пользование недрами при наступлении определенных событий, оговоренных в лицензии), Федеральное агентство водных ресурсов (плата за пользование водными объектами, находящимися в федеральной собственности), Федеральное агентство лесного хозяйства (плата за использование лесов), Федеральное агентство по рыболовству (плата за пользование водными биологическими ресурсами по межправительственным соглашениям),

[11] СЗ РФ.-2010.-№51(ч.1,2,3).-Ст.6809

Министерство финансов РФ (перечисление нефтегазовых доходов и нефтегазовых трансфертов), Федеральное агентство по управлению государственным имуществом (доходы от продажи земельных участков, находящихся в федеральной собственности), Федеральная налоговая служба (сборы за пользование объектами животного мира и за пользование объектами водных биологических ресурсов). В большинстве случаев администраторами доходов федерального бюджета от использования природных ресурсов являются не государственные органы специальной компетенции, для которых финансовая деятельность является основной, а органы, осуществляющие финансовую деятельность в связи с выполнением своих основных функций и задач.

В постановлениях Правительства РФ, закрепляющих полномочия этих федеральных органов государственной власти, не отражено, что эти органы являются главными администраторами соответствующих доходов бюджета.

Только в двух нормативных правовых актах есть упоминания о их роли в организации поступлений в федеральный бюджет.

Федеральное агентство по управлению государственным имуществом является федеральным органом исполнительной власти, осуществляющим функции по управлению федеральным имуществом, функции по организации продажи приватизируемого федерального имущества, реализации имущества, арестованного во исполнение судебных решений или актов органов, которым предоставлено право принимать решения об обращении взыскания на имущество, функции по реализации конфискованного движимого бесхозяйного, изъятого и иного имущества, обращенного в собственность государства в соответствии с законодательством Российской Федерации, функции по оказанию государственных услуг и правоприменительные функции в сфере имущественных и земельных отношений[12]. В его полномочиях отражено, что Федеральное агентство по управлению госимуществом принимает меры для обеспечения поступления в федеральный бюджет средств от продажи земельных участков, находящихся в федеральной собственности, а также от продажи права на заключение договора аренды земельного участка на торгах (аукционах, конкурсах).

Федеральное агентство по недропользованию является федеральным органом исполнительной власти, осуществляющим функции по оказанию государственных услуг и управлению государственным имуществом в сфере недропользования[13]. Оно осуществляет предоставление в пользование за плату геологической информации о недрах, полученной в результате государственного геологического изучения недр и установление конкретного размера ставки

[12] Постановление Правительства РФ от 05.06.2008 № 432 «О Федеральном агентстве по управлению государственным имуществом» // СЗ РФ. – 2008. - № 23. – ст. 2721.

[13] Постановление Правительства РФ от 17.06.04 № 293 «Об утверждении Положения о Федеральном агентстве по недропользованию» // СЗ РФ. – 2004. - № 26. – Ст. 2669.

регулярного платежа за пользование недрами по каждому участку недр, на который в установленном порядке выдается лицензия за пользование недрами, в том числе расположенные на континентальном шельфе РФ, в исключительной экономической зоне РФ и за пределами РФ на территориях, находящихся под юрисдикцией РФ, а также арендуемых у иностранных государств или используемых на основании международного договора (если иное не установлено международным договором), в пределах минимальных и максимальных ставок, установленных законодательством РФ о недрах.

Ни в одном из нормативно-правовых актах, определяющих компетенцию многих государственных органов, осуществляющих финансовую деятельность в связи с выполнением своих основных функций и задач, не закреплены их полномочия, связанные с администрированием доходов в бюджеты РФ. Например, в Положениях о Федеральном агентстве лесного хозяйства[14], о Федеральном агентстве водных ресурсов[15], о Федеральном агентстве по недропользованию[16], не отражена их компетенция по контролю за правильностью уплаты, учета, взыскания и принятие решений о возврате излишне уплаченных платежей, штрафов, являющихся доходами бюджетов бюджетной системы РФ. Полномочия этих органов как главных администраторов доходов следуют только из бюджетного законодательства.

В нормативных правовых актах, закрепляющих компетенцию этих органов, обязательно должно быть отражено, что они являются главными администраторами соответствующих видов дохода в федеральный бюджет.

Такой вид финансовой деятельности государства как распределение государственных финансовых ресурсов осуществляется главными распорядителями бюджетных средств.

Главный распорядитель бюджетных средств (главный распорядитель средств соответствующего бюджета) – орган государственной власти (государственный орган), орган управления государственным внебюджетным фондом, орган местного самоуправления, орган местной администрации, а также наиболее значимое учреждение науки, образования, культуры и здравоохранения, указанное в ведомственной структуре расходов бюджета, имеющие право распределять бюджетные ассигнования и лимиты бюджетных обязательств между подведомственными распорядителями и(или) получателями бюджетных средств.

Распорядитель бюджетных средств (распорядитель средств соответствующего бюджета) – орган государственной власти (государственный орган), орган управления государственным внебюджетным фондом, орган

[14] Постановление Правительства РФ от 23.09.2010 № 736 // СЗ РФ – 2010.- № 40. – Ст. 5068.
[15] Постановление Правительства РФ от 16.06.2004 № 282 // СЗ РФ – 2004 - № 25. – Ст. 2564.
[16] Постановление Правительства РФ от 17.06.2004 № 293 // СЗ РФ – 2004. - № 26. – Ст. 2669.

местного самоуправления, орган местной администрации, бюджетное учреждение, имеющие право распределять бюджетные ассигнования и лимиты бюджетных обязательств между подведомственными распорядителями и(или) получателями бюджетных средств. Например, в ФЗ «О федеральном бюджете на 2011 год и на плановый период 2012 и 2013 годов» в приложении № 8 «Ведомственная структура расходов Федерального бюджета на 2011 год» главными распорядителями средств федерального бюджета на реализацию природоохранной функции государства являются Федеральная служба по надзору в сфере природопользования (например, по распоряжению средств, идущих на охрану окружающей среды), Федеральное агентство по недропользованию (на воспроизводство минерально-сырьевой базы), Федеральное агентство водных ресурсов (водное хозяйство,), Федеральное агентство лесного хозяйства (осуществление прав пользования и распоряжение лесами, их охрана, защита и воспроизводство), Федеральное служба государственной регистрации, кадастра и картографии (мероприятия по землеустройству и землепользованию), Федеральное агентство по рыболовству (рыболовное хозяйство, Федеральная целевая программа"Повышение эффективности использования и развитие ресурсного потенциала рыбохозяйственного комплекса в2009 - 2014 годах"), Федеральная служба по ветеринарному и фитосанитарному надзору (осуществление полномочий РФ по контролю, надзору, выдаче лицензий и разрешений в области охраны и использования объектов животного мира и среды их обитания), Министерство сельского хозяйства РФ (Федеральная целевая программа «Сохранение и восстановление плодородия почв земель сельскохозяйственного назначения и агроландшафтов как национального достояния России на 2006-2012 годы ина период до 2013 года»), Федеральное агентство по управлению государственным имуществом, Федеральная служба по гидрометеорологии и мониторингу окружающей среды и другие.

В нормативных правовых актах, отражающих компетенцию государственных органов власти, например, в Положении о Федеральном агентстве лесного хозяйства (п.5.17), о Федеральном агентстве водных ресурсов (п. 5.13), о Федеральном агентстве по рыболовству (п.5.13), закреплено, что они являются главными распорядителями бюджетных средств, предусмотренных на их содержание и финансовое обеспечение возложенных на них задач.

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Dimensions of Autonomy of Territorial Self-government in Spain

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Abstract: In every country territorial self-government develops within the existing legal framework. One of the fundamental questions is its autonomy, which is basically understood as the autonomy of territorial units from the central government, which the government may either extend or reduce. Autonomy is usually restricted legally or financially, in the latter case by limiting the amount of funding available to local governments. Spain is quite exceptional in this respect. Its Constitution treats autonomy as one of the major pillars supporting the legal order in the state. Therefore, questions are worth asking about the practical functioning of autonomy in Spain, i.e. about its performance and scope, the levels of autonomy granted to various tiers of self-government units and the state's interference. Other interesting questions concern the emerging problems and Spain's future as the state of the autonomies.

Keywords: Spain, autonomy, finances, territorial self-government.

1. Introduction

For every state the autonomy of its territorial self-government units is as important as difficult. Not only has the term 'autonomy" to be clearly defined, but also, once it has been done, the degree of autonomy must be determined for particular tiers. Neither "a model" autonomy nor tools for its measurement are available. In most cases the scope of autonomy is defined descriptively, using adjectives such as broad, narrow or limited, or a comparative approach is adopted, in which case the autonomy of territorial self-government in country X is defined as greater, or smaller, than in country Y. These judgments and measurements are not only imprecise, but they are also likely to be misleading, because there is additionally the problem of a formal (normative) approach to autonomy and of its implementation. The differences in this area can be substantial. Therefore, efforts must be made to ensure that all comparisons are as

reliable as possible, but even then the comparisons must be treated with some caution. This article discusses the autonomy of the units of territorial self-government in Spain.

In the first place, the very notion of autonomy should be considered. Autonomy (a Greek word for self-government) may not be and is not understood in the same way everywhere. The Polish foreign words dictionary defines autonomy as self-determination, the right of a given community, nation, town, institution, etc., to resolve its internal problems independently. The Polish dictionary of synonyms connects autonomy with freedom, but also with latitude, independence, sovereignty, and self-determination. The "Diccinario Enciclopédico Ilustrado. El Pequeño Larousse Ilustrado 2009" describes autonomy as: 1. the freedom of a government, country, etc. to rule its matters according to its own laws; 2. the ability of a nation, region, province, municipality or another unit being a state to govern based on its own rules and prerogatives; 3. a region or a unit capable of the same. Autonomy is usually understood as independence in some fields, as self-rule sanctioned by the country's legal system in force. Each country's unique historical experiences cause that they have their own views on the autonomy of territorial self-government. Where autonomy has existed for a long time or where the central government is unwilling to intervene into local governments' matters, autonomy is greater or its greater scope is expected. In other countries autonomy may be restricted. Because the phenomenon is not straightforward particular countries implement it differently, which is another factor influencing its evaluations. Evaluations should take into consideration the specific solutions in the country, as autonomy may be in fact greater or smaller than perceived from outside. It is so, because autonomy depends not only on the actual legal framework, but also on the practice that may substantially vary between countries. These circumstances make Spain a very interesting case.

It is practical to examine the autonomy of territorial self-government with respect to the classification of states. Two or three types of states are distinguished: unitary states, federal states and regional states, the best example of the regional states being Italy. People in favour of the two type-classification assert that a regional state is actually a variant of a unitary state**.** The arguments over the subject can be „reconciled" by classifying states with respect to the concentration of powers, which leads to their two classes, i.e. centralised states and decentralised states, the latter having many centres with political powers, including those dealing with the territorial structure of the state, which makes the whole picture quite complex. Most decentralised states are federal states; in the unitary states different levels of decentralisation are found. Spain has had a complex structure of government since 1978, when a new, democratic Constitution was made effective. Being a unitary state, Spain resembles a federal state because of the distribution of powers in the country. Spanish statehood is based on three fundamental principles laid out in its Constitution: unity, autonomy and solidarity. The second principle has earned Spain the name of the state of the autonomies.

The territorial self-government authorities in Spain, mainly regional authorities, enjoy great autonomy defined by the laws and implemented accordingly. It is doubtless that in Europe Spain is the country where the territorial units have the greatest autonomy. When the Spanish autonomy is compared with the self-rule granted to local governments in other states it becomes obvious that the Spanish solutions may be treated as a model for territorial self-government. Spanish autonomy is not without some problems, though, that dictate a more conservative evaluation of Spanish solutions. Even then, learning from other countries' experiences to reshape the autonomy of territorial self-government in one's own country seems a practical approach. One way of using the experiences and solutions is to analyse them, a critical approach being particularly useful. This article discusses the multifaceted character of the autonomy of territorial self-government addressing its political, administrative, and political aspects, but the main stress is laid on the financial and economic aspects that can spark internal conflicts the most easily.

Before a more detailed presentation of the aspects is made, the very strong internal pressures on turning Spain into a federal state or on strengthening the formal regional autonomy to a degree making Spain equivalent to a federal state must be mentioned. The pressures have grown stronger because of the economic crisis, whose impact on the country has been substantial. To cater to the demands the Constitution would have to be amended, as its present articles ban autonomous communities from entering into any federalism-oriented agreements.

Presenting as complicated matter as Spanish territorial autonomy in a short article is very difficult, as the information must be necessarily summarised and the knowledge of Spanish solutions is quite limited in other countries, not to say non-existent. By the same token, Polish laws and solutions are not known in Hungary and vice versa, even among those knowledgeable of territorial self-government. However, this should not be a factor preventing the presentation of the solutions or their exploration. This article presents the already mentioned aspects of territorial autonomy in Spain, its scope and problems, for instance, those arising from interterritorial solidarity.

Let us present first a more detailed picture of Spain to set the stage for further discussion.

2. Spain as the state of the autonomies

Article 1 of the Spanish Constitution of 1978 defines Spain as a parliamentary monarchy. However, the Constitution underlines very early that Spain is a civic and democratic state under the rule of law, where freedom, justice, equality and political pluralism are safeguarded as the paramount values of its legal system. Central to our discussion is article 2, which guarantees autonomy to Spanish nationalities and regions. The same one-sentence article stresses their solidarity. These articles are crucial for the

present situation in the state and for the autonomy itself. The Spanish Constitution was enacted at a turning point in the country's history, after the death of the dictator, when the risk of the country falling apart was very high. Consequently, the country's 'architecture' to be defined in the set of its fundamental laws had to accommodate people's political expectations. It is worth noting here that the Constitution has remained almost unchanged since enacted (for 33 years), having been added only one amendment about a matter being outside the scope this article. Today stronger pressures are felt towards making additional changes to the Constitution.

Autonomy in Spain is mainly viewed in terms of its autonomous communities (*las comunidades autónomas – CCAA*), which are also called regions (the two names will be used interchangeably hereafter). Autonomous communities have longer tradition than that established under the present Constitution. Some Spanish regions, mainly Catalonia and the Basque Country, are still showing very strong separatist inclinations. Such inclinations, wherever they appear, are usually caused by economic inequalities between particular regions and unequal distribution of GDP that invariably provokes dissatisfaction of the richer regions. Spain is not different in this respect. Catalonia, in particular, and the Basque Country belong to the richest regions, and the problem of unfair revenue distribution tops the list of the demanded changes. After the Civil War (1936-1939), the autonomy of communities[1] was liquidated, as well as all manifestations of territorial units' political independence. Discriminatory practices aimed to restrict the use of local language and culture, mainly in Catalonia and the Basque Country, additionally complicated the situation after the dictator died in 1975. Discrimination observed in the economic sphere was aggravated by the "Castillinization" of the public, social, cultural, etc., space, thus fuelling nationalist moods.

Spanish autonomous communities coexist with other territorial units: provinces (*las* provincias) and municipalities (*los municipios*), which are called local corporations (*las corporaciones locales*). Provinces and municipalities are also allowed by the Constitution to govern their own matters independently, but their freedom is much more limited than that granted to autonomous communities. In the period of dictatorship local governments were strongly controlled by the state, having almost no independence at all.

3. The characteristics of Spanish territorial self-government

The territorial self-government system in Spain has three tiers. These are municipalities, provinces and autonomous communities. The numbers of units making up each tire are considerably different, which is quite natural considering the area of the

[1] In fact, Catalonia was the only one that was granted full autonomy, as well as being the first autonomous community. Shortly before the Civil War the work on laws establishing autonomous community in the Basque Country was completed. The processes aimed to establish the Galicia autonomous community were quite advanced.

country (over 500,000 km^2) and its population (around 45 millions). For instance, Spain has 8,100 municipalities (Poland (322,500 km^2) has 2,480 municipalities, the Czech Republic (ca. 79,000 km^2) has 6,258 municipalities, and Hungary (93,000 km^2)has 214 towns and 2,898 municipalities). Some Spanish municipalities have as few as several residents. The second tier is comprised of 50 provinces. Because Spain has two archipelagos: the Canary Islands and the Balearic Islands, two additional units have been introduced there – the isles (*la isla*) – to make administration more efficient and to reduce the communication costs (these units are not be discussed here). The democratic transformation initiated in 1975 did not increase the number of provinces. The third tier is 17 autonomous communities, which were established by the country's new Constitution. The autonomous communities are a very diverse group. They can be classified using the following criteria. The first criterion is the number of provinces making up the community. Six autonomous communities (Asturias, Cantabria, Madrid, Murcia, Navarra, La Rioja) have only one province. The second criterion is the community financing system. Two autonomous communities, the Basque Country and Navarra, are financed according to a special system called *foral*, while the other communities are covered by a system called *común*. Spanish autonomous communities can also be classified in terms of their area, population and GDP per capita. Unlike the Polish units of territorial self-government, autonomous communities in Spain have certain normative and administrative powers over their provinces and municipalities, which have been granted to them in the Constitution and other laws.

To characterize Spanish units of territorial self-government in terms of autonomy their legislative and executive bodies need to be presented, as well as the types of relations linking them with the national government and its bodies.

Unlike the Polish system, all municipalities in Spain belong to the same class. Both the smallest municipality and the largest municipality (Madrid) have the same name *el municipio*, although the Spanish term for a town is *la ciudad*. This makes it difficult to translate into Polish the position of the person in charge of the municipality that in Spain is called *el alcalde*,while in Poland different names are used depending on the municipality profile (rural, rural/urban or urban) or size (officers in charge of towns with population in excess of 100,000 are called presidents). For the sake of clarity, the English term mayor will be used henceforth. A Spanish municipality is governed by the mayor and the council. The powers granted to the mayor are regulated by law. The person is responsible for managing the municipality board and municipal administration; represents the board and the municipality council; calls and chairs the plenary sessions of the council; manages and supervises public services and public works that the municipality is responsible for; makes announcements and develops economic activities under the budget in force; makes expenditures and enters into financial transactions (with some exceptions) falling with his or her competence. The mayor also chairs the council whose members are all elected councillors.

A province is governed by the president and the council. The president of the provincial council (*la diputación*) manages the board and the provincial administration, represents the provincial council, calls and chairs the council, manages, supervises and makes arrangements for the delivery of public services and public works that the province is responsible for, manages the delivery of services requested by the autonomous community that a given province is equivalent to or belongs to, develops economic activities under the budget in force, makes expenditures and enters into financial transactions (with some exceptions) falling with his or her competence. The scopes of the provincial president's powers and of the mayor's are formally almost the same, but in terms of their contents they show strong differences because of different tasks and prerogatives the two functions have.

The government system in the autonomous communities (regions) has a completely different structure, as the legislative bodies and the executive bodies can be found at the level. The judicial system being the exclusive responsibility of the national government is uniform across Spain. The law-making bodies are one-chamber assemblies (*las asambleas*) or autonomous parliaments (*los parlamentos autonómicos*) that can pass statutes and other laws unless they infringe the exclusive (*exclusivo*) or basic (*básicas*) competencies of the state. The latter belong to the category of so-called shared competencies (*compartidas*). Autonomous parliaments may participate in the national legislative processes by submitting proposals for new laws to the government, which presents them to the higher (self-government) chamber of the Spanish Parliament - the Senate. The Constitution obligated the autonomous communities to enact their charters, "constitutions", in the early period of their functioning. The charters were subject to approval by the Cortes Generales – the Spanish Parliament. Every autonomous community had the right to give a name to its parliament.

In each autonomous community the executive power belongs to its government. The community governments are headed by presidents. The members of the governments are called counsellors (*los consejeros*) and not ministers. Their number, powers, as well as the organizational structure of particular offices (administration) are determined by the autonomous communities themselves.

Every community has to establish two offices with jurisdiction limited to its territory. These are the ombudsman and the Court of Audit.

This part of the discussion can be concluded by stating that Spain has very important and appreciated institutions that ensure cooperation between the central authorities and the various tiers of subnational self-government authorities. At the local level, this is the Spanish Federation of Municipalities and Provinces that handles various matters on behalf of local governments, including the management of their finances. At the regional level, the number of bilateral and multilateral institutions established to facilitate cooperation is much greater. These are, for instance, various bilateral committees called sectoral conferences (*las conferencias sectorales*) which are

formed by the competent ministers (e.g. the minister of education forms the Educational Committee), the minister of public administration (participating in every committee) and the pertinent counsellors from the communities to handle issues lying within their competence. Other important bodies are the Conference of the Presidents whose members are the prime minister of the ***national government*** and the presidents of autonomous communities and the Fiscal and Financial Policy Council presented below.

4. Laws regulating territorial self-government in Spain

As frequently mentioned in this article, the Spanish territorial self-government laws stem from the country's Constitution. Its chapter dealing with territorial self-government *On the territorial organization of the state* has 22 articles out of the total of 169. This demonstrates the importance given to territorial self-government, particularly to self-governing regions, and to building a new, democratic state where territorial self-rule is one of the major institutions.

It is worth noting that the powers of the state (art. 149) and of the autonomous communities (art. 148) are distinctly kept separate. The state has been granted its powers to ensure that the principles of unity and solidarity will be respected. This part of the Constitution has a section devoted to financial management in the communities, which requires it to be consistent with the state-wide financial management (art. 156). The Constitution enumerates funds that autonomous communities can use, as well as providing for the establishment of the Interterritorial Equalization Fund responsible for reducing economic inequalities between autonomous communities. A broader discussion of articles dealing with territorial self-government is not possible for the lack of space.

Other vital laws concerning territorial self-government are the statute concerning issues central to the local legal system (*la Ley Reguladora de las Bases de Régimen Local*) and the statute regulating financial management at the local level (*la Ley Reguladora de las Haciendas Locales*).

A noteworthy law concerning autonomous communities is the organic statute on community financing (*la Ley Orgánica de Financiación Comunidades Autonómas – LOFCA*). This statute extends and specifies the articles of the Constitution in its part about financial management in autonomous communities.

5. Financial autonomy of territorial self-government in Spain

The autonomy of Spanish territorial self-government is mainly measured in financial terms. The financial dimension is very important, because allowing any government to have broad autonomy while failing to provide it with adequate funds questions the very sense of autonomy. For this reason, financial matters are counted in Spain among the most vital for its system of territorial self-government. It is worth

noting, though, that municipalities and provinces and regions (i.e. autonomous communities) have been provided with different solutions in this area.

Self-government units representing a lower level of the territorial structure (municipalities and provinces) have been granted limited financial autonomy. Generally, all funds that provinces need to cover their expenditures come from the national government, mainly in the form of unconditional transfers. Municipalities have their own taxes; some of them are optional, which means that municipalities are free to decide whether to levy them or not. Their legislative power over local taxes is limited, unlike the administrative power.

Autonomous communities enjoy extensive financial autonomy. Both Spanish and Polish Constitutions state that statutes are the only legitimate instruments allowing the state to levy taxes. This requirement equally applies to Spanish autonomous communities, where some laws have the status of a statute. Nevertheless, LOFCA substantially limits their tax-levying powers.

According to the Constitution and LOFCA, the revenues of autonomous communities include taxes that the national government has entirely or partially ceded to them, surcharges on national taxes and other forms of participation in state's revenues; the community's own taxes, charges and special payments; transfers from the Interterritorial Equalization Fund as well as other funds from the budget; revenues derived from the community-owned property and private-law revenues; credits and loans. Article 1 of LOFCA lays emphasis on the financial autonomy of the regions. The financial interests of autonomous communities are safeguarded by the Fiscal and Financial Policy Council (*el Consejo de Política Fiscal y Financiera - CPFF*), a body established under LOFCA. Its members are ministers of finance and public administration and financial counsellors representing autonomous communities. Before 2006, the CPFF was responsible for developing financial management rules for autonomous communities in the form of Agreements, which were to remain effective for five years. The community parliaments could approve them or reject, if the solutions were found disadvantageous. In the latter case the validity of the existing rules was prolonged[2]. The CPFF has many powers, including budget policy coordination between the communities and the national government; the making of analyses and defining the criteria for distributing the FCI's funds; the development of methods allowing the estimation of the costs of public services that the state assigned to the communities, so that the amounts of financial transfers due can be calculated; coordination of debt policy; coordination of public investments policy, etc.

LOFCA distinguishes between community financing systems called *común* and *foral*. The first system, covering 15 autonomous communities, was modified in 2006. The communities received their remaining powers then, which made the system simpler. The system called *foral* concerns so-called historical areas, i.e. three provinces in the Basque country and one in Navarra being a single-province community. The term *foral* is difficult to

[2] However rarely, such cases did happen.

translate. The most appropriate equivalent would be *aprinciple of privilege*, because certain privileges were granted to the provinces in the period of Reconquista and then formally confirmed at the turn of the 18th.century. Very generally, the system allows two autonomous communities (the Basque Country and Navarra) to use their own financial authorities (including tax administration) to collect all revenues according to the national laws and then to transfer their portion agreed between the national government and the given community on behalf of the state. Other autonomous communities envy this solution, particularly Catalonia.

6. Final conclusions

The above discussion has shown that in Spain autonomous communities enjoy the greatest degree of autonomy among all units of territorial self-government. The autonomy of territorial self-government being the embodiment of the principle has various aspects: political, constitutional, administrative, economic and financial. Most important for territorial self-government is financial autonomy, which, simply speaking, is about local governments having their own revenues. Own revenues allow local governments to exercise their powers and fulfil public tasks. The Spanish solutions in this field have remained unchanged for many years. The highest level of autonomy can be found among autonomous communities, to which some taxes (particularly excise taxes) have been ceded either fully or in part by the state. Autonomous communities have limited normative powers over some taxes and full administrative powers over many of them.The systems used to finance autonomous communities clearly follow the principles of solidarity (as shown by the establishment of the Interterritorial Equalization Fund and the Sufficiency Fund) and unity. However, the same principles stir protests in some autonomous communities, particularly in Catalonia. Communities believe that the revenue (GDP) distribution system is not fair and that the well-to-do communities are robbed of their wealth, so changes are needed. The best solution would be to extend the *foral* system used in the Basque Country and Navarra. Fiscal federalism applying federalist solutions to the financial system is very popular in Spain, but there are voices demanding that further steps be taken, i.e. that Spain be transformed into a federal country also politically.

The above discussion can be concluded by stating that trying to create a perfect system of territorial self-government with broad autonomy is not a straightforward task.

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Fiscal Decision-making of Self-governing Regional Authorities

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Abstract: Territorial sovereignty related to public power gives rise to the right to obtain the requisite funds for the execution of tasks and the payment of the attending costs. In the Czech Republic, the right of local communities to their own financial resources and the right to use them are ensured by the Constitution and other acts. Other important documents include the European Charter of Local Self-Governance, which took effect in the Czech Republic on 1 September 1999. Various resources are available to local self-governance – designated taxes and charges as well as non-tax sources. An important source is subsidies from the state budget that help address the situation of municipalities of varying financial strength. The principle of solidarity is applied in the granting of them, which is also embodied in the Charter. Municipalities may also have other sources, related to their economic activity, or may use refundable sources. In the case of refundable income, recipients must take measures to enable the return of the funds obtained at some point in the future. Expenditures related to the payment of refundable income have an impact not only on the expense side of the budget of a municipality in upcoming years, but will also have an impact on the indebtedness of the municipality. The indebtedness of a municipality is then reflected in the overall indebtedness of the state and is carefully monitored by EU authorities. A harmonisation of approaches to the financing of local self-governing bodies is therefore very much needed in addressing the issues raised by the economic crisis. Of assistance in this regard could be, for example, the Congress of the Council of Europe, which monitors the financial management of regional self-governing bodies in individual countries.

Keywords: fiscal decision-making, self-governing regional authorities, territorial sovereignty.

1. Fiscal federalism and financial autonomy

The public budgetary system of the Czech Republic (in other words, the fiscal system) is comprised of various public budgets and of authorities and institutions responsible for the relations and processes in the fiscal system. The system respects the nature of the state and the division of public administration into state and territorial spheres. In most contemporary unitary states, we find, aside from the central government, regional self-administration, as is the case in the Czech Republic.

The relationships between the central government and regional self-administration may be of various types. Their form depends on the definition and division of powers and responsibilities in managing public assets, the optimum distribution of income among various levels, the preferences and reflection of certain interests (of the whole or of territories), and the level of autonomy in decision-making and control by the state. These relationships are governed by the applicable laws and factually they mean the application of a certain model of fiscal federalism[1].

At the root of all this is the decision as to which issues will be addressed on the level of the state and which will be left to individual regional self-administering units. There are three models of fiscal federalism[2].

The centralised model is characterised by a low level of self-sufficiency on the local levels, where most taxes flow to the national budget. Financial relations are vertical – primarily through subsidies – and the government can thus intensively influence the activities of municipalities and re-distributive relations are extensive and decided upon by the legislator.

The decentralised model would be characterised by the complete financial self-sufficiency of the lower levels of government, without the existence of redistributive processes within the budgetary system, which would mean extensive tax powers for regional self-governing authorities. In this model, self-governing authorities would have to be financially self-sufficient in order to cover all of their needs, which would be unrealistic, given the different size of municipalities, different tax capacities, and different tax incomes of smaller territorial units, and in that situation, the state would have no way of making up for those differences. This approach would also be uneconomical and would result in an increased tax burden in order to ensure the required income, because increasing public consumption is a trend. It could therefore be said that this model is to a large degree only theoretical.

A combined model sets an income for each level of government. The budgetary designation of taxes has an impact on the level of financial self-sufficiency of each level of government. Regional self-governing authorities have a set share in taxes and that income is supplemented with subsidies from the higher budget and their own income. In this model of fiscal federalism, centralising or decentralising elements may prevail, depending on what is deemed necessary at any given stage.

The rationale for decision-making as to the level on which particular issues will be decided is reflected in the constitutional distribution of political powers between the central and local levels. Every municipality should, however, have the possibility of

[1] The theory of fiscal federalism arose after the Second World War from the need to improve democratic decision-making about financial flows in the budgetary system, and the need to intensify public and civic control over the spending of public resources and to increase the efficiency of the financing of the needs of the public sector. It examines the possibility for using the functions of public finance by various levels of government, studies the optimum division of responsibilities for the financing of public assets, and examines the optimum allocation of income and expenditures in the budgetary system.

[2] Marková H., Boháč R.: *Rozpočtové právo* , C.H.Beck Prague 2007 ISBN 978-80-7179-598-8

deciding how it will finance the exercise of its powers, and should to a certain degree independently decide about the structure and the volume of its expenditures, which is, however, connected to it having a certain power to decide about the structure and volume of its income. Those are elements of the fiscal autonomy of municipalities that can be understood differently.

The factual distribution of powers in every country is therefore the outcome of historical developments and the political make-up of the country. The state usually takes care of those tasks that should be secured on the same level throughout its territory, based on the principle that identical taxes = identical services. There are, however, tasks that can be secured either by the state or by regional self-governing authorities, and then there are those that are better performed by self-governing authorities.[3]Territorial sovereignty gives rise to a certain degree of financial sovereignty, i.e., the right to procure the funds required for performing tasks and for paying the attending costs. In principle, municipalities should pay their expenditures from resources that flow from their own territory.

In a situation when the public power in a state is divided among several entities, there are several creditors of individuals and legal entities – the sole sources of funds – and unless an appropriate ratio is set between those entities, individuals and legal entities are at the risk of being overburdened. A legal norm must set out the limit for the claims of the state on the one hand and all regional self-governing units on the other.

At present, the absolute financial self-sufficiency of regional units would be unrealistic and the requisite financing necessarily flows into regional budgets primarily from central budgets or from special funds. Even today, it is still not possible to do without the process of redistribution among various levels of government[4].

Hence, financial autonomy means a situation when the income of the budgets of regional units is secured by a particular act and the exercise of self-governance is not restricted by state oversight over the use of public funds, but there is usually state oversight over the acceptance of debt instruments[5].

If we compare the indications of financial autonomy with the reality in the Czech Republic, we can say that there are relevant laws that ensure the regional units their own financial resources, although those financial resources usually do not suffice to cover all of the needs of regional units and must be supplemented from central resources.

The second requirement – that the exercise of self-governance is not restricted in the use of public funds – is being met, albeit not entirely, as there are provisions in

[3] Marková H.: *Finacování územních samosprávných celků*, Charles University in Prague, Faculty of Law 2008. ISBN 978-80-87146-08-8
[4] Marková H., Boháč R.: *Rozpočtové právo*, C.H.Beck Prague 2007 ISBN 978-80-7179-598-8
[5] Radvan, M., *Místní daně jako prvek ekonomické autonomie obcí. Právní regulace místní (a regionální) samosprávy*. Masaryk Universitya, Brno 2008. ISBN 978-80-210-4784-6

legal norms concerning, for example, a review of the financial management in the previous year or the setting of rules for the use of budgetary funds obtained from the state budget, etc. Oversight over the debt area in the Czech Republic is performed by the state, but it is of an extent that does not restrict the exercise of the self-governing functions of regional units.

As has been indicated, there are areas where the role of the state overlaps with the powers of municipalities, and these are cases when a municipality derives the volume and structure of its income not only from its own decision-making but also on the basis of a state-determined fiscal mechanism, which comes, in principle, in two forms:

1. Subsidies from the centre to municipal budgets; and
2. Taxes in the form of shared taxes, which are centrally set and the income from which is divided between budgets.

The present form of financing of self-governance thus has its advantages, as the risk of a sudden outage in income should be minimal, provided the law does not change, and even less active municipalities have a relatively stable share in tax income. Financing through general-purpose subsidies would have the same effect, as, in spite of their designation, shared taxes are very similar to general-purpose subsidies.

It is a question as to whether the share in taxes could be considered a municipality's own budgetary source. That question probably cannot be answered affirmatively, as the volume of the source is determined by the government rather than the municipality itself. It is passive income, i.e., a municipality obtains the funds regardless of its own exertions, but at the same time, it means that it cannot influence the volume of those resources – as is the case with subsidies (see below)[6].

2. Budgetary income of municipalities in the Czech Republic

Those taxes whose entire revenue is intended for the municipality and for which the term "entrusted taxes" is used (in the Czech Republic, this is only the real estate tax) are administered centrally (set by an act that applies to the entire country), but the legal regulation of the tax sets out elements that make it possible for municipalities to intervene in setting the overall level of tax liability (in certain countries, modification of the tax rate is used; in the Czech Republic, various coefficients are used). These facts lead municipalities to consider the entire context when introducing the coefficients (the budgetary income vs. the various impacts on

[6] E.g., public budgetary tax income in 2011 includes: all of the revenue from real estate tax and all of the revenue from corporate income tax (if the payer is the relevant municipality), and 21.4% of the national gross income from corporate income tax (with certain exceptions) and the same share of value-added tax and of individual income tax (in this case, the redistribution is more detailed).

the citizens, etc.). Abroad, real property tax is considered a local tax, as it is usually not decided upon on the central level, but on the regional.

Real estate tax in the Czech Republic involves the use of different rates, i.e., the rate depends on whether the property is land or a building, etc. A nationally applicable act sets rates for certain properties, which can be influenced by a municipality, for example, by a coefficient, but the maximum amount of that coefficient (and the process for increasing or decreasing it) is prescribed by law for the entire country. The municipality cannot overrule the statutorily set procedures and maximum tax with its own regulations.

From the society-wide point of view, it is desirable for the revenue base of municipalities to be comprised of income that the municipality can positively influence through its activities and that are evenly distributed territorially, with a view to the needs of municipalities[7].

Local charges play a special role in the Czech system of municipal budgetary income; these are predominantly of a tax nature. In the Czech Republic, local charges have yet to be converted into local or municipal taxes. In essence, local charges are payments the type and basic features of which are set by law nationally, but their introduction and adaptation to local conditions is left to the discretion of municipalities. Municipalities, by their regulations, introduce and collect those types of charges that they deem suitable for the given locale and beneficial for their budgets. The Act on Local Charges[8] sets out the mandatory elements of the legal structure of local charges, and the municipality itself, when it decides to introduce one of the charges, sets the optional features. When a municipality decides to introduce and collect such charges, it is increasing its own responsibility for its financial management, and once introduced, the charges are as binding upon payers as other taxes and constitute a certain financial burden for them.

Municipal income comprises, among other things, income that can be called non-recoverable and of a non-tax nature[9]. What is common to all such income is the fact that this income is not derived from an obligation imposed by law, but rather, from a municipality's own activities. The non-tax income of a regional budget includes income from business run by the self-governing unit (income from assets, income from their own operations or from the operations of entities established by them), extra-budgetary fund income, user charges, income from fines, and random, irregular income.

A theoretical requirement as to the proper budgetary income of municipalities is that it should be income that is to a certain degree foreseeable and the generation of which should not be unduly administratively difficult. This is a problem in the Czech Republic, which should be addressed by the SCP system (single collection point),

[7] Pařízková I., *Finance územní samosprávy*, MU Brno, 2008, ISBN 978-80-210-4511-8,
[8] Act No. 565/1990 Coll., on Local Charges, as amended
[9] Mrkývka, P., et al.: *Finanční právo a finanční správa* – MU Brno 2004. ISBN 80-210-3578-1

which should transfer the administration of all compulsory payments, such as taxes and health and social insurance, to one point. Although the general principles of municipal autonomy require that municipalities be able to influence the amount of their overall income through their own decisions and to administer their income independently of the central government, central administration is cheaper in many regards, and hence, also used more frequently.

Aside from exercising their own powers (self-governance), municipalities, as units of local self-governance, carry out powers delegated to them. The delegated powers of municipalities are essentially decentralised state administration entrusted to municipalities (in the Czech Republic on the basis of Art. 105 of the Constitution of the Czech Republic). In exercising delegated powers, a municipality acts similarly to the executive bodies of the state, and its activities are of a supra-legal, executive, and mandating nature. Municipalities are provided with contributions from the state budget for those activities, to partially cover the costs related to the exercise of state administration by the territorial authorities of towns and municipalities. The procedure for the determination of the amount of the contribution to municipalities for the exercise of state administration is embodied in an appendix to the State Budget Act for the relevant year. It has the form of a subsidy provided to a municipality.

In general, subsidies are understood as non-recoverable funds, i.e., if the subsidy recipient meets the conditions subject to which funds were provided to it, no obligation arises for it with respect to the provider. It is a major source of income for regional self-governing authorities, because the state budget plans on transferring a certain portion of the funds from the state budget (in the form of subsidies) to municipal budgets. More than 20 years after the renewal of territorial self-governance in the Czech Republic, there are demonstrable expense items that could be used as criteria for the allocation of subsidies (e.g., the number of inhabitants, pupils, beds, clients in retirement homes), but these are not used in practice yet. Hectare areas are also known, another option would be elevation or the length of local roads, or a contribution to the transport service – as with the contribution for state administration, subsidies should grow progressively, at least based on the number of inhabitants. The annual indexation of the subsidy amounts based on inflation or on the development of tax income should ensure satisfactory financial funds to self-governing authorities. But that approach would necessitate a change in the current laws, in particular those that set out rules for the management of budgetary funds, which is rather unrealistic at the present moment, due to the budgetary problems in a number of countries and the internal situation in the Czech Republic.

We must also mention the possibilities for municipalities to draw recoverable funds, which can be provided to a municipality in the form of a loan by a bank or another entity, or in the form of recoverable financial assistance. The income of a municipal budget may also include the intake from securities issued by municipalities –

municipal bonds. With all these types of income, the regional authorities must plan on having sufficient resources in the next time-period to return the funds (they will appear on the budgetary expense side in the upcoming period). Recoverable income usually entails interest costs, which in turn have an impact on the financial management of municipalities. Given that the level of indebtedness of regional self-governing units is reflected in the rate of indebtedness of the entire country, the assumption of debt on the level of municipalities is regulated and closely watched, in particular in times of economic crises. In line with the principle of balanced public budgets, for example, the Act on the Budgetary Rules of Regional Self-governing Units in the Czech Republic stipulates that a municipal budget is normally to be set as balanced (that principle is not stated by the act for the national budget). This is a general rule, the application of which in practice is made questionable by the use of the word "normally". A budget can therefore be approved with a surplus or a deficit (but only if the deficit can be covered with funds from previous years or from recoverable sources).

3. Fiscal autonomy, European Charter of Local Self-Governance and the Czech Republic

The financial resources of local communities are considered to be one of the basic guarantees of the performance of the role of local government in Europe. This approach is manifest in the European Charter of Local Self-Governance (hereinafter referred to as the "Charter") enacted in 1985. The Charter is a framework international treaty to which further countries can accede, which took effect in 1988; with respect to the Czech Republic, the Charter only took effect on 1 September 1999[10].

The Charter considers the ability to freely use the sources obtained by the community as constituting a fundamental principle of municipal financial management, and it counts on re-distribution in favour of financially weaker local communities and on the provision of subsidies from the centre, which, on the other hand, should not restrict the basic freedom of local authorities. Questions arise, in the application of that principle, as to the extent to which a local community is free to manage the funds provided to it, whether it should not be limited in so doing, and how the responsible conduct of those entities in the use of financial funds can be ensured. Those questions are posed primarily in connection with the present economic problems in various countries. In the Czech Republic, the link between resources and responsibility is set by the Constitution and other acts, and is understood as a necessary principle that must be adhered to.

The Charter also mentions the principle of a sort of partial tax autonomy and flexibility of resources, which means not only that local communities have the use of certain taxes and charges, but that other sources are also available to them, that they can

[10] Communication of the Ministry of Foreign Affairs, published under No. 181/1999 Coll.

also make use of refundable sources, which may include contractual loans, refundable financial assistance, or the proceeds of the sale of their own bonds[11]. *"Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers,"* states the first paragraph of Art. 9 of the Charter, which our country respects – it is embodied both in the Constitution and in other acts and legal norms; however, the Czech Republic does not feel bound by another principle – that of partial financial autonomy, i.e., that **"***Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate*."

The principle of the power to tax may be applied through surcharges on centrally set taxes or the possibility to set their own taxes. For example, surcharges on state taxes were used in this country in the first half of the twentieth century, but at present municipalities have no such power[12]. Similarly, it is not possible for municipalities to introduce their own taxes (to a limited extent, the introduction of compulsory payments is possible in the form of local charges).

In general, it can be said that in terms of the sources of budgetary income, sources controlled by the tax principle prevail in terms of the amount of income. They are suitable for all regional self-governing units – whether they relate to assets, income, proceeds, production, or consumption, provided they do not disrupt the single financial system in the country, ensure a uniform distribution of the tax burden within the state, and, finally, promise a strong and flexible income and an effortless and inexpensive collection method. The types of tax income that are exclusively suited for the state draw from the entire national economy of the country, e.g., customs, consumption taxes, etc., and for municipalities, these will be primarily taxes depending on local conditions, most frequently real properties located in their territory, or those related to the operation of entities in the given territory and the production of income generated by those entities.

The Czech Republic applied an exemption with respect to another provision of the Charter: "The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures, which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere

[11] In greater detail also in Marková H.: *Finanční zdroje místních společenství a Evropská charta místní samosprávy v podmínkách ČR*, MU Brno 2005 - ISBN 80-210-3677-X

[12] The year 1927 could be used as a comparison. In that year, a major public administrative reform took place in the Czech Republic, including a reform of direct taxes and of the financing of each level of regional self-administration, and social insurance was modified. The main feature of all those changes was the application of the principle of solidarity among regional self-governing units. At that time, the legal regulation was based on three main principles: the surcharge limit, the so-called balancing funds, and a budget adaptation.

of responsibility." This is the application of the principle of solidarity, which in essence means that the budgetary income of elements on the same level is practically identical and that regions generate income depending on the number of their inhabitants. The proponents of this principle (embodied in the Charter) emphasise that the promotion of the principle of merit (as opposed to the principle of solidarity) leads to the creation of poor and rich areas within a single country and that great differences among territorial units may cause unrest or the depopulation of certain areas. Another argument used by the proponents of the solidarity principle is the fact that most budgetary income is factually directed towards the provision of public goods and the exercise of delegated powers, which should be identical throughout the country. But if self-governance is limited, by definition, to a certain territory within the country, then for the sake of the preservation of the state, naturally primarily all tasks relating to the entire territory and the entire population as a whole are reserved to the state, as well as tasks that require identical regulation for the entire territory. This division is subject to constant change, which touches upon the issue of stability.

Currently, it could be stated that the absolute financial self-sufficiency of regional units is probably unrealistic and that the necessary funds necessarily flow to regional budgets primarily from central budgets or special funds. The reasons for that are several:

1. The nature of tax payments
2. Subsidies for expense programmes with specifically set goals, primarily in the social sphere
3. The scope and nature of public assets
4. The attempt to achieve a more equitable distribution of tax income while maintaining an economically efficient system of income
5. Ensuring a standard level of certain public goods throughout the territory
6. To some extent – also in the process of a certain fiscal decentralisation – ensuring a certain level of influence and control over the financial management of regional units by the central government.

Ways are therefore sought to boost municipal budgetary income without burdening taxpayers with further obligations, or to find the optimum level of enhancing the financial autonomy of regional self-governing units. As the experience of various countries shows, finding the right solution is not easy. For example, monitoring committees of the Council of Europe, concerning the functioning of local self-governance, could aid unification and the finding of a suitable process[13]. Representatives of the Congress of the Council of Europe[14] came to the Czech Republic in June 2011 in

[13] The product of the trip will be a report of the Council of Europe monitoring committee that will be drawn up by the end of 2011 and then provided to the Czech Republic.

[14] Member States of the Council of Europe which signed the so-called European Charter of Local Self-Government (currently, there are 47), undertook to apply rules that guarantee the political, administrative, and financial independence of local self-governance. Since 1994, the Congress of Local and Regional

order to monitor municipalities and regions in terms of their adherence to the principles embodied by the European Charter of Local Self-Governance. They were interested in the system for redistributing selected funds and its functioning, the budgetary designation of taxes, the system of executing financial audits of municipalities and regions, and how local self-governing bodies are enabled to adapt their delegated powers to local conditions. This monitoring has been under way in other European countries, as well.

In concluding, we can state that the European Charter of Local Self-Governance, as an internationally recognised document, has established a certain foundation for harmonising member states' approaches to the financing of local self-governing bodies. Its enactment and further existence stands as a guarantee for regional self-governing units that certain European principles will be respected in relation to local self-governance. The monitoring of adherence to the set rules could contribute to the resolution of problems that arise in many countries and are similar.

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Authorities has been an advisory body of the Council of Europe. Its members include elected Member State representatives – the Czech Republic has 7 standing members and 7 substitutes – who work in three statutory committees, one of which is responsible for monitoring CoE Member States. On the basis of a recommendation by that committee, Resolution 307 was enacted in 2010, which included the Czech Republic among the countries in which monitoring will be carried out in 2011, focusing primarily on local self-governance administration. Over time, the monitoring will be conducted in all Member States.

Fiscal Audit as a Measure Towards Combating Corruption in Public Administration

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Abstract: The indirect objective of fiscal audit involves prevention and disclosure of bureaucratic corruption performed by persons employed by or in the service of organisational units subordinate to the Minister competent for public finance, as well as other public officials. This objective is being pursued through a variety of actions undertaken by the fiscal audit to combat this criminal phenomenon.

Keywords: corruption, public administration, fiscal audit, property statement.

1. Introduction

One of the objectives of the Fiscal Audit Act of 28 September 1991[1] (hereinafter referred to as UKS), as stipulated in Article 1 Paragraph 2 UKS, as well as one of the elements of the Act's subjective scope, as stipulated in Article 2 Paragraph 1 Subparagraph 14b UKS, is to prevent and disclose criminal offences enumerated in Article 228-231 of the Penal Code of 6 June 1997[2] (hereinafter referred to as KK), committed by persons employed by or in the service of organisational units subordinate to the Minister competent for public finance. Undisputedly, such scope exceeds the domain of fiscal audit, nevertheless, according to the provisions of UKS, is to be pursued by fiscal audit authorities. All the measures that are aimed at combating corruption can be divided into direct and indirect ones, or otherwise into overt and covert measures. The direct and covert measures are performed by treasury intelligence, whereas those indirect and overt are performed by fiscal audit officers in the course of conducted audit proceedings. Note that the fiscal audit authorities are obligated by the provisions of Article 304 Paragraph 2 of the Code of Criminal Procedure of 6 June 1997[3], (hereinafter referred to as KPK), to immediately inform the state prosecutor or the Police, as well as to take steps not amenable to delay, until the arrival of the officials of an agency authorised to prosecute, or until that agency issues a suitable ruling in order to prevent the effacing of traces and evidence of the offence, when,

[1] Consolidated text: Dz. U. (Journal of Laws), 2011, No. 41, item 214 as amended.
[2] Dz. U., 1997, No. 88, item 553 as amended.
[3] Dz. U., 1997, No. 89, item 555 as amended.

while performing their duties, the fiscal audit authorities learnt that an offence prosecuted *ex officio* (such as corruption) has been committed. The more aware the fiscal audit inspectors are of the possible corruption phenomena which might arise during fiscal audit proceedings or day-to-day civil servant's work, the better the abovementioned obligation is likely to be carried out.

2. Corruption phenomenon

Corruption is undoubtedly a term of the international legal language, as it is commonly used in international conventions on the matter, as well as in penal legislation of most countries[4]. The Latin word *corruptio* stands for depravation, seduction, perversity[5]. Corruption has also been defined as the act of accepting or demanding a material profit or a personal benefit by a public servant in exchange for the performance of an official duty or an act in violation of the law[6]. Corruption has also been described as demoralisation among public servants manifested in bribery and venality[7]. The encyclopaedic definition describes corruption as acceptance (venality) or offering (bribery) of bribes in connection with performance of public duties by a public official or other person appointed to perform public duties[8]. It is certainly a type of social and institutional pathology which tends to internationalise, cross cultural, ideological and national borders, as well as to expand its influence[9]. The presence of corruption within the state government is undoubtedly a sign of weak rule, and generally manifests itself in the lack of transparent decision-making process, high material expectations combined with no ethical restraints leading to a breach of the institution's formal regulations, and further on, to the decomposition of the political order. According to Giovanni Sartori, an outstanding Italian political theorist specialised in the study of comparative politics and political systems in geopolitical or historical dimensions, "Politics has never been and probably never will be completely pure, and political corruption certainly is nothing new. Yet greed and corruption have currently reached an unprecedented level. As a matter of fact, political corruption has reached the point where the corruption of politics begins".

[4] See: C. Nowak, Korupcja w polskim prawie karnym na tle uregulowań międzynarodowych (Corruption in Polish Penal Legislation Against a Background of International Regulations), Warszawa, 2008, p. 1.
[5] See: Słownik łacińsko-polski (Latin-Polish Dictionary), PWN, Warszawa, 1976, p. 130.
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[9] See: M. Jarosz, Władza. Przywileje. Korupcja. (Power. Privileges. Corruption), PAN, Warszawa, 2004, p.202.

Literature on the subject[10] indicates a set of features common to most of corruption activities, i.e.:

- the beneficial exchange of goods, services or other provisions performed between the parties of corruption arrangement is in violation of the law;
- the parties engaged in the corruption interaction establish mutual agreement based on the rule *do, ut des* (Latin for "I give so that you may give");
- both partners of the corruption arrangement, i.e. "the giver" and "the receiver", are driven by the intent to gain personal benefit and to minimise the risk the partners would be exposed to if their arrangement was disclosed, because corruption activities usually involve secret transactions beneficial to both engaged parties.

A classic example of corruption "in the office" is the practice used in Japanese administration. Traditionally, public officials in Japan hold a very strong position and greatly influence the mechanisms that drive the economy in this country. It is widely recognised that they played the most important role in the creation of the Japanese economic miracle, mostly due to their skilful support of the development of domestic entrepreneurship. Japanese public officials have monopolised the decision-making process in the fields of fiscal and economic policy, distribution of public funds and state subsidies, access to information. It is also worth noting that a number of executive regulations is not published in Japan and restricted to the exclusive knowledge of government legal service. Moreover, public officials in Japan grant licences in more than a hundred domains of economic activity. No surprisingly this system has for decades shaped close relationships between business and public administration.

In 1998, two public officials of the Ministry of Finance were accused of concealing the results of fiscal audit conducted in four banks in exchange for "hospitality" which involved joint rounds of golf, expensive restaurant dinners in the company of half-naked waitresses and trips to casinos in Las Vegas. Irregularities in the functioning of a number of Japanese banks are believed to have been one of the main causes of economic crisis in the "Land of the Rising Sun" in late 1990s. On the other hand, there is a longstanding corrupt tradition of Japanese public officials retiring early to take up high-profile positions in the private sector. In Japanese terminology such practice is called *amakudari* which means "descent from heaven". Thanks to these "heavenly" bureaucrats Japanese enterprises are granted lucrative public procurements without tendering procedures, get warned on incoming "unexpected" fiscal audit, and those on the brink of bankruptcy receive an immediate injection of state aid. It is estimated, that about 7 thousand former public officials are employed in the private sector.

[10] A. Kojder, Korupcja (Corruption), in: Księga Dziesięciolecia Polski Niepodległej 1989 – 1999 (Decade Book of Independent Poland 1989 – 1999), W. Kuczyński (ed.), United Publishers and Productions, Warszawa, 2001, p. 1019.

It has not been until recently, that following a series of corruption affairs, Japan introduced a ban on employing former government officials in private enterprises co-operating with the government directly after they have emptied their posts[11].

Corruption lowers the general welfare of the society[12], which can be proved by the following:

- corruption heralds the failure of political objectives pursued by the government, e.g. corrupt distribution of posts leads to inefficiency and waste; corrupt allocation of positions at the university prevents full realisation of its potential and opportunities;
- corruption degenerates private enterprises leading to speedy or excessive revenue collection in times of uncertainty, as well as to the cessation of investment in the enterprise;
- corruptions rises the costs of administration, the taxpayer "is made to" practice bribery, which results in multiple payments for the same service;
- if the act of corruption involves receiving a share in the profit, it reduces the amount of funds available for public purposes;
- corruption has a negative influence on the whole bureaucratic apparatus, as it discourages public servants to maintain high standards of honesty;
- corruption undermines the legitimacy of political institutions and thus the government is less able to rely on the co-operation and support of the public;
- if top politicians and senior government officials are publicly known to be corrupt, the citizens have no reason not to "help" themselves in identical way;
- development has always been hindered by the reluctance at the political level to make unpopular decisions;
- corruption seriously hinders productivity, as time and energy are devoted to seeking connections to outwit the system and not to improving market position and strengthening the enterprise's offer;
- corruption, as institutionalised injustice, provokes groundless suspicions and accusations which makes even the honest politicians prone to blackmail;
- the most common in some countries form of corruption, called as "quick money" or "greasing somebody's palm", puts money instead of citizen's welfare in the centre of the decision-making process[13].

[11] D. Hałasa, Tęsknota za zejściem z niebios (Longing for the Descent from Heaven), Rzeczpospolita, 27 Feb. 1998.

[12] David J. Gould, Jose Amaro-Reyes, The Effects of Corruption on Administrative Performance: Illustration from Developing Countries, in: World Bank Staff Working Papers, No. 580, Management and Development Series, No. 7, 1983.

[13] See: J. Pope (ed.) Rzetelność życia publicznego, podręcznik procedur antykorupcyjnych (National Integrity, Handbook of Anti-Corruption Procedures), Warszawa, 2000, pp. 39-40, after D. Bayley, The Effects of Corruption In a Developing Nation, „The Western Political Quarterly", p. 725.

While performing their duties, the fiscal audit authorities most often encounter and inform the law enforcement agencies of the following corruption activities:

- bribery;
- use of budgetary funds and public property for the purpose of private or personal benefit;
- influence peddling;
- trading in influence, e.g. offering support during electoral campaign or financing political parties in exchange for gaining certain influence;
- malpractices in public procurement procedures, allocation of grants and contracts, licensing procedures, court rulings;
- tax evasion;
- peculation;
- favouritism;
- nepotism and cronyism.

On the other hand, a group of white collar crimes enumerated in Articles 228 – 231 KK, which are to be tackled by fiscal audit authorities, includes:

- acceptance of a material or personal benefit or a promise thereof, or demanding such a benefit in connection with the performance of a public function;
- acceptance of a material or personal benefit or a promise thereof, for an act committed in connection with a violation of law;
- making the performance of official duties conditional upon receiving a material or personal benefit or a promise thereof, or demanding such a benefit in connection with official capacity;
- giving a material or personal benefit or promising to provide it to a person performing public functions;
- claiming to have influence on a state or local government and undertaking to intercede in the settling of a matter in exchange for a material or personal benefit or for a promise thereof;
- acting to the detriment of a public or individual interest while exceeding the authority of a public official, or not performing his duty.

3. Overt and indirect measures aimed at the disclosure of corruption offences

Fiscal audit authorities perform their duties mostly in form of conducted fiscal audit proceedings, regulated in Chapter 3 UKS, in course of which the auditors may encounter traces of corruption activities. Audit proceedings, in the scope stipulated in Article 2 UKS, provide perfect legal instrument to gather information on possible corruption offences. The broad scope of fiscal audit, as well as access to accounting,

tax, legal and bank documentation provide fiscal auditors with powerful tools in search for any legally doubtful activities of auditees. For instance, while verifying the correctness of public procurement procedures, not only does the fiscal audit organ examine the accounting correctness of the action, but also concluded civil law contracts, correctness of tendering procedures, etc. Once such thorough verification has been completed, the fiscal audit inspectors will gain a detailed insight into public procurement procedures conducted by the auditee, which, in turn, may cause not only tax consequences, but also other ones, e.g. penal consequences provided for by the provisions of KK.

A number of fiscal audit procedures[14] are aimed directly at tackling corruption activities, e.g. the audit of declarations on the property status[15]. In most cases, however, the scope and objective of fiscal audit proceedings are not directly linked with the disclosure of corruption offences. If the fiscal audit organ conducts proceedings on e.g. the veracity of declared tax bases and correctness of calculation and payment of corporate income tax in 2011, the main scope of the audit involves the verification of the correctness of fulfilled tax liabilities owed by the State Treasury to the taxpayer. We should underline the necessity to raise awareness among the auditors of possible corruption phenomena which may come to light in the course of conducted audit proceedings; otherwise these criminal acts may remain unnoticed and thus encourage the auditees to recommit them in the future.

As the Voivodship Administrative Court (WSA) in Białystok rightly observed[16] in one of its rulings, the provisions of the UKS do not completely regulate the rules and procedures of fiscal audit proceedings. Such full regulation would not even be reasonable, since, due to its character, the fiscal audit is one of the types of broadly understood administrative proceedings. Thus, in the Article 31 Paragraph 1 UKS the legislator included the reference to the provisions of the Tax Code whenever a matter is not regulated by the UKS. At the same time it should be underlined that the Article 31 Paragraph 1 UKS provides for "relevant" application of the provisions of the Tax Code within fiscal audit proceedings. Such "relevance", however, does not mean direct identity. While conducting fiscal audit proceedings, the fiscal audit authorities perform actions which may exceed the scope included in the theoretical model of control. Fiscal audit authority does not limit itself to the comparison between the declarative state (calculation) and factual state (performance), but also performs governing activities with respect to the auditee.

One should agree with the abovementioned ruling of the administrative court, which defines the fiscal audit proceedings as a particular type of administrative

[14] See more: D. Zalewski, A. Melezini, Kontrola podatkowa przedsiębiorców (Tax Audit of Entrepreneurs), Warszawa, 2010.
[15] See: Problematyka oświadczeń majątkowych w kontekście kontroli skarbowej (Declarations on the Property Status in the Context of Fiscal Audit), Finanse Komunalne, No.5, 2011.
[16] Ruling of the WSA in Białystok of 5 May 2009, I SA/Bk 93/09, LEX No. 558737.

procedure which combines audit and police powers, as well as, typical of tax audit proceedings, ruling competences. It is, however, neither tax proceedings nor tax audit. Moreover, tax proceedings by no means equal fiscal audit proceedings. The latter give the fiscal audit authorities a much broader range of available actions than the tax authorities may use while conducting tax proceedings.

A special type of fiscal audit proceedings, which features higher probability of encountering evidence of corruption offences, is the audit of sources of origin of property as well as unaccounted income in the declared or undisclosed sources of revenue (Article 2 Paragraph 1 Subparagraph 3 UKS). The material scope of such fiscal audit of income involves two types of situations. Firstly, when a person, despite statutory obligations, does not declare the sources of origin of his revenue – which indicates income from undisclosed sources of revenue. Secondly, when a person declares the sources of his revenue but the declared amount departs from the actual value – which indicates income unaccounted in the disclosed sources of revenue.

If a person does not disclose his derived (either legally or illegally) income, it is highly probable that such income might have been gained as a result of committed offences, including corruption ones. It is difficult to imagine such a situation, in which a bribe recipient declares the bribe as income in his tax return. Theoretically, if this happened, such event would have to be qualified as an attempt to legalise cash means which originate from an offence. It may be assumed that a portion of the money obtained through corruption offences is revealed as purely fictional corporate income. By increasing such corporate income, natural persons, who commit corruption offences, get a chance to legally withdraw cash from the enterprise in form of a dividend. While engaged in this type of proceedings, fiscal audit inspectors should be particularly sensitive to possible corruption phenomena. Their superiors, however, should supervise steps undertaken by the auditors in the course of conducted evidentiary proceedings and verify the factual state as regards possible corruption activities.

The use of the abovementioned legal instruments, which serve the purpose of verification of sources of origin of property as well as unaccounted income in the declared or undisclosed sources of revenue, may provide sufficient evidence to substantiate committed corruption offences. In such a case, fiscal audit authorities shall inform law enforcement agencies under the procedure and rules of Article 304 Paragraph 2 KPK.

4. Covert and direct measures aimed at the disclosure of corruption offences

Treasury intelligence has at its disposal a broad range of legal instruments to directly disclose corruption offences. However, detection of corruption crimes is just one within the scope of duties to be performed by this institution.

According to the provisions of Article 36 Paragraph 1 UKS, treasury intelligence is composed of organisational units incorporated into fiscal audit structures, which, within the scope of the provisions of Article 1 UKS, perform the duties of treasury intelligence. On the basis of Article 35 Paragraph 2 UKS, as limited by the provisions of Article 36aa – 36h UKS, the abovementioned duties include acquisition, collection, processing and exploitation of information on income, turnover, property and propriety rights of entities subject to fiscal audit in order to perform a variety of tasks, including those connected with the prevention and disclosure of criminal offences enumerated in Article 228-231 KK, committed by persons employed or performing public functions in organisational units subordinate to the Minister competent for public finance.

It is obvious, that the prevention and disclosure of criminal offences committed by persons employed or performing public functions in organisational units subordinate to the Minister competent for public finance should not be top priority of treasure intelligence, however, it may provide an important preventive mechanism against potential perpetrators of corruption offences. The disclosure of corruption offences may be a direct effect of focused treasury intelligence activities. Nevertheless, evidence of corruption may also emerge as a side-effect of performance of other duties. For instance, the use of a covert listening device in an institution in order to gather evidence of suspected tax evasion may result in the disclosure of a corruption network, and thus, under the procedure of Article 304 Paragraph 2 KPK, in the necessity to inform the state prosecutor or the Police on suspicion of committing criminal offence.

The broader the circle of informers (both institutional and covert) of the treasury intelligence, the more probable it is to succeed in combating corruption offences[17]. The provisions of Article 36f Paragraph 1 UKS provide the basis and general rule of co-operation between treasury intelligence and the following:

- organs, services and institutions authorised to perform preliminary investigation activities, i.e. the Police, Internal Security Agency, Foreign Intelligence Agency, Central Anti-Corruption Bureau, Border Guard, Military Gendarmerie, Military Intelligence Service and Military Counter-Intelligence Service;
- corresponding authorities and institutions of the EU Member States;
- within the scope and under the rules provided by other statutory provisions, e.g. General Inspector of Financial Information, Customs Service, General Inspector of Road Transport, Railway Guard.

Within the scope of combating corruption, the treasury intelligence is authorised to use the following legal instruments:

- performance of preliminary investigation which involves acquisition, collection, processing and exploitation of information on income, turnover,

[17] See: D. Zalewski, A. Melezini, Ustawa o kontroli skarbowej. Komentarz praktyczny. (Fiscal Audit Act. Practical Commentary.), Warszawa, 2011.

property and propriety rights of entities subject to fiscal audit enumerated in Article 4 UKS. These activities, however, have to be closely correlated with the purpose of conducted proceedings, i.e. as regards combating corruption in public administration, with the audit of declarations on the property status of persons – obliged in accordance with separate provisions to submit such declarations – employed by or in the service of organizational units of customs, tax and fiscal audit administrations subordinate to the Minister competent for public finance, including the office rendering service to this Minister, or directly with the prevention and disclosure of criminal offences enumerated in Art. 228-231 KK, committed by persons employed by or in the service of organisational units subordinate to the Minister competent for public finance. While performing these duties, the treasury intelligence officers are authorised to use surveillance, as well as to record picture and sound of events in public places by means of electronic equipment – exclusively in the course of proceedings undertaken in order to establish perpetrators or to collect and record evidence of fiscal offences or offences enumerated in Article 2 Paragraph 1 Subparagraph 14b UKS;

– conducting operational surveillance – only if the prerequisites of the provisions of Article 36c Paragraph 1 UKS have been met. Firstly, operational surveillance has to be conducted within the scope of treasury intelligence preliminary investigation. Secondly, such surveillance may be conducted strictly when other means have proved ineffective or useless – i.e. when it is certain that audit proceedings and other UKS regulated overt and covert procedures do not guarantee the collection of information or evidence; it may as well be conducted in a situation when the to date performed activities have indicated there is no other statutory means to collect information or evidence. Operational surveillance might be conducted in order to detect and establish perpetrators as well as to collect and record evidence of giving or accepting a material benefit in connection with the performance of a public function or a function connected with special responsibility;

– controlled delivery – this instrument may be used upon authorisation issued in a regulation of the General Inspector of Fiscal Intelligence. It involves covert control over the production, movement and storage of, as well as trade in the subject matter of a crime, provided that it shall not create a life or health-threatening situation and other means of preliminary investigation have proved ineffective or useless (which has to be thoroughly justified in the regulation). The use of this procedure has to be correlated with the objective of preliminary investigation, i.e. the detection and establishment of perpetrators as well as the collection and recording of evidence of giving or accepting a material benefit in

connection with the performance of a public function or a function connected with special responsibility;

- telecommunications data retention – in order to ensure proper performance of some duties imposed on the fiscal intelligence by the provisions of UKS, including those connected with the disclosure of corruption offences, the legislator has equipped fiscal intelligence authorities with specific powers enabling the use of telecommunications data.

Summary

As proved by the foregoing analysis of statutory provisions, the fiscal audit authorities hold a broad range of legal instruments in order to effectively prevent and disclose bureaucratic corruption offences committed by persons employed by or in the service of organisational units subordinate to the Minister competent for public finance, but also other persons as well. What seems to be most important is the awareness among the inspectors of fiscal audit as well as systematic trainings in the organisational units of fiscal audit focused on possible corruption phenomena that might emerge in the course of fiscal audit.

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Financial Decentralisation and the Conditions of its Development

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Abstract: The article discusses the notion of financial decentralisation, underlining its two essential elements: scope (volume) of decentralisation and its quality that means financial independence of local self-government. It points out to the fact that the scope of decentralisation is a permanent phenomenon and it develops in the EU countries. However, measurements of financial independence are difficult on the international level and they require detailed examination. It is proven on the example of Poland that is referred to in the article. Moreover, the international standards and conditions of development of financial decentralisation and internal conditions were also analysed. Taking them into consideration makes it easier to build the optimum model of financial decentralisation and shaping its scope in individual countries.

Keywords: decentralisation of public finance, financial decentralisation, local spending, crisis of public finance, financial independence, local self-government, volume (scope) of financial decentralisation, quality of financial decentralisation, conditions of development of financial decentralisation.

1. The notion of financial decentralisation

It may be assumed as a simplification that the decentralisation of public power takes place in the contemporary countries mainly through the decentralisation to local self-government (territorial decentralisation). Besides political and administrative decentralisation, one of its main elements is public finance decentralisation, that is called simply financial decentralisation[1]. If the public finance decentralisation is understood as the volume of financial funds allocated to local self-governments and possibility to manage them independently, it is difficult to measure a phenomenon in such shape with one indicator only. Usually a few indicators (measures) are used for this purpose and too extensive simplifications should not be made in this area.

The issue presented is related to a complex and dual nature of financial decentralisation. First of all, it is a phenomenon that can be measured in the formal

[1] Cf. E. Ruśkowski, Finanse lokalne (zarys wykładu), [*Local finance (a lecture outline)*] Siedlce 2001, p. 23 et seq.

sense (in terms of volume) as the amount of funds provided at the disposal of local self-government to accomplish its tasks. Secondly, the scope of local self-government's rights in creating and using allocated funds may differ. The latter phenomenon is called "financial independence of local government", or sometimes "financial autonomy of local government". Therefore, E. Ruśkowski's earlier analyses on the subject should be recounted in full and maintained here. In accordance with these, the public finance decentralisation refers to public resources and rights and obligations related to the structuring and use of such resources, as well as the organisation and maintenance of the financial management of local self-government, while financial independence (autonomy) of local government refers mainly to its rights to shape the volume of income (revenues) and spend funds, as well as to the organisation and maintenance of the financial management. It means that the notion of financial decentralisation is a broader phenomenon, while financial independence (autonomy) of local government is an element of this notion[2]. In general, one may assume that the scope of financial independence of local government bears witness to the quality of financial decentralisation.

2. Scope (volume) of financial decentralisation

The ratio of local self-government's spending to GDP is usually used to measure the scope (volume) of financial decentralisation and it is accepted in general. It is sometimes supplemented with the ratio of local self-government's spending to the total public spending. The former ratio for the EU countries in selected years is presented in the following table.

[2] Ibidem, p. 27.

Table 1. Financial decentralisation ratio in the EU countries in selected years

	Local spending in relation to GDP (in %)					
	2000	2004	2007	2008	2009	2010
Denmark	31.2	33.6	32.4	33.5	37.5	37.6
Sweden	23.8	24.2	24.5	24.8	26.4	25.6
Finland	17.7	19.4	19.2	20.5	22.9	22.5
Netherlands	15.7	16.2	15.4	15.7	17.6	17.3
Spain	6.0	5.9	6.6	6.6	7.2	7.0
Italy	14.1	15.5	15.0	15.5	16.7	15.7
Hungary	11.8	12.7	11.7	11.5	12.1	12.3
Ireland	12.2	14.2	7.2	7.6	7.1	6.8
Poland	13.4	12.9	13.3	14.1	14.7	15.0
Latvia	9.7	10.0	11.0	12.5	12.9	11.8
France	9.8	10.7	11.2	11.4	12.0	11.7
United Kingdom	11.5	12.5	12.8	13.4	14.4	14.2
Austria	9.1	7.8	7.5	7.6	8.2	8.3
Czech Republic	9.6	12.6	11.1	11.4	12.4	12.2
Estonia	8.5	9.6	9.7	11.0	11.4	9.9
Germany	7.3	7.1	7.1	7.2	7.8	7.7
Lithuania	9.1	8.9	8.3	9.3	10.9	11.5
Belgium	6.6	6.8	6.7	6.8	7.2	7.1
Portugal	5.9	6.1	6.7	6.9	7.4	6.5
Luxembourg	5.2	5.5	4.6	4.7	5.4	5.1
Slovenia	8.4	8.6	8.4	9.1	10.1	10.0
Slovakia	2.7	6.4	6.0	6.0	7.2	7.4
Greece	2.5	2.7	2.6	2.8	3.1	2.7
Cyprus	1.5	1.9	1.9	1.9	2.1	2.1
Malta	0.7	0.7	0.6	0.5	0.6	0.6
Bulgaria	7.6	6.4	6.6	7.3	8.2	6.9
Romania	4.4	7.0	9.6	9.7	9.9	9.6

***Source**: own comparison on the basis of statistical data published at http://epp.eurostat.ec.europa.eu*

On the basis of the above data, one may clearly state that the scope of public finance decentralisation in most European countries is a **clear and permanent phenomenon that has shown a growing tendency in the 21st century**. The recent years of public finance crisis have had no definite impact on this tendency. It is proven by the fact that as compared to 2007 (the last year before the crisis), the 2010 ratio of

the scope of financial decentralisation in the EU decreased slightly for Portugal and Ireland only and in Malta and Romania it remained unchanged, while it grew in the remaining 23 EU member states. Among those Central and Eastern European countries belonging to the EU, particular attention should the paid to the ratio of Poland, which in 2010 joined the group of countries characterised by the biggest scope of financial decentralisation[3] and to a huge growth of the ratio in Slovakia. The recent development of the scope of financial decentralisation is an interesting issue taking into account that the negative consequences of the Great Crisis of the early 1930's had an impact on the local finances, which also considerably reduced the scope of financial decentralisation at that time[4].

3. Financial independence of local governments and problems with its measurements

Financial independence of local government is a complex phenomenon, since it refers to rights related to income (revenues), spending (expenditure) and organisation of financial management. It is difficult to find one universal ratio to measure it. If such ratios (measurements) are sometimes used, it should be realised that their nature is simplified.

Historically, it was believed that the main measurement of financial independence of a local government is the scope of taxes allocated to such local government. What is more, it was also believed that the independence (autonomy) of local government is equal to its fiscal power. Some time later it was pointed out that local government possesses an essential scope of independence in structuring and collecting other income of non-fiscal nature (such as for instance fees, rents, etc.). So the notion of local government's own income was worked out to mean income which is freely spent by local government, which is allocated to local self-government for a longer period and local government may influence its structure and volume. We suggest that own income in this meaning should be called own income sensu *stricto*. One also started using the term "own income" to describe other meanings than those mentioned above. In some countries, for instance in Poland since 2004, own income has included local government share in national taxes, although local government has no impact on their volume or shape. In case of international statistics, such type of income is

[3]According to some experts this group consists of countries for which the ratio amounts to 15% at least – cf. J. Blanc, *Finances locales comparées*, L.G.D.J., Paris 2002, p. 18.

[4]Cf. E. Ruśkowski, Uwagi o byłym i aktualnym kryzysie finansów samorządu terytorialnego w Polsce, [*Comments on the former and current crisis of local government finance in Poland*] in: O prawie i jego dziejach księgi dwie. Księga II. Studia ofiarowane Profesorowi Adamowi Lityńskiemu w czterdziestopięciolecie pracy naukowej i siedemdziesięciolecie urodzin, [*Two Books on the Law and its History. Book 2. Studies offered to Professor Adam Lityński on the 45th Anniversary of His Academic Work and 70th Birthday*] Białystok 2010, p. 1133 et seq.

regarded as transfers (such as subsidies)[5], but because it is treated as own income by the legal provisions, we suggest that such type of income is called own income sensu *largo*. What is remarkable here is the fact of uneven distribution of local taxes and own income sensu *stricto* to individual local government levels.

Measurements (ratios) referring to the groups of above mentioned income point out mainly to the rights of local self-governments to structure them or to the stability of granting such group of income to local government at least. However, they only slightly reflect the scope of local government independence in structuring spending (expenditure). In this field, similar independence when it comes to spending, as in the case of own income sensu *largo,* is possessed by local self-government in using subventions, which in some countries are called general subsidies, while designated subsidies are treated as a barrier or even an instrument which negates financial independence (autonomy) of local government. Therefore this means that the larger the share of designated subsidies in financing of local self-government, the smaller its financial independence (autonomy)[6].

Today it is not possible to present above-mentioned ratios for all EU countries completely, although respective examination is conducted in this area in Poland. It is related to incomplete data, delays in their publication by some countries, etc. Thus, to make the above general discussion more precise, we shall present respective data on Poland commenting on them as briefly as possible.

Table 2. The role of local taxes in the structure of local self-government's income in Poland, in selected years

Total income during a year = 100%			
2003	2004	2009	2010
17.6	16.5	12.6	12.5

Source: own comparison on the basis of: the National Council of Regional Accounting Chambers, Report on the Activities of Regional Accounting Chambers and Accomplishment of the Budget by Local Government Entities in 2010, Warsaw 2011, p. 147

The presented specification shows that the role of local taxes in the income of local self-government in Poland is small and it decreases gradually. And the assessment of fiscal power of local governments should be approached in the same way. Moreover, local taxes in Poland are at disposal of the commune (*gmina*) level of local self-government and this level has a specific scope of fiscal powers. Fiscal powers are not possessed by *poviats* and regional level (*voivodeships*)of local government.

[5] See for instance „Finanse samorządu terytorialnego w Europie" [*Financing Local Government in Europe*], Dexia, Warsaw-Paris 2004. The issue is treated in the same way by Eurostat.
[6] E. Ruśkowski, Finanse lokalne w dobie akcesji [*Local Finance at the Time of Accession*], Warsaw 2004, p. 29.

Table 3. Structure of local government income in Poland in time, in selected years

Years	Total income during a year = 100%			
	Own income sensu largo	Including: share in state taxes	General subvention	Designated subventions
2003	43.5	13.0	40.1	16.4
2004	51.5	21.9	34.2	14.3
2009	48.8	21.7	29.1	22.1
2010	48.4	20.3	28.8	22.8

Source: own comparison on the basis of: the National Council of Regional Accounting Chambers, Report on the Activities of Regional Accounting Chambers and Accomplishment of the Budget by Local Government Entities in 2010, Warsaw 2011, p. 147

It means that own income sensu *largo* is of major importance in the local self-government's income in Poland and that it amounts to ca. 50% of total local self-government's income. However, if we subtract the share of local self-government in national taxes from it, we will receive a ratio lower than 30% of income that illustrates the volume of own income sensu *stricto*. It is the weakness of the financial independence of the three-level local government that has been maintained since the beginnings of such self-government (that is since 1999), as the ratio of own income sensu *stricto* in Poland is one of the lowest ratios in the European Union[7]. It is accompanied by a decrease of the role of general subventions in the last decade in favour of the growing importance of designated subventions and share of national taxes in local self-government's financing in Poland.

4. Standard and non-standard international norms of financial decentralisation in Europe

A set of standard international norms concerning local self-government's financing is presented in Article 9 of the European Charter for the Local Self-Government (the Charter). It is an international convention adopted in Strasbourg on 15th October 1985, that came into effect on 1st September 1988 (after its ratification by the first four countries). The Charter has been signed and ratified so far by 42 countries, it has been signed but not ratified by 2 countries (Montenegro and Serbia) and three other countries are not its signatories (Andorra, San Marino and Monaco). The Charter is not binding in a few other European countries which remain outside the Council of Europe (e.g. Belarus). It is worth mentioning here that such "historical democracies" like Belgium or Switzerland ratified the Charter only recently (in 2004 and 2005

[7] Cf. E. Ruśkowski, J. M. Salachna, Finanse lokalne po akcesji [*Local Finance after Accession*], Warsaw 2007, p. 42.

respectively), while France ratified in on 17th January 2007 with effect as from 1st May 2007.

The Charter contains a flexible application formula. It may be adopted in whole and without objections, then all 8 items presented in Article 9 are binding for local self-government financing, or it may be adopted in part and with objections, having accepted however its minimum provisions, which in case of local self-government's financing means the first three items of Article 9.

The flexible formula of the Charter's application triggers various regulations and obligations referring to individual countries which have signed and ratified the Charter. The initial awareness of the issue lets us state that numerous countries which are parties to the Charter's have specific problems to comply with the obligations imposed by the Charter. So it is the issue that may be an excellent subject of wide comparative studies, in particular in the Central and Eastern European countries, in which the respective data are still not well-known and often underestimated[8]. At this stage a research hypothesis for such research may be defined to state that the **quality of local self-government's finance in individual countries is closely related to the scope of ratification of Article 9 of the Charter, in particular the extent of accomplishment of respective obligations undertaken by a given country.**

Besides the European standards of local self-government's financing which were discussed above and which constitute applicable legal norms, there are also standards, patterns or stipulations in this area which are not obligatory. They vary largely in terms of their form (written or not) and extent, the degree of order and level of detail. A typical example of this are projects of international regional convention, in the case of which attempts have been made for years to assign the nature and status of the Charter to it. Its first version, under the name of the European Charter for Regional Self-Government was adopted on the 6th session of the Europe's Congress of Local and Regional Authorities of Europe on 3-5 June 1997 in Strasbourg. The standards of regional financing were discussed in articles 14 and 15 and in numerous aspects they provided better protection to financial independence of regions than the Charter's protection in the case of local self-government. Due to the failure of its ratification, a few new drafts have been worked out. On 27-29 May 2008 in Strasbourg the Congress of Local and Regional Authorities of the Council of Europe adopted a draft of the European Charter for Regional Democracy (ECRD) with an assumption that when it is accessed by five member states of the Council of Europe, it will become the binding international convention with a possibility of being recommended to be adopted by all member states of this organisation[9]. In accordance with the new draft of the European

[8] Cf. E. Ruśkowski, B. Dolnicki (ed.), Władza i finanse lokalne w Polsce i krajach ościennych [*Local Government and Finance in Poland and Neighbouring Countries*], Bydgoszcz-Białystok-Katowice 2007.

[9] Cf. E. Leja, Attempts at determining regional finance in international conventions, in: The Basic Problems of Public Finance Reforms in the 21th Century in Europe. "Białostockie Studia Prawnicze" 2008, no 5, ed. by E. Ruśkowski and M. Tyniewicki.

Charter for Regional Democracy, it is very likely to be transformed into applicable international convention, which supports the proposition to be aware of and take account of the solutions imposed by the Charter while drafting national solutions.

Finally, it is worth mentioning the European standards that do not refer directly to local self-government's financing, but have an essential impact on the national legislation in this field. The typical example are the provisions of the Maastricht Treaty as regards the maximum level of the national budget deficit and public debt. To comply with them, individual countries limit the deficits and public debt of the local self-government in different forms, to which particular attention should be paid, in particular in the recently-accepted EU countries, mainly as regards local self-government's possibilities to obtain aid funds.

On the other hand, the foreign experience in decentralisation of public finance may be an inspiration and a point of reference for decentralisation of public finance in individual countries (in particular with regard to tendencies and legal, economic and management instruments). However, they should be treated thoughtfully and prudently, since not all of them may be applied in every place and time. There is a relationship between them consisting in the fact that **the better the awareness of standards and experience, the larger the possibilities to optimise decentralisation of public finance in a given country.**

5. Conditions for decentralisation of public finance inside individual countries

Besides the external conditions of development of public finance decentralisation discussed above, that have to be taken into consideration by individual countries to the respective extent, the discussed phenomenon depends also on internal conditions in a given state. The major conditions are presented in the following list.

1. International experience shows that the *sine qua non* conditions for correct decentralisation of public finance are political will and determination of the government in this field. Without them, further conditions become less important. This factor is so special, that it is deserves separate interdisciplinary studies. It may not be denied that liberal governments are more inclined to decentralise public power, but there are numerous examples of successful decentralisation reforms introduced by (or only by) left governments. Apart from political concepts, it may be stated that the more pragmatic and foreseeable the government's policy, the bigger its inclination to decentralise public powers and its important segment, that is decentralisation of public finance. The exception of Great Britain seems to be an exception to the rule only.
2. Remembering that decentralisation of public finance is an important but only one among several pillars (aspects) of decentralisation of a larger phenomenon,

that is decentralisation of public power and must serve it as well as possible, an essential condition of decentralisation of public finances is a **coherent, holistic concept of decentralisation of public power and its accomplishment.** The correlations seem to function in such a way that **correct political and administrative decentralisation is a necessary but insufficient condition to accomplish correct decentralisation of public finance.**

3. Another important factor having an impact on the possibility of rational decentralisation of public finance is the **state of knowledge and science in this area in a given country.** This condition functions in such a way, that **the better the state of knowledge and science of a given country in the field of decentralisation of public finance,** including foreign achievements, **the bigger the possibilities to apply it in practice.**
4. The decentralisation of public finance may be in a way determined by the **form of a country**. Constitutionalists distinguish two basic forms of a democratic country with market economy: federal states and unitary states, but they also emphasize the third (intermediate) form of a country with constitutional rule of regional autonomy. **In case of federal states and states with regional autonomy, the possibilities of decentralisation of public finance are objectively bigger, than in unitary states.** However, this rule is not always observed in practice, since in the European Union a few unitary states belong to the group of states charactered by the biggest scope and highest quality of public finance decentralisation.
5. Decentralisation of public finance is **supported by multi-level structure of local self-government** (local authorities) and it is limited significantly by one-level system.
6. Historical experience and international comparisons show that decentralisation of public finances is supported by good condition of the economy and public finance, while it is hindered in the period of recession and crises.
7. The factor which undoubtedly determines decentralisation of public finance is the **organisational and personnel condition and system of legal regulations of a local self-government.** The better the situation in the above mentioned areas, objectively the better the conditions for decentralisation of public finance in a given place and time.

   This set of conditions of public finance decentralisation is of great importance and of complex nature that consists of multiple aspects, but shall not be discussed in detail due to the limited size of this paper. Nonetheless, I would like to point here to one aspect of the problem that has been merely mentioned. I mean the existence of an efficient and adequate legal system of organisation and control and liability of local self-government as regards public funds management (that is management with decentralised public finance). Existence

of such system supports decentralisation of public finance, whilehe lack of such system or its grave defectiveness may hinder decentralisation as in the well-known French maxim saying that the only things worse than arrogance and lawlessness of central administration are arrogance and lawlessness of local high-ranking officials.

8. At the end it is worth pointing out to a very important – although difficult to precisely identify – group of **historical conditions for decentralisation of public finance.** The case of France shows that their role may be prevailing, since for more than 1.5 centuries France has been unable to break the chains of the centralised Napoleonic system, and even the biggest French minds have been inclined to try and repair the system rather than to break with it definitely. Similar difficulties may be observed in some countries of the Central and Eastern Europe, including the ones which have joined the European Union recently.

6. Final conclusions

The analysis presented in the paper shows that financial decentralisation is a permanent phenomenon which has been developing in the European Union in spite of the crisis of public finance. However, this phenomenon should not be limited to the scope of financial decentralisation (its volume) measured by means of the ratio of self-government's spending to GDP, since also its quality related to the financial independence of local self-government is of great importance. The European Charter for the Local Self-Government defined the requirement of maintaining specific balance between the scope (volume) of financial decentralisation and the scope of financial independence of self-government. The correlations of these categories in individual countries are very differentiated. Poland is an example of such a country, since it is among the top EU countries in terms of the scope of financial decentralisation, but at the same time it ranks significantly low in terms of measurements of the scope of financial independence of local self-government. However, the establishment of mutual harmony between the categories of financial decentralisation and financial independence of local self-government is a very complex phenomenon and it requires that individual countries take account of the conditions of development of financial decentralisation presented in this paper.

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Audit of EU funds - Control of Cligible Costs

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Introduction

European economies have been devastated by the Second World War. Europe needed time and money for the reconstruction of economic and political potential. In April 1951, an organization has been founded that gave birth to the European Union, the European Coal and Steel Community, whose founders besides France and Germany were Italy, Belgium, the Netherlands and Luxembourg. Unique and sectoral integration, which was created mainly for political reasons, has brought a positive economic impact and called for the further dependence on integration between existing members. In 1957, the organization became the European Economic Community. In 1992, the Treaty of Maastricht established the European Union. The main objective of the Union is to increase economic efficiency and welfare of the member countries and to reduce disparities in the level of economic development through: the convergence (support for the regions for which GDP per capita does not exceed 75% of EU average), improvement of regional competitiveness and employment and strengthening the cross-border cooperation[1]. The possibility of obtaining EU assistance, however, involves the proper use of appropriations, i.e. in accordance with EU and national regulations and the provisions of the European Commission[2].

1. The legal bases and principles of control of the use of structural funds

The prerequisite for co-financing structural funds is the existence and functioning of adequate control and management. The legal basis for these systems are the EU Council Regulation, in particular:

- The Treaty Establishing the European Community,
- Council Regulation No. 1083/2006 laying down general provisions on the Structural Funds,
- Commission Regulation (EC) No 1681/94 of 11 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the

[1] Mechanizmy Funkcjonowanie Strefy Euro, NBP Warszawa, 2010
[2] Piaszczyk A., 2007: Audyt środków unijnych. Polskie Wydawnictwo Ekonomiczne.

financing of structural policies and the organization of an information system in this area,

- Council Regulation (EC, Euratom) No 2185/96 of 11 November 1996 on the spot checks and inspections carried out by the Commission in order to protect the Communities' financial interests against fraud and other irregularities,
- Regulation of the European Parliament and Commission (EC) No 1073/1999 of 25 May 1999 concerning investigations conducted by the European Bureau of Fraud,
- Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Bureau of Fraud.

In addition to EU regulations, each of the member countries have national regulations and uses[3].

Audit use of EU funds applies to the actions of management at different levels, starting from the paying authority, through the managing authority, the intermediate body and the implementing one to the ultimate recipient's.

Any grant agreement requires the implementation of the project in accordance with the application form. By signing the agreement for funding, the beneficiary agrees to be subject to the revision of the project. On the basis of the grant agreement, it undertakes to submit to inspection by the Implementing Agency and other authorized entities. Eligible institutions include the Intermediate Body, the Managing Authority, the Audit Authority, the Certifying Authority, the Supreme Chamber of Control and the control authorities of the European Commission. Implementing Authority is authorized to carry out two types of control. The first type - the control of the project documents at the headquarters of the Implementing Institution. This is the formal, substantive and accounting control of the application for payment. The second type of control is the on-site control. Each Implementing Authority is obliged to inspect at least 30% of the projects implemented under the measure. Projects are selected for inspection based on the risk analysis. Each Implementing Authority may assess the riskiness of projects due to other factors. According to the agreement for project financing, the control may be carried out both in the premises of the beneficiary, at the headquarters of the partner (if any) and at the location of the project. The financing agreement includes the information that the beneficiary shall ensure that individuals engaged in monitoring the right to inspect all documents related to the project, including electronic documents and documents related to the project components implemented directly by the partner and the project contractors, throughout the period of storage, or even 10 years for documents concerning state aid granted. The purpose of the inspection at the spot may be as follows:

- whether the service provided is consistent with the signed agreement,

[3] Czykier-Wierzba D., 2003: Finansowanie polityki regionalnej w Unii Europejskiej. Warszawa, Wydawnictwo Twigger

- whether the service provided is in accordance with the timetable set out in the request for funding the project,
- whether the scope of training (workshop, conference) is consistent with the approved application for funding the project,
- whether evidence of completion of services comply with the agreement such as the number of man-hours (attendance, daily activities),
- assessment services through a conversation with the ultimate beneficiaries or participants in the project to see if participants have been notified that the project is co-financed by the ESF,
- whether the information and publicity rules were fulfilled during the implementation of training, through placing inside/outside the room posters or plaques with ESF logo and the information of co-financing from the ESF project,
- whether the participants receive training or training materials (if provided in the project) and whether they were properly labeled with ESF logo. During inspections at the premises of the beneficiary, the compatibility of the project with its objectives and agreement on funding for the project will be checked.

Further aspects to be verified during the on-site inspections will check whether the contribution is made in accordance with the schedule of the project and - if possible - included in the separate accounts. Accounting records bearing evidence of own contribution may be subject to the control. It will also be checked, whether the project will not finance the ordinary course of business of the body implementing the project, but only the cost of the project. This means that funds for project implementation should be settled in proportion to the involvement of such personnel operating the project, or area occupied by the project office. The scope of the audit will cover mainly the indirect costs borne by the beneficiary during the project[4].

The beneficiary, by signing a grant agreement, declares to comply with the Community and national law, including the Act of 29 January 2004 - Public Procurement Law. For the beneficiaries of public procurement, it is one of the major problems during the implementation of projects. Specialists can be hired for the project under a contract of employment or under a civil law contract. The form of employment and its duration should be adapted to the organizational structure of the institution (if there is a public procurement unit, its employee can be delegated as a staff of the project), the number of implemented projects and the number and complexity of procedures for public procurement. The on-site control of the project may be performed as an announced control (the beneficiary is notified at least five days in advance) or as an emergency control. The on-site control of the project should last from one to four

[4] Kwiatkowski K., 2010: Kontrola bez niespodzianek cz. I. UE Fundusze Strukturalne.

days. The audit team should consisting of at least two people. Controlling persons should have adequate authority to carry out the audit, which should include at least:

- designation of the inspection institution,
- date and place of issue,
- the legal basis for the inspection,
- name of persons included in the inspection team, indicating the person holding the head of inspection team,
- numbers of the official ID documents or identity cards of people included in the inspection team,
- name and address of the controlled entity,
- the title and project number,
- the audit scope,
- signature of the person giving the authorization along with information about their position,
- the validity of the authorization.

After the audit, the inspection team within 14 days of its completion, sends to the controlled entity the follow-up information. The beneficiary should remember that it can make comments and objections to the follow-up information. For those comments, the beneficiary has 14 days from the date of the receipt of the follow-up information. If the beneficiary agrees with the content of information and does not make any follow-up observations, it sends within 14 days from the follow-up the signed information to the inspection. In case of any objection by the recipient to the follow-up information, the inspection institution may:

- determine the validity of part or all of the reservations, modify or supplement information about follow-up observations made by the beneficiary, or
- not take into account the objections submitted by the beneficiary and not change follow-up information. These activities should be conducted within 14 days from the receipt of comments from the institution controlled.

Then, the beneficiary, within seven days, signs a final version of the follow-up information or prepare a written justification for the refusal of signing a follow-up information. The next step is to prepare the follow-up inspection team and set a deadline for their implementation. Implementation of audit recommendations will be checked by the inspection body. On-site inspection of the project should contribute to better implementation of the project and other projects carried out by the beneficiary[5].

[5] Kwiatkowski K., 2010: Kontrola bez niespodzianek cz. II. UE Fundusze Strukturalne.

2. Costs co-financed by the European Union

The basic breakdown of the costs used in the implementation of projects funded from the European Union is the division of the eligible costs, which can be funded from the European Union and these are actual costs incurred. The European Commission has only reimbursed the expenditures actually incurred and not accounted for costs. Actual costs must result from the accounts or tax documents of the contractor. Costs incurred during the project, with the exception of the cost of preparation of the final report, which may be incurred within 45 days after completion of the project, in accordance with the agreement. Eligible expenses must have an economic justification and cover the project.

The classification of eligible costs can be distinguished into:

- direct costs incurred by the contractor directly from the project such as salaries of personnel, assets, subcontracting, travels, materials, computer calculations, protection of intellectual property;
- indirect costs, closely related to the direct costs of the project: the management costs such as internal audit, depreciation of buildings and equipment, lease or rental of premises and equipment, external services such as telecommunications, energy, water, insurance, equipment, facilities, salaries of support staff.

The costs not refunded by the European Union are: indirect taxes including VAT, interest owed, provisions for future losses, losses resulting from foreign exchange losses, costs related to another EU project, costs of return on capital investment, debt and debt service charges, unnecessary or unjustified economically costs, and all the other costs that do not meet the conditions to qualify for eligible costs.

3. Detailed eligibility of costs

The Commission has identified 12 principles of eligibility of costs as allowable under the grant.

The first principle says that there are expenses actually incurred, it concerns the final beneficiaries and states that all payments made by them should take the form of cash. The exceptions are: depreciation, contributions in kind (contribution) and indirect costs. The cost of depreciation is an eligible cost if the following conditions are met: the property or equipment are not purchased with the aid of national or Community funds. Depreciation cost is calculated in accordance with relevant accounting principles. The cost refers only to the period of co-financing the project.

In-kind contributions are eligible expenditure provided that: they include the provision of land or buildings, equipment or materials, research or professional work or unpaid voluntary work, are not made with respect to the measures referred to in principles 8, 9 and 10; their value can be assessed in an independent and audited way;

for the provision of land or real estate, their value has been confirmed by an independent qualified valuer or official body with appropriate powers; in case of unpaid voluntary work, its value is defined taking into account the amount of time spent and the normal hourly and daily rate for work performed; are complied with rules 4,5 and 6 if applicable. Overheads are eligible expenditure if they are based on real costs associated with implementation of projects co-financed by the Structural Funds and are allocated in proportion (pro rata) to the project. For example, in parts of the programs overall costs flat rate is determined in relation to direct costs, usually amounting to 20%. The payment of structural funds reported to the European Commission as a payment after the completion of the project must be documented by receipted invoices or accounting documents of equivalent probative value. Subcontracting is an acceptable form for the project implementation, but not all types of subcontracts shall be considered as eligible. The agreements are not honored if they increase the cost of the project without increasing proportion of its value as well as agreements with intermediaries or consultants in which the payment is expressed as a percentage of the total cost of the project.

The second principle - accounting of receipts.One of the assumptions of the idea of financing projects from EU funds is the assumption of self-financing, at least in part, by generating revenue. These receipts represent income to weaken the amount of funding under the Structural Funds, as required for the project.Before calculating the share of structural funds, but not later than at the end of the bridging program, these receipts are deducted from the eligible project costs in full or pro rata, depending on whether they were generated entirely or only partially within the project. For the purposes of this principle, net revenue shall be considered as revenue after deducting the cost of obtaining it. These include net revenues: sales, rentals, services, registration, fees or other equivalent titles acquired under the project. The contribution of funds is limited to the following ceilings:

In the case of structural investments generating substantial net revenue, the contribution may not exceed 40% of the total eligible cost in Objective 1 regions, which may be increased by no more than additional 10% in the Member States covered by the Cohesion Fund. 25% of the total eligible cost in the areas covered by Objective 2. These rates can be increased by amounts for forms of financing other than direct assistance, provided that this increase does not exceed 10% of the total eligible cost.

a) In case of investments in companies, the contribution cannot exceed 35% of the total eligible cost in Objective 1 regions. 15% of the total eligible cost in the regions covered by Objective 2. In case of investments in small and medium-sized enterprises, those amounts can be increased by an amount for forms other than direct assistance, provided that this increase does not exceed 10% of the total eligible cost.

The third principle, fees and other charges and legal expenses.Not eligible for financing from the Structural Funds are debit interest, fees of financial transactions, commissions related to currency exchange losses associated with differential rates, and other financial expenses. However, charges for transnational financial transactions within assistance under Peace II and Community Initiatives (such as Interreg III, Leader +) are eligible for financing from the Structural Funds after the deduction of interest received from payments collected on the account. Moreover, in case of global grants, debit interest paid by the designated intermediary prior to payment of final balance for the assistance, are eligible for financing at the expense of net interest earned from payments collected on the account. In case of obtaining financing for projects implemented by the Structural Funds, it is required to open a separate account or accounts. Bank charges for opening and administering accounts are ineligible. Legal fees for advice, notary fees, costs of technical and financial expertise, accounting and audit costs are eligible if they are directly related to the operation and if they are necessary. Koszty gwarancji bankowych lub udzielonych przez inna instytucję finansami, jeśli obowiązek uzyskania gwarancji wynika z przepisów prawa. Fines, financial penalties and expenses of litigation are not eligible.

The fourth principle concerns the purchase of used equipment.If three conditions are met, second-hand equipment may be treated as a qualified expense. The seller must provide a declaration stating its origin, and confirm that in the last 7 years it has not been purchased using the aid of national or Community finance, together with the invoice of purchase. The price of equipment cannot exceed its market value and it is lower than the price of a similar new equipment. The equipment must also have technical characteristics indicating suitability for the project.

The fifth principle applies to the purchase of land.It says that the purchase of undeveloped land is eligible for financing from the Structural Funds, if all three following conditions are fulfilled. There is a direct relationship between the land purchase and the objectives of co-operation. In case of environmental projects, it may constitute no more than 10% of the total eligible costs of the project. An opinion in the form of a certificate from an independent expert as to market value should be also obtained. In case of projects for environmental protection, eligible costs are those that meet all four conditions. The purchase must be made after a positive decision by the managing authority. The land is used as intended within the period specified in the decision. The land is not for agricultural purposes, except in justified cases. The purchase was made by or on behalf of a public institution.

The sixth principle, regarding the purchase of real estate,says that it is eligible for co-financing structural funds, if there is a direct link between the purchase and the project. This is governed by the four conditions: one must obtain a certificate from an independent expert confirming that the purchase price does not exceed the market value and that the building meets national standards. Within 10 years from the date of

acquisition, the building has not been granted national or Community grant. The property must be used for the purpose and for the period which is given by the managing authority and must be operated while maintaining the purpose of the project.

The seventh principle, VAT and other taxes,explains that VAT is not treated as an eligible cost. The exception is VAT tax, which is genuinely and definitively borne by the final beneficiary or final recipient of an aid. A similar interpretation is in case of other taxes and levies, such as social security. They are an eligible cost only if they are genuinely and definitely borne by the final beneficiary or final recipient of an aid.

The eighth principle, venture capital and loan funds.Venture capital funds operate on the following principle: take the long-term deposits from investors' money, invest it in high-risk ventures (company shares), then after obtaining a corresponding increase in the value of its shares - sells them. In any case, investing in companies in a difficult situation is not allowed/recommended. In the case of other investment conditions, it is the most important that upon completion of the project, eligible costs should include the fund's capital that has been invested in or loaned to small or medium enterprises, including management costs incurred. In addition, during the implementation of the assistance, management costs may not exceed 5% of paid-in capital.

According to the ninth principle, the expenditures associated with the guarantee fund are eligible expenditure, since these are financial instruments that guarantee funds and venture lending funds. Funds may be in the form created by SMEs mutual funds, publicly funded, commercially-managed funds with partners from the private sector or fund financed entirely by public funds.The share of structural funds in the funds may be added by partial guarantees granted under other Community financial instruments. Also in this case, guarantees should not be provided for enterprises in difficult situation.

According to the tenth principle, the costs of leasing are also eligible. Yet, financing through a lessor must meet the following conditions: the lessor is the direct recipient of funding under the Community, which are used to reduce the lease installments paid by the lessees for assets to be the lease agreement. The agreement, on the implementation of which the assistance is granted, should provide an option to buy or guarantee a minimum period of lease, equal to the period of use of the asset. In the event of termination of the lease contract before the minimum period, without the consent of the competent authorities, the lessor is obliged to return part of the Community aid corresponding to the remainder of the leasing period. Purchase of assets must be documented by receipted invoices or accounting document. The maximum eligible amount shall not exceed the market value of assets to be leased. Costs associated with the conclusion of the lease such as taxes, leasing margin, are not eligible. Appropriations in the Community aid paid to the lessor must be used entirely by the lessee to reduce - in the same way - all the installments of the lease. In determining the distribution of the installments or using an alternative method of

equivalent effect, the lessor demonstrates that the lessee shall benefit from Community aid entirely. Costs and any taxes arising from the lease and other contractual terms should be equivalent to those costs, taxes and conditions that would apply if there was no financial assistance from the community.

Direct funding is levied on the lessee to the following conditions. The lessee is the direct recipient of funds awarded under the Community co-financing. Leasing rentals paid to the lessor by the lessee must also be documented. The maximum amount eligible may not exceed the market value of assets to be leased. Leasing costs are equally disregarded, as eligible. Resources for leasing projects are paid as a lump sum or in installments, in accordance with the actual paid off installments. If the duration of the contract exceeds beyond the end date of taking account of payments under the Community assistance, the eligible expenses are limited to that lease installments payable and paid by the lessee before the final date of payment of Community aid. For contracts that do not provide the possibility of purchasing and contracts that are valid for a period shorter than the useful life of assets for which the contract relates, the leasing installments are eligible for Community co-financing in proportion to the period of the eligible project. However, the lessee must demonstrate that leasing was the most cost effective method for obtaining the assets.

Costs incurred in connection with the management and the introduction of the Structural Funds are included as an eleventh principle. In most situations, the costs associated with deployment, management, monitoring and control of structural funds are not considered as eligible. In specific situations, it is possible to waive from this rule. Eligible costs are the costs associated with the preparation, selection, evaluation and monitoring of aid and projects, as well as costs of meetings of monitoring committees and subcommittees for the implementation of assistance programs, if the chairman of the committee considers their participation as important in the implementation of aid programs and the costs of audits on-site. Qualified as eligible costs are also the expenses on salaries for officials such as customs officers, civil servants and other workers, such as auditor. The period of secondment or employment may not extend beyond the end date of eligibility of costs referred to in the decision approving the assistance. Public expenditure are eligible for financing under condition that they do not arise from the statutory public body or from the tasks associated with daily management, monitoring and control.

The last, twelfth rule qualifies the project, depending on location. In Poland, the territorial units have been divided into 5 levels:

- Notus I, Level 1 covers the whole country,
- Notus II, Level 2 covers the region,
- Notus III, level 3, covering sub-regions (counties),
- Notus IV, level 4 includes counties,
- Notus V, Level 5 includes the communities.

These are the names of the territorial units used in the European Union for statistical purposes. The general rule is that the location of the project is linked to and consistent with the region where the aid is granted. With the consent of the managing authority, it is possible that the region, from which the aid is linked in whole or in part, benefited from the project located outside the region. The project must be located within a Member State Notus II, directly adjacent to the region, from which the aid is linked, for example, a dam construction in Czech Republic, which Polish border regions will also benefit from. The maximum eligible expenditure is determined in proportion to the anticipated benefits of the project. Benefits are estimated by taking into account the specific objectives of the assistance and the anticipated effect. A co-financed project cannot be accepted if the benefits are less than 50%.

4. Accounting and reporting

In accounting terms, there are no specific rules neither at the EU level nor at the national level, which means that the accounting should be conducted in accordance with Polish regulations, guided, if necessary, by the International Accounting Standards. There is the requirement to keep separate accounts, which is associated with some changes. A new, separate account should be created to make them record the transactions relating to EU assistance. Such an action requires, in turn, updating company chart of accounts and hence changes in accounting policy. An essential requirement is that the accounting records should be carried out in the analytical division, so as to identify the funds spent on individual tasks of the project and transferred to the beneficiary by way of reimbursement of eligible expenses or premiums. Specific issues for each project are included in the grant agreement.

For most institutions involved in management of the Structural Funds and in the case of the final recipients, there is no need to carry out two records, i.e. in Polish currency and in euro, since payments from the parent institution shall be made in Polish currency. The national currency is defined as the amount of the grant recipient in the applications submitted to the managing and reporting on project implementation. Conversion of the currency into Polish zlotys is at the level of managing the account, with the beneficiary reimbursement of incurred expenses, and costs of exchange differences are charged to the state budget. In accordance with Polish law, specific rules govern the term, the extent and patterns of financial statements. The mode of reporting means reporting in written form and electronically, and transfer of them to the parent institution. Reporting terms are different depending on the type of the report and the institution which completes them. The shortest deadlines are for projects drawn up by the final consumers. All kinds of reports constitute a very important source of information for the auditor (Attachment 1). There is, however, a clear difference in the audit of the financial statements for the Structural Funds and the control by the Chartered Accountant. It is because the subject to control is not the accuracy and

reliability of the reports, but the management and control systems, and the declarations of expenditure in terms of their acceptability[6].

The process of reporting, on such a broad scope, needs to be computerized. The System of Monitoring and Control Information of the Structural Funds and Cohesion Fund (SIMIK) has been developed . In practice, however, the system turned out not to be fully functional and besides the Operational Programme, *Technical Assistance* section has not started[7].

5. Promotion of EU projects

The obligation to inform about the project being co-financing from EU funds is disposed according to the EU regulations. The most important goal of the promotion of EU projects is to raise public awareness about the fact of co-financing by the European Union. Institutions managing regional and national programs provide beneficiaries with guidance in terms of information and promotion projects. Beneficiaries are required to promote the EU funds according to strict rules. It is essential to describe the relevant accounting documents and other evidence documenting expenses incurred. Fixed assets and intangible assets purchased with support from EU funds should be properly marked with the European Union symbol (Attachment 2). Depending on the specifics of the project and the guidelines of the operational programs, the appropriate tool for promotion and information should be selected. Measures incurred in promotions of the project are eligible expenditures. Information boards are compulsory elements placed at the site of the investment from the start of its implementation as well as plaques for such investments as roads, construction, renovation, modernization, purchase of mobile equipment and appliances. At least 20% of the area should be devoted to information about the involvement of EU funds. Training projects, so-called soft projects, are promoted by the promotional and informational materials such as brochures, folders and leaflets. Participants also receive certificates or diplomas, which should contain a reference about project co-finance. Notices of vacancy for training and articles published in local and nationwide newspapers as well as on websites also play an important role in implementation of information and publicity. Taking part in trade fairs and congresses, and conferences, and information meetings are also important. Primarily, media representatives should be invited. Through radio, television or newspapers, executors of the projects have at their disposal various communication channels, which gives the possibility to reach rapidly and directly to a mass audience. The most common mistakes in this matter are gaps in relevant premises signs, on construction sites or in documentation[8].

[6] Piaszczyk A., 2007: Audyt środków unijnych. Polskie Wydawnictwo Ekonomiczne
[7] Jaworska M., 2005: Audyt i co Dalej?: zarządzanie, sprawozdawczość, kontrola, promocja i projektów dofinansowanych z funduszy strukturalnych. Warszawa, Wydawnictwo Twigger.
[8] Skwierzyńska A., 2010: Promocja projektów Unijnych. UE Fundusze Strukturalne.

The European Commission places great emphasis on wide dissemination of information on co-financing projects from EU funds. In § 21 of the Agreement, the basic obligations of the beneficiary's information and promotion are set out. However, detailed guidelines relating to the implementation of these tasks, as set out in § 21. 4, were included in the "Guidelines on information and promotion". These guidelines should be included into the website of the institution, of which the beneficiary has signed an agreement for financing the project. Of course, information and promotion activities will also be subject to spot checks of the project. The control of information and publicity measures undertaken in the project will consist of checking:

▪ how the information about the project and its financing is disseminated. Information about the ESF involvement in the project should be included in all possible locations such as the training materials, publications issued under the project, recruitment posters, press advertisements, sponsored articles, gadgets, etc.;

▪ the way the documents related to the project are labelled. The beneficiary at the beginning of the project should prepare appropriate letterhead, which contains the information specified in the Guidelines on information and promotion such as information on co-financing the project from the ESF, the ESF logo, the title of the project. It is important to label the relevant documents sent to the IP or IA (IPII). Correspondence and other documents related to the project (including contracts of workers employed at the project, contracts with subcontractors, tender documentation) also require proper labeling;

▪ proper marking of the premises where the project is executed. All rooms should be properly marked (in accordance with the Guidelines for information and promotion). Only project's office space does not require marking;

▪ proper labeling of equipment and other items purchased under the project. Most marking is done by placing stickers with information on co-financing by the ESF on the equipment. The markings must be visible and durable. For example sticking a sticker on the underside of a computer purchased for the project should not happened. Such designation will be considered by the controlling team as incorrect;

▪ the way of informing the final beneficiaries participating in a project co-financed by the ESF. Beneficiaries may be informed orally, but this way is difficult to be proved during the inspection. The best way is to notify in writing, the notification signed by the ultimate beneficiary (this can be done during the recruitment or when completing the recruitment survey). For the inspection team, such document will be the best evidence of information to the final beneficiaries participating in a project co-financed by the ESF[9].

[9] Kwiatkowski K., 2010: Kontrola bez niespodzianek cz. II. UE Fundusze Strukturalne.

6. Legal consequences in connection with the misuse of EU funds

Frauds affecting the economic interests of the European Union are components of economic crime. The statistical data received from the Police Headquarters show that abuse discovered by the authorities, given the scale of values and social risks, are marginal problem. Most of the cases against the financial interests of the European Union is carried out in units of the police organizational level: KMP, KRP, KPP, KP, Kspec. Allocation of the transaction takes place primarily in the Regional and Provincial Offices of the Local Government Units, which is why it is important to appropriate cooperation with the officers of Regional Headquarters Departments and the Central Bureau of Investigation KGP. Statistically, crime associated with obtaining and using funds from the European Union is becoming less of a threat to the economy. The most characteristic cases of irregularities are published in various reports and public statements by the Ministry of Finance and the Ministry of Finance[10].

The group of the most common abnormalities mainly consists of falsification of documents and quoting in the application documents false personal data, both of the designer as well as technical details of the project, financing of ineligible expenditure or breach of procurement law (Attachment 3). In case of irregularities or fraud, each of the designers must take into account the specific sanctions. The severity and type of punishment depends on the severity and effects on the proper implementation of the project and may take the following forms:

- imprisonment - in case of proven infringement of the Penalty Code,
- return of all grant funds - for a crime affecting the financial interests of the European Community,
- exclusion from receiving grants - when the beneficiary misused the funds. In this case the beneficiary will not be allowed to receive funds from the European Union for a period of up to three years.
- reimbursement of funds recognized as invalid.
- denial of reimbursement of expenses deemed irregular.
- offsetting measures deemed invalid from the next installment of the refund.
- damages, for example in case of mistakenly submitted application for payment[11].

7. Conclusions

Please note that the privileges of using EU subsidies are also associated with numerous responsibilities. Oversights can often have severe financial consequences and criminal penalties. Errors can be minimized through the use of information websites or consultants. Applicants who have questions or concerns about ways of applying for

[10] Siejka Z., 2010: Z Policyjnych statystyk. UE Fundusze Strukturalne, biuletyn Specjalny.
[11] Jaworska M., 2005: Audyt i co Dalej?: zarządzanie, sprawozdawczość, kontrola, promocja i projektów dofinansowanych z funduszy strukturalnych. Warszawa, wydawnictwo Twigger.

funding or on other issues related to the project may address them, inter alia, to the Polish Agency for Enterprise Development (ul. Pańska 81/83, 00-834 Warszawa) or in electronic form to: instytucje@parp.gov.pl. Both the questions and answers are published on the PARP website at http://www.parp.gov.pl in the "knowledge base" section. Funds from the European Union should be used in the most complete manner. They constitute source of funds for many entrepreneurs and provide an opportunity for the development of our country in all areas.

It is hard to overestimate the importance of control systems in any organization[12]. Despite efficient control bodies, mistakes happen all the time. Reliable control is needed to mitigate these mistakes. Fewer mistakes means more funds to use for Poland

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The Structural Funds as Tools to Promote Economic and Social Cohesion in Regions of the Central and Eastern Europe

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Abstract: The European Union is commonly seen as the community of 27 member countries which are the areas with different levels of development, acceding to the EU structures at various stages of the integration of this group. However, according to the EU's territorial classification (NUTS) the European Union is a community of 271 regions, among which the development disparities are even more apparent, especially after the accession of Central and Eastern European countries. To improve the competitive position of the European Union as a whole, and its weakest regions in particular, the EU provides European cohesion policy. Through the European Regional Development Fund and the European Social Fund, as well as the Cohesion Fund, it invests in thousands of projects across all of Europe's regions to achieve its primary objective: to promote economic and social cohesion by reducing disparities between member countries and its regions. The paper presents issues regarding allocation of Structural Funds in selected countries of Central and Eastern Europe.

Keywords: European Union, Structural Funds, cohesion policy, European regions.

1. Introduction

In 2004, ten countries, including eight of Central and Eastern Europe (CEE), joined the European Community. There was the biggest EU enlargement in its history. Two more countries acquired the status of EU member in 2007. Since then, the European Union comprises of 27 members which are at different levels of development. To improve the competitive position of the EU as a whole, and its weakest regions in particular, the EU provides the cohesion policy with its main tools: the Structural Funds and the Cohesion Fund.

All new EU members benefited from the European Union support grants long before the accession as they were entitled to funds in the pre-accession programmes. After joining the European Union, these countries have access to all the European funds, including the Structural Funds and the Cohesion Fund, starting from the 2000-2006 period. The European Union has allocated € 23 billion under the Structural Funds for the acceding

countries in 2004. For the period 2007-2013, the EU has earmarked a record amount of € 347.4 billion to promote economic growth in the regions and create new jobs. The biggest beneficiary of this support is Poland, for which it was allocated € 67.3 billion.

The basic information about the cohesion policy and the Structural Funds for the period 2007-2013 are presented below. On the basis of selected CEE countries it was presented the funds allocation to priority economic and social issues that are formulated in operational programmes.

2. Convergence of regions as the objective of the cohesion policy

The European Union is widely seen as a group of 27 member countries which are the areas with different levels of development, different traditions and aspirations, and joined the EU structures at various stages of the integration. However, according to the EU's territorial classification, so called NUTS, the EU is a group of 271 regions, among which the development disparities are even more apparent.

Table 1. The richest and poorest regions in the European Union in 2008 (GDP per capita, EU27 = 100)

Regional GDP per inhabitant in the EU27 in 2008 (in PPS, EU27 = 100)			
The richest region		**The poorest region**	
Inner London (United Kingdom)	343	Severozapaden (Bulgaria)	28
Luxembourg (Luxembourg)	279	Nord-Est (Romania)	29
Bruxelles-Capitale (Belgium)	216	Severen tsentralen (Bulgaria)	30
Groningen (Netherlands)	198	Yuzhen tsentralen (Bulgaria)	30
Hamburg (Germany)	188	Yugoiztochen (Bulgaria)	36
Praha (Czech Republic)	172	Sud-Vest Oltenia (Romania)	36
Ile de France (France)	168	Severoiztochen (Bulgaria)	37
Stockholm (Sweden)	167	Sud-Est (Romania)	39
Bratislavský Kraj (Slovakia)	167	Podkarpackie (Poland)	39
Wien (Austria)	163	Sud-Muntenia (Romania)	39
Oberbayern (Germany)	162	Lubelskie (Poland)	39
Bremen (Germany)	158	Észak-Magyarország (Hungary)	40
Utrecht (Netherlands)	157	Észak-Alföld (Hungary)	40
North Eastern Scotland (United Kingdom)	157	Podlaskie (Poland)	41
Darmstadt (Germany)	156	Nord-Vest (Romania)	41
Berkshire, Buckinghamshire (United Kingdom)	154	Warmińsko-Mazurskie (Poland)	42
Noord-Holland (Netherlands)	152	Dél-Alföld (Hungary)	43
Hovedstaden (Germany)	152	Dél-Dunántúl (Hungary)	44
Southern & Eastern (Ireland)	148	Centru (Romania)	45
Åland (Finland)	145	Świetokrzyskie (Poland)	45

Source: own study based on: Eurostat Statistical Books, Europe in figures, Eurostatyearbook 2010, p. 613-622; Regional GDP per inhabitant in 2008, Eurostat newsrelease 28/2.11, p. 2.

Assessing the level of wealth of the regions, it is used the rate based on the GDP per inhabitant in relation to the EU average. According to Eurostat, in 2008, the EU's richest region was the Inner London in the United Kingdom, with GDP per inhabitant at 343% of the EU-27 average (see: Table 1). The leading regions in this ranking were also: the Grand Duchy of Luxembourg (279% of the average), Brussels in Belgium (216%), Groningen in the Netherlands (198%), Hamburg in Germany (188%) and Prague in the Czech Republic (172%). Among the 40 regions exceeding the 125% level of GDP of the EU average ten were in Germany, five in the Netherlands, four each in Austria and the UK, three each in Spain and Italy, two each in Belgium and Finland and one each in the Czech Republic, Denmark, Ireland, France, Slovakia, Sweden and Luxembourg. On the other hand, in every fourth EU region GDP per capita is below 75% of the average[1]. The lowest regions in the ranking were all in Bulgaria and Romania. Among the 64 regions below the 75% level, fifteen were in Poland, seven each in the Czech Republic and Romania, six each in Bulgaria and Hungary, four each in Italy and Portugal, three each in Greece, France and Slovakia, two in the United Kingdom, one in Spain, Estonia, Latvia and Lithuania[2].

In order to reduce development disparities between regions and strengthen their competitiveness, the UE authorities lead the cohesion policy on the supranational level. Basis of this policy have been already laid down in the Treaty of Rome in 1957 which established the European Community, but it was not initially implemented in a systematic manner, and was confined mainly to coordinate regional policies carried out independently by the particular member states. Successive enlargements of the European Communities revealed a growing disparity between the integrating regions, and the actual implementation of a common regional policy became one of the priorities of integrating Europe. However, this did not take place until thirty years after the Treaty of Rome. It is recognized that the actual basis to lead the cohesion policy on the supranational level was provided by the Single European Act of 1986[3]. Since then, the policy has been very often modified to adapt it to the changes in socio-economic environment as well as the ongoing process of EU enlargement by another countries which are usually backward in relation to existing members. As a result, there were changed regional policy objectives, the amount of funds allocated for its implementation and the manner of distribution of funds.

In the current period 2007-2013, the EU has determined three objectives of the cohesion policy and has earmarked a record amount of € 347.4 billion to promote economic growth in the regions and create new jobs. These objectives are[4]:

[1] *Regional GDP per inhabitant in 2008*, Eurostat newsrelease 28/2.11, p. 1.
[2] Ibidem, p. 2.
[3] D. Czykier-Wierzba (2003): *Finansowanie polityki regionalnej w Unii Europejskiej*, Warszawa, p. 44-46.
[4] A. Jankowska (2005): *Fundusze Unii Europejskiej w okresie programowania 2007-2013*, Polska Agencja Rozwoju Przedsiębiorczości, Warszawa, p. 72-73.

1. Convergence – it aims to support the poorest areas in reducing development disparities – this objective concerns 84 regions with GDP per capita below 75% of the UE average and a further 16 regions with a GDP only slightly above the minimum because of the statistical effect of enlargement. The amount available under this objective is € 282.8 billion, representing 81.5% of all funds;
2. Regional competitiveness and employment – it supports areas undergoing social and economic transformation. 171 regions are eligible to receive grants under this objective. The allocation amounts to € 54.9 billion that represents about 16% of the total funds;
3. European Territorial Cooperation – it aims to strengthen cross-border cooperation – the UE has earmarked for this objective the amount of € 8.7 billion (2.5% of the total).

It is estimated that the cohesion policy instruments may increase economic growth in the new members an average of 6% and lead to the creation of 2 million new vacancies[5].

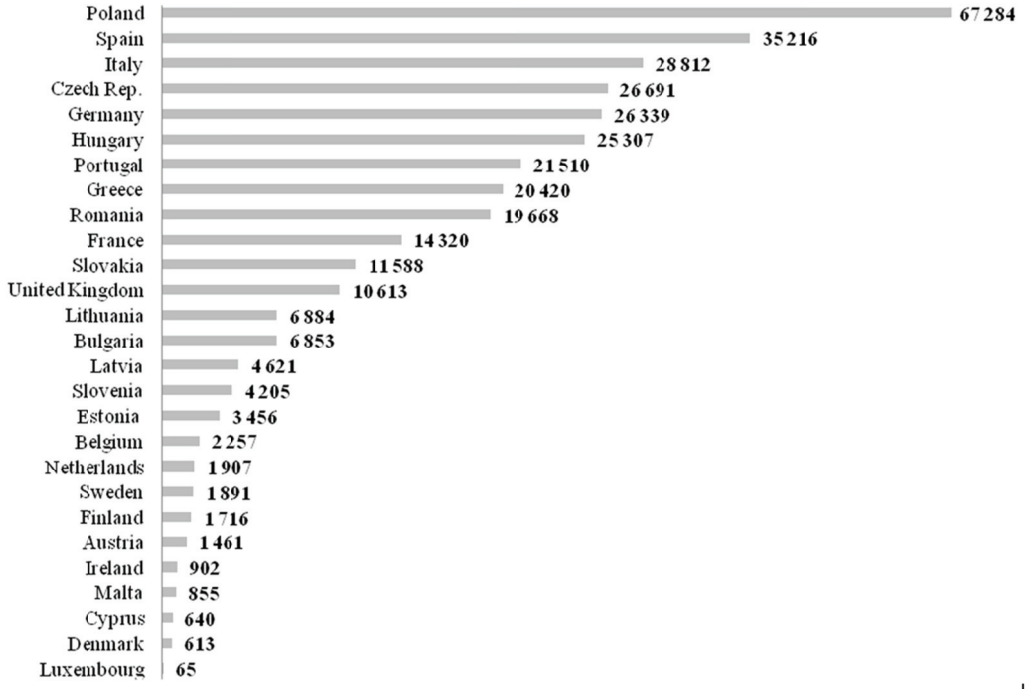
Financial allocation, intended for the implementation of the cohesion policy objectives, has been divided into three funds: the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund, of which only the first two are the Structural Funds. ERDF finances investments in infrastructure and in enterprises. ESF is focused on projects related to the social policy and employment. The Cohesion Fund is intended to finance large transport projects and investments in environmental protection[6].

3. Allocation of European Union funds for the period 2007-2013

The UE funds are allocated to the members over the 7 years based on a series of criteria: eligible population, national wealth, regional wealth and unemployment rate. Then, each country decides how to distribute the resources among its regions. For period 2007-2013, ten new EU countries (which joined the UE in 2004) have received on average 166% more than they did in 2004-2006. On the other hand, the 15 countries that were members before 2004, have received on average 30% less funds than they did in 2000-2006[7].

[5] Komisja Europejska (2008): *Praca na rzecz regionów. Polityka regionalna Unii Europejskiej na lata 2007-2013*, Bruksela, p. 8-9.
[6] Ministerstwo Rozwoju Regionalnego (2005): *Przewodnik po źródłach finansowania z Funduszy Europejskich*, Warszawa, p. 22.
[7] European Commission, *Regional Policy*, http://ec.europa.eu/regional_policy (10.09.2011).

Figure 1. The value of EU support from the Structural Funds and the Cohesion Fund for the period 2007-2013 (million €)



Source: own study based on: European Commission, Cohesion Policy 2007-2013: Indicative Financial Allocations, http://ec.europa.eu (01.09.2011).

The biggest beneficiary of EU grants for 2007-2013 is Poland (see: Figure 1). From the total amount of more than € 347 billion, Poland will receive € 67.3 billion, that is the highest so far financial support granted for one country in a period of seven years. The second biggest beneficiary of EU grants under the cohesion policy is Spain, which will receive € 35.2 billion, thus less than half the support granted to Poland. The smallest recipient of funds is Luxembourg, which will receive about € 65 million i.e. one-hundredth of the funds allocated to Poland. As regards the funds granted to the CEE countries that joined the EU in 2004 and 2007, there is also a large discrepancy. The Czech Republic and Hungary have received funds amounting to € 25-26 billion, while the other five countries (Lithuania, Bulgaria, Latvia, Slovenia, Estonia) each has received less than € 7 billion[8].

Among the 12 new EU members, 10 countries, that joined the EU in 2004, received funds in the previous period 2000-2006, while Bulgaria and Romania, due to the accession in 2007, have less experience in disposing of the grants. These are also the poorest countries in the EU, however, it can be seen some improvement in their

[8] European Commission, *Cohesion Policy 2007-2013: Indicative Financial Allocations*, http://ec.europa.eu/regional_policy (05.09.2011).

economic situation. The following table shows the basic macroeconomic data relating to the CEE countries in 2004 and 2010.

Table 2. Basic macroeconomic data of the CEE countries in 2004 and 2010

Country	Number of regions	GDP per capita[1] in 2004	GDP per capita[1] in 2010	Unemployment rate in 2004[2]	Unemployment rate in 2010[2]	Public debt in 2004[3]	Public debt in 2010[3]
Bulgaria	6	35	44	12,1	10,2	37,0	16,2
Czech Rep.	8	75	80	8,3	7,3	30,1	38,5
Estonia	1	57	65	9,7	16,9	5,0	6,6
Hungary	7	64	64	6,1	11,2	59,1	80,2
Latvia	1	46	52	10,4	18,7	14,9	44,7
Lithuania	1	50	58	11,4	17,8	19,4	38,2
Poland	16	51	62	19,0	9,6	45,7	55,0
Romania	8	34	45	8,0	7,3	18,7	30,8
Slovakia	4	57	74	18,2	14,4	41,5	41,0
Slovenia	2	87	86	6,3	7,3	27,4	38,0

[1] GDP per capita in Purchasing Power Standard (EU27 =100).
[2] Unemployment rates represent unemployed persons as a percentage of the labour force.
[3] Public debt as a percentage of gross domestic product.
Source: own study based on: Eurostat, Annual national accounts, Employment and unemployment, Government statistics, http://epp.eurostat.ec.europa.eu (01.09.2011).

It is worth noting that the fundamental indicator of the wealth of a country or region (GDP per capita in PPS) increased in 2010 compared to 2004 in 10 countries (decreased by 1 percentage point only in Slovenia, and remained unchanged in Hungary). The largest increase of 17 percentage points was recorded in Slovakia. It is noteworthy that the effects of EU funds can also be seen in Bulgaria and Romania, where the rate is increased by 9 and 11 percentage points. In these countries, unemployment has also decreased, although this phenomenon is not necessarily a positive effect of the use of EU support. The decline in unemployment rate in the CEE countries may be due to the opening of labour markets by the "old UE-15 members" and the emigration of CEE countries' citizens.

All new EU members are mostly eligible for financial support under "Convergence" Objective. Only three regions – one each from the Czech Republic, Slovakia and Hungary – are eligible for support under "Regional competitiveness and employment" Objective. As it was mentioned above, each country decides itself how to divide the funds allocated from the EU budget. These are the member states which know best, where grants should be transfer so that they would be best spent and contributed to achieving development goals.

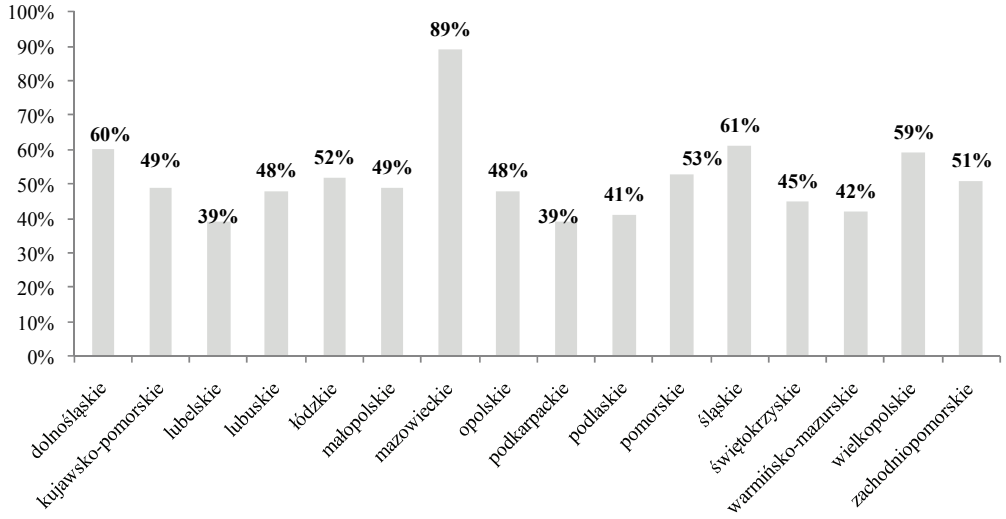
Below, there are presented operational programs prepared by Poland, Czech Republic and Hungary i.e. countries that have received the most funds in the current

programming period among the countries of the "great EU enlargement" in 2004, as well as Bulgaria's programmes, which benefits from the Structural Funds for the first time.

4. The Structural Funds in Poland for the period 2007-2013

As it was mentioned above, Poland is the biggest recipient of EU support in the field of the cohesion policy for the period 2007-2013[9]. According to the NUTS2 classification, Poland is divided into 16 regions and all regions are eligible to receive the EU grants under the "Convergence" Objective and from the Cohesion Fund (see: Figure 2). In 2008, only one region passed the level GDP per capita at 75% of EU average, reaching this rate at 89%[10].

Figure 2. The level of development of Polish regions on the background of the EU average in 2008 (GDP per capita, EU27 = 100)



Source: own study based on: Eurostat Statistical Books, Europe in figures, Eurostatyearbook 2010, p. 613-622; Regional GDP per inhabitant in 2008, Eurostat newsrelease 28/2.11, p. 6.

From the EU funds granted to Poland more than € 66.5 billion will be spent on co-operating programmes under the "Convergence" Objective and more than € 731 million for the programmes under the "European Territorial Cooperation" Objective[11]. These resources are distributed through 33 operational programmes. A detailed division

[9] Ibidem.
[10] Eurostat, *Regional GDP per inhabitant in 2008*, op.cit., p. 1-7.
[11] Ministerstwo Rozwoju Regionalnego (2007): *Narodowe Strategiczne Ramy Odniesienia 2007-2013 wspierające wzrost gospodarczy i zatrudnienie*, Warszawa, p. 116.

of the Structural Funds and Cohesion Fund for particular programmes is presented in the table below.

Table 3. Allocation of the Structural Funds in Poland for the period 2007-2013

Operational Programme	**UE funds allocation (bln euro)**	**UE funds allocation (% of total llocation)**
Operational Programme Infrastructure and Environment	27.9	42
16 Regional Operational Programmes	16.6	25
Operational Programme Human Capital	9.7	14
Operational Programme Innovative Economy	8.3	12
Operational Programme Development of Eastern Poland	2.3	3
12 Operational Programmes European Territory Cooperation	0.7	1
Operational Programme Technical Assistance	0.5	1
Performance provision	1.3	2

Source: Ministerstwo Rozwoju Regionalnego (2007): Narodowe Strategiczne Ramy Odniesienia 2007-2013 wspierające wzrost gospodarczy i zatrudnienie, Warszawa, p. 116.

More than 40% of EU funds devoted to the implementation of the OP Infrastructure and Environment. The main objective of this Programme is to raise the investment attractiveness of Poland and its regions through the development of technical infrastructure while protecting and improving the environment, health, preserving cultural identity and developing territorial cohesion[12]. The Programme finances large projects that have national or supra-regional nature and relate primarily to the environment, but also the promotion of culture, science and health. Grants are intended for local and state authorities, universities as well as enterprises. In view of the latter it was created the OP Innovative Economy, which aims at the development of the Polish economy based on innovative enterprises[13]. This will be achieved by increasing the innovativeness of enterprises as well as the competitiveness of Polish science, enhancing the role of science in economic development, increasing the share of innovative products of the Polish economy in the international market, creating sustainable and better jobs, increased use of ICT. The OP Innovative Economy supports enterprises, business environment institutions and academic units that want to help businesses entities implement the latest technological solutions[14].

To increase the competitiveness of the Polish economy based on knowledge and entrepreneurship, there are planned the activities and funds in the OP Human

[12] Ministerstwo Rozwoju Regionalnego (2007): *Program Operacyjny Infrastruktura i Środowisko*, Warszawa, p. 89-107.
[13] Ministerstwo Rozwoju Regionalnego (2007): *Program Operacyjny Innowacyjna Gospodarka*, Warszawa, p. 61.
[14] Ibidem, p. 61-64.

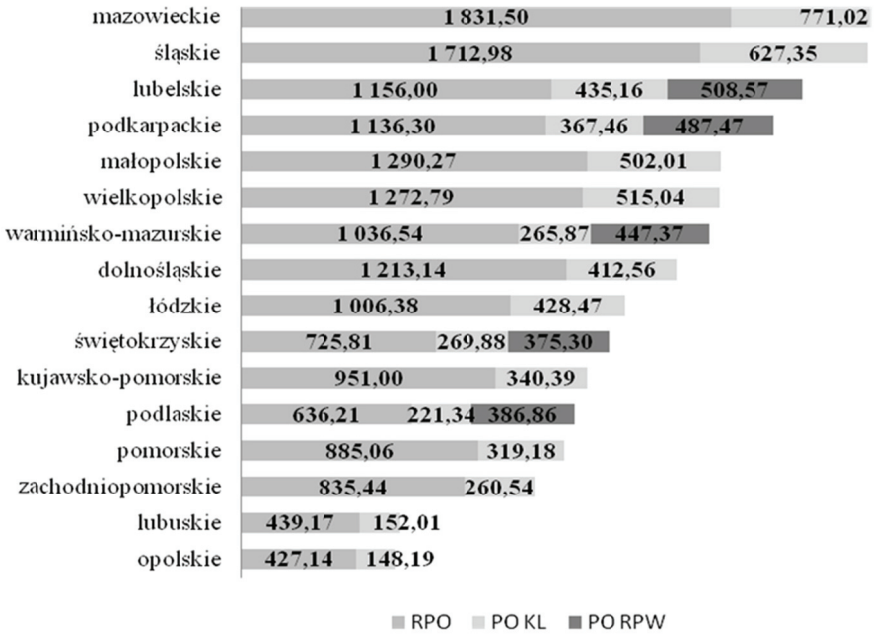
Capital. The main objective of this Programme is to increase employment and education and reducing areas of social exclusion. In the current period, Poland has earmarked for this purpose € 9.7 billion. The OP Human Capital as a whole is financed by the European Social Fund and earmarked for the co-financing of projects related to training, consulting, seminars, etc. Among the applicants there are indicated non-governmental institutions, local authorities, labour market institutions, training centers, colleges, as well as individual entrepreneurs and business environment institutions[15].

All operational programmes, presented briefly above, have the central character, and relate to the very large, nationwide or trans-regional projects. For smaller projects, of local or regional extent, the Regional Operational Programmes are more appropriated. The Polish government earmarked € 16.6 billion for the implementation of the 16 ROP, that represents 25% of the total allocation of EU funds. Distribution of funds to regional programmes takes into account following criteria: population, the level of income and unemployment rate in the region, aiming to equal opportunities and anti-marginalization of development of regions[16]. The results of this distribution is shown below (see: Figure 3).

According to this division of the Structural Funds for the particular RPO, the most resources allocated to the provinces: mazowieckie, slaskie, malopolskie, wielkopolskie and dolnoslaskie. However, the aim of cohesion policy pursued both by the EU authorities, as well as implemented in the country, is to prevent the marginalization of the regions, hence eastern Polish provinces, that belong to the poorest EU regions, are privileged while funds are distributed. These are five regions: swietokrzyskie (GDP per capita 45% of EU average), warminsko-mazurskie (42%), podlaskie (41%), podkarpackie (39%) and lubelskie (39%)[17]. The last one was the poorest region in the entire European Union until the enlargement of Bulgaria and Romania in 2007. To overcome structural problems in these regions, it is necessary to grant them additional funds, which is reflected, inter alia, by the creation of the separate Operational Programme Development of Eastern Polish, intended only for these five regions. These funds are expected to contribute to the improvement of roads, preparation of land for investment, development of universities, technology parks as well as the dissemination of Internet access[18].

[15] Ministerstwo Rozwoju Regionalnego (2007): *Program Operacyjny Kapitał Ludzki*, Warszawa, p. 111.
[16] Ministerstwo Rozwoju Regionalnego (2007): *Narodowe Strategiczne Ramy*…, op. cit., p. 118.
[17] Eurostat, *Regional GDP per inhabitant in 2008*, op. cit., p. 6.
[18] Ministerstwo Rozwoju Regionalnego (2007): *Program Operacyjny Rozwój Polski Wschodniej*, Warszawa, p. 60-66.

Figure 3. The EU funds granted for Polish regions for the period 2007-2013 (million €)



Source: Ministerstwo Rozwoju Regionalnego (2009): Polska i jej fundusze, Warszawa, p. 11.

A total financial resources for actions to improve the socio-economic cohesion of the Polish regions in the seven-year period amount to € 85.6 billion, including € 67.3 billion will come from the EU budget, € 11.9 billion from national public funds (including € 5.9 billion from the state budget), and approximately 6.4 billion € will be spent by private entities[19].

5. Allocation of the European Union funds in the Czech Republic

For the period 2007–2013, the Czech Republic has been allocated € 26.7 billion in total: € 25.9 billion under the "Convergence" Objective, € 0.4 billion under the "Regional Competitiveness and Employment" Objective, and € 0.4 billion under the "European Territorial Cooperation" Objective. The EU funds will be complemented by the Czech Republic's national contribution amounted to € 4.6 billion over seven years[20].

According to the National Strategic Reference Framework of the Czech Republic, the main objective of the country is to transform socio-economic environment in compliance with the principles of sustainable development, so as to make the country an attractive location for investment as well as for the work and

[19] Ministerstwo Rozwoju Regionalnego (2007): *Narodowe Strategiczne Ramy*…, op. cit., p. 115.
[20] *Information about EU Funds*, http://www.strukturalni-fondy.cz (02.09.2011).

life of its citizens[21]. This objective will be achieved by directing contributions from EU funds and the beneficiaries' resources to the projects of the following four strategic priorities[22]:

1. A competitive Czech economy – activities under this objective are to contribute to improving the competitiveness of enterprises, supporting research and development area as well as implementation of progressive technologies and modern forms of management;
2. An open, flexible and cohesive society – this includes an inclusive and flexible labour market with a skilled workforce, an effective system of administration of the public affairs, including the providing of the public services and infrastructure at all levels;
3. An attractive environment – this aims to protect the environment, to take care of and make use of the landscape potential, prevent of and deal with risks, develop the environmental infrastructure;
4. A balanced development of territory – activities under this objective are to ensure sustainable development of urban and rural areas and lead to territorial cooperation.

The Czech Republic's strategic plan for the 2007–2013 period will be implemented through 26 programmes (presented below in Table 4).

Table 4. Division of the Structural Funds to the Czech operational programmes for 2007-2013

Operational Programme	**UE Funds allocation (bln euro)**	**UE Funds allocation (% of total allocation)**
Operational Programme Transport	5.77	22
Operational Programme Environment	4.92	18
Operational Programme Enterprise and Innovation	3.04	11
Integrated Operational Programme	1.58	6
Operational Programme Education and Competitiveness	1,83	7
Operational Programme Research and Development for Innovations	2.07	8
Operational Programme Human Resources and Employment	1.84	7
Operational Programme Technical Assistance	0.29	1
7 Regional Operational Programmes	4.60	17
9 Operational Programmes European Territory Cooperation	0.39	2
2 Operational Programmes Prague (Objective 2 of cohesion policy)	0.34	1

Source: own study based on: National strategic reference framework of the Czech Republic 2007 – 2013, Prague 2007, p. 78-93.

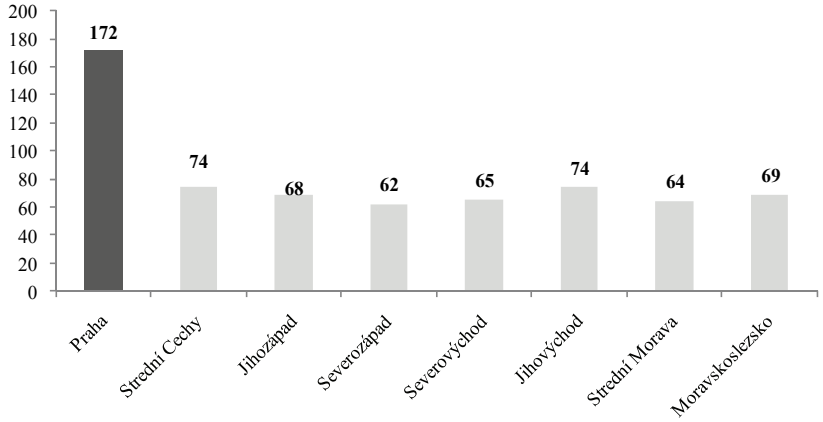
[21] *National strategic reference framework of the Czech Republic 2007 – 2013*, Prague 2007, p. 41.
[22] Ibidem, p. 42.

The largest Czech operational programme is Transport. From the EU funds, the amount of € 5.77 billion has been reserved for it, which amounts to approximately 22% of all allocation intended for the Czech Republic for 2007-2013 period. In addition, the Programme is to be financed by € 1.01 billion from the Czech public sources. This Programme is focused on improvement of the infrastructure quality and mutual inter-connection of the railway, road and waterway transport within the so-called Trans-European Transport Networks (TEN-T). It also finances the development and modernization of the Prague metro[23].

Nearly 18% of the total EU allocation, € 4.92 billion, will be granted for improving the environment. In addition, the OP Environment resources are to be increased by € 0.87 billion from the Czech public sources. Almost half of this amount will be invested in direct measures such as waste water treatment, nature and air protection and risk prevention. Support for energy efficiency and renewable energy will account for over € 1 billion[24].

Approximately 17% of the allocation is reserved to the Czech regions. In accordance with the NUTS classification, the Czech Republic have been divided into 8 regions, among which seven are eligible for support under the "Convergence" Objective and the Prague, due to the high GDP per capita (Figure 4.), is eligible for support under the "Competitiveness and employment" Objective. These seven regions and their Regional Operational Programmes will receive approximately € 4.6 billion.

Figure 4. The level of development of Czech regions on the background of the EU average in 2008 (GDP per capita, EU27 = 100)



Source: own study based on: Eurostat Statistical Books, Europe in figures, Eurostatyearbook 2010, p. 613-622; Regional GDP per inhabitant in 2008, Eurostat newsrelease 28/2.11, p. 6.

[23] *Operational Programme Transport*, http://www.strukturalni-fondy.cz (01.09.2011).
[24] *Operational Programme Environment*, http://www.strukturalni-fondy.cz (01.09.2011).

Despite the fact that each regional programme is a separate document administered by a separate Regional Council and reacting to the needs of the respective region, in general, they focus on similar topics that may be summarized into the following areas[25]:

- Transport accessibility and services (construction and modernization of local roads, building of infrastructure for the needs of public transport, etc);
- Territorial development (preparation of development territories for business, living and services, revitalization of city centers and historical zones, construction and equipment of the community facilities, cultural and leisure facilities, buildings of the social and education infrastructure, etc);
- Regional business development (support of investments improving the material and technical equipment and conditions of companies, schools and training centers, etc).

Out of regions of the Czech Republic, only the Capital City of Prague receives funds under the "Regional Competitiveness and Employment" Objective. There are two Operational Programmes prepared for Prague: the OP Prague "Competitiveness" and the OP Prague "Adaptability". The amount of € 343.4 million is reserved for these programmes. They are of a combined nature of regional as well as thematic programmes: they are intended just for one region and they address a wider range of problematic areas than the quite narrow-focused thematic programmes under the "Convergence" Objective[26].

Apart from the Structural Funds, the Czech Republic will also receive support under the Cohesion Fund, the allocation for the period 2007-2013 is € 8.8 billion.

6. Allocation of the European Union funds in Hungary

For the 2007–2013 period, Hungary has been allocated € 25.3 billion in total: € 22.9 billion under the "Convergence" Objective, € 2.03 billion under the "Regional Competitiveness and Employment" Objective and € 386 million under the "European Territorial Cooperation Objective"[27].

The further development of Hungary and its increased international competitiveness require that the resources coming from the European Union are to be focused on two areas: increased employment and the promotion of long term growth. According to the National Action Programme: "Without a considerable strengthening of these areas and the establishment of macro-economic stability, it is impossible for Hungary to catch up with the average development level of the European Union"[28].

[25] *Regional Operational Programmes*, http://www.strukturalni-fondy.cz (01.09.2011).
[26] *Operational Programmes Prague*, http://www.strukturalni-fondy.cz (01.09.2011).
[27] European Commission, *European Cohesion Policy in Hungary*, p. 2, http://ec.europa.eu/regional_policy (01.09.2011).
[28] National Development Agency (2007): *National Strategic Reference Framework of Hungary 2007–2013 Employment and Growth*, Hungary, p. 75.

These strategic objectives were expressed in values i.e. the target long term growth amounting to 120 000 jobs in the business sector, and 10% higher added value in the business sector[29].

EU funds are spent within the 21 operational programmes, including eight national, 7 regional and 6 of the European Territorial Cooperation Programmes.

Table 5. Division of the Structural Funds in Hungary for the period 2007-2013

Operational Programme	UE Funds allocation (bln euro)	UE Funds allocation (% of total allocation)
Operational Programme Transport	6.22	25
Operational Programme Economic Development	2.50	10
Operational Programme Social Renewal	3.48	14
Operational Programme Social Infrastructure	1.95	8
Operational Programme Environment and Energy	4.18	16
Operational Programme State Reform	0.14	1
Operational Programme Electronic Administration	0.36	1
Operational Programme Implementation	0.32	1
7 Regional Operational Programmes	5.73	23
6 Operational Programmes European Territory Cooperation	0.40	1

Source: own study based on: National Development Agency (2007): National Strategic Reference Framework of Hungary 2007–2013, Employment and Growth, Hungary, p. 160-161.

It seems that the development of transport infrastructure is seen as essential to increase economic competitiveness and stimulate job creation in Hungary. Around 25% of total granting funds are allocated to the OP Transport which is focused on the following objectives[30]:

1. Improving Hungary's integration into the European economy and developing transport infrastructure that can support the country's emerging markets;
2. Improving accessibility to Hungary's regions;
3. Improving the intermodality of transport systems;
4. Contributing to the sustainable and economical development of public transport systems.

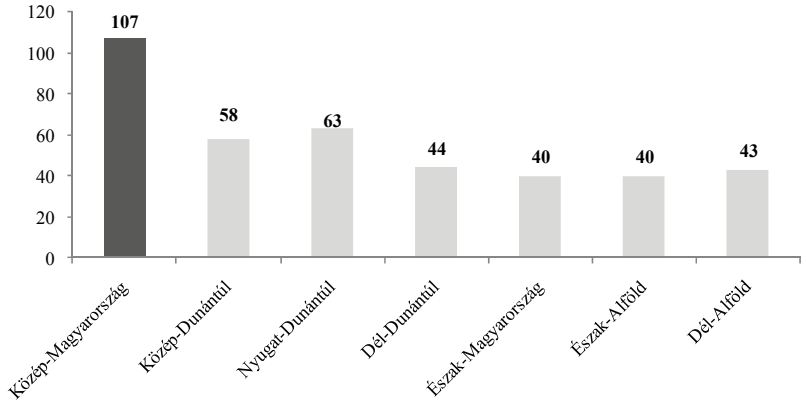
The Programme's effect are to be seen in various infrastructure developments, which include: constructing about 330 km of new expressways, modernising about 500 km of railway track, upgrading about 1100 km of roads. In addition, urban transport will be improved in Hungary's major regional centers through investment in infrastructure such as trams, trolley buses, etc. Funds will also be set aside to build or modernize metro lines.

[29] Ibidem, p. 76.
[30] Government of the Republic of Hungary (2007): *Transport Operational Programme*, Budapest, p. 71-75.

The second biggest programme relates to environment and energy. Projects granted from this Programme should aim to preserve and improve healthy environmental conditions by reducing or eliminating dangerous pollutants, to protect ecosystems and to increase the usage of renewable energy sources as well as to strengthen environmental awareness[31].

Approximately 23% of the EU funds were transferred for the regional authorities under seven Regional Operational Programmes. Six programmes are funded under the "Convergence" Objective, while the Central Hungary region, which consists of the counties Budapest and Pest, falls within the "Regional Competitiveness and Employment" Objective and has a total budget of around € 1.73 billion. Specific objectives of this Programme include developing the factors that are decisive for competitiveness as well as strengthening internal cohesion, i.e. strengthening the research and development activities, integrating regional roads into the international road networks, improving competitiveness for the region's tourism and increasing standards of education and health[32].

Figure 5. The level of development of Hungarian regions on the background of the EU average in 2008 (GDP per capita, EU27 = 100)



Source: own study based on: Eurostat Statistical Books, Europe in figures, Eurostatyearbook 2010, p. 613-622; Regional GDP per inhabitant in 2008, Eurostat newsrelease 28/2.11, p. 6.

The remaining six Regional Operational Programmes are funding under the "Convergence" Objective. And although they vary in the amount of granted funds and agreed priorities, they all aim to increase the economic competitiveness of the region by reducing territorial and socio-economic disparities using its strengths and eliminating weaknesses.

[31] Government of the Republic of Hungary (2007): *Environment And Energy Operational Programme*, Budapest, p. 39-40.
[32] Government of the Republic of Hungary (2007): *Central Hungary Operational Programme*, Budapest, p. 46-49.

7. The European Union funds granted to Bulgaria

Bulgaria joined the European Union only in 2007, thus, this is the first time that it has had an opportunity to benefit from the EU funds under the cohesion policy. For the 2007-2013 period, Bulgaria has been allocated almost € 6.9 billion in total i.e. € 6.7 billion under the "Convergence" Objective and € 179 million under the "European Territorial Cooperation" Objective. The Bulgarian strategy sets two major objectives of development during the running programming period. These are as follows[33]:

- Strengthen the competitiveness of the economy to achieve high and sustainable growth – it aims to improve the image of the country and its regions as an attractive place to invest and work, ensuring the accessibility of an efficient and safe transport infrastructure and targeting the funds at the environmental infrastructure in order to enhance the synergies between the environmental protection and the economic growth.
- Develop human capital to ensure higher employment, income and social integration – it aims at increasing employment and productivity, quality and competitiveness of the labour force, raising the employment rate and increasing living and health standards.

Initial studies indicate that the cohesion policy programmes in Bulgaria may contribute to an overall increase in GDP estimated at 15% by 2020. Moreover, by 2013, the EU funds are to contribute to increasing GDP per capita to 51% of the EU average, the employment rate to 64%, as compared to 56% in 2005, and expenditure on research and development from 0.4% to 1.15% of GDP[34]. To achieve these objectives Bulgaria sets four strategic priorities – three thematic and one territorial[35]:

1. Improving basic infrastructure – it aims at supporting transport infrastructures and investments in environmental protection infrastructure;
2. Increasing quality of human capital with a focus on employment – it supports adequate human resources in both the public and private sectors;
3. Fostering entrepreneurship, favourable business environment and good governance – it is focused on setting up an effective business support framework by improving the regulatory environment, encouraging entrepreneurship, innovation and developing efficient and transparent state administration;
4. Supporting balanced territorial development – it has territorial dimension and targets balanced growth through assisting the regions to develop their growth potential.

The above mentioned objectives and priorities are organized and presented in seven operational programmes (Table 6).

[33]Republic of Bulgaria (2007): *National Strategic Reference Framework Programming Period 2007-2013*, Sofia, p. 58.
[34] Ibidem, p. 59.
[35] Ibidem, p. 60-61.

Table 6. The EU funds granted to the Bulgarian operational programmes for 2007-2013

Operational Programme	**UE Fundsallocation (bln euro)**	**UE Funds allocation (% of total**
Operational Programme Transport	1.62	24
Operational Programme Environment	1.47	21
Operational Programme Competitiveness	0.99	14
Operational Programme Human Resources	1.03	15
Operational Programme Administrative Capacity	0.15	2
Operational Programme Technical Assistance	0.05	1
Operational Programme Regional Development	1.36	20
6 Operational Programmes European Territory	0.18	3

Source: own study based on: Republic of Bulgaria (2007): National Strategic Reference Framework Programming Period 2007-2013, Sofia, p. 101-102.

According to Bulgarian strategy, investments in infrastructure are one of the fundamental areas that facilitate the reduction of disparities between the regions lagging behind in terms of socio-economic development, therefore two the biggest operational programmes relate to transport and environment. Bulgaria aims at reducing the environmental and traffic congestion and safety risks of the expected increase in transport needs by investments in road quality and in modernisation of the major rail links for passenger and freight[36]. Priority projects under the trans-European transport networks (TEN-T) aim to construct 248 km motorways. Over 2 100 km of roads and 780 km of railways are to be upgraded with the support of the EU funds.

The Operational Programme Environment also contributes to the improvement of the infrastructure as it aims to protect and improve the condition of water resources, waste management and soil protection as well as to preserve the biodiversity. Any improvements in environmental sector will also improve the quality of life of the population and expand the possibilities for investments in the country. About 70% of the Programme financial resources is allocated on improvement and development of water and waste water infrastructure and 5% on preservation and restoration of biodiversity[37].

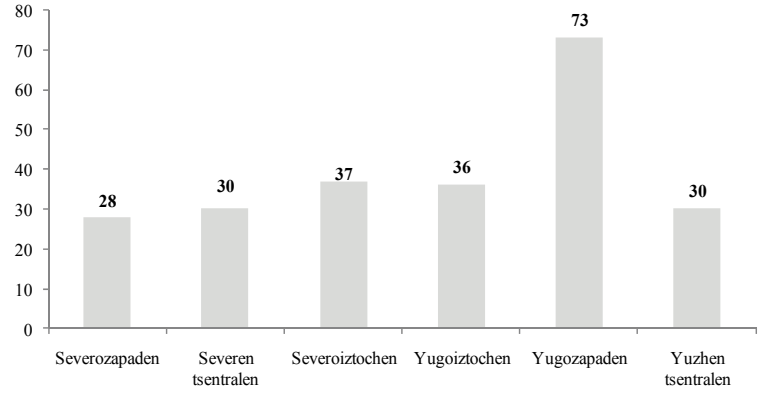
More than € 1.03 billion (14% of fund allocations) has been allocated to support health, education and social services under the Operational Programme Human Resources Development. This Programme is focused on actions that aim to promote job creation, raise the productivity and adaptability of the employed persons, improve the quality of education and training in correspondence with the labour market needs for building knowledge-based

[36] Republic of Bulgaria (2007): *Operational Programme On Transport 2007-2013*, Sofia, p. 79-80.
[37] Republic of Bulgaria (2007): *Operational Programme Environment 2007 -2013*, Sofia, p. 74.

economy, improve the access to education and training as well as the efficiency of the labour market institutions and of social and healthcare services[38].

It should be noted that Bulgaria has prepared only one regional programme that is intended for six Bulgarian regions and managed by central authorities. This approach was also applied for programming period 2000-2006 in the CEE countries that joined the EU in 2004. For the current period all these countries implement operational programmes for each region separately, so it may be expected that Bulgarian regional programmes will also be decentralized in next programming period.

Figure 6. The level of development of Bulgarian regions on the background of the EU average in 2008 (GDP per capita, EU27 = 100)



Source: own study based on: Eurostat Statistical Books, Europe in figures, Eurostatyearbook 2010, p. 613-622; Regional GDP per inhabitant in 2008, Eurostat newsrelease 28/2.11, p. 6.

The Operational Programme Regional Development is the third largest in terms of the allocated funds. Total allocation for regions development amounts to € 1.36 billion (20% of EU grants). Bulgaria is one of the poorest European Union members. In 2008 five of six regions reached GDP per capita below 40% of UE average rate (see: Figure 6). The highest GDP level has been reached by the capital city Sofia, in which a significant part of the national economy is concentrated, but it is still below 75% of EU average. Therefore, all Bulgarian regions are eligible for funding from the Structural Funds, under the "Convergence" Objective. The regional programme finances projects that will contribute to achieving the following objectives[39]:

- Enhancing the physical, economic and social living and working environments of urban centers and connecting these areas with each other;
- Connecting surrounding areas with their centers to ensure appropriate access;
- Support key investments in these areas;

[38] Republic of Bulgaria (2007): *Operational Programme Human Resources Development 2007-2013*, Sofia, p. 68-79.
[39] Republic of Bulgaria (2007): *Operational Programme Regional Development 2007-2013*, Sofia, p. 81.

- Promoting a rational and cost-effective approach to investment through co-operation between large urban centers and their surrounding areas municipalities;
- Ensuring adequate support to the local and inter-regional development process.

Although management of the Programme remains the responsibility of central government, it does have a regional dimension, distinguishing it from other operational programmes. While the other programmes deal with development objectives and priorities emphasising national policy and taking only partially into account the regional features of Bulgaria, the role of the OP Regional Development is to prepare and reach a set of integrated measures intended to contribute to achievement of the long term development goals of the country by incorporating also the territorial factors of growth. Moreover, all project and actions will be undertaken with the participation of the regional and local authorities and stakeholders.

8. Conclusions

The main objective of the EU cohesion policy is to reduce the significant economic, social and territorial disparities between Europe's regions. European funds, which are the fundamental tools of this policy, are the expression of the EU's solidarity with its less developed countries and regions, that aim to support the sustainable development of the regions and of the EU as a whole. It was supposed to be more than just transferring wealth from rich regions to poorer ones. Funds are focused on economic growth and creating jobs, by, inter alia, improving transport connections and infrastructure, supporting small and medium-sized enterprises, investing in environment protection activities and improving education and skills.

Accession and integration into the European Union provide the imperative for reform, but also bring significant amounts of external funds that could be used to propel the reform process, and to support needed investments. On the basis of the selected CEE countries it was presented the division of funds granted by the EU. Although the number of operational programmes, the manner of funds allocation, as well as institutional and organizational structure of programmes are different between countries, their common feature is striving to reduce development disparities.

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Intézkedések a pénzmosás és a terrorizmus finanszírozása ellen, valamint kapcsolatuk az online szerencsejátékkal

(The Measures Against Legalization of the Proceeds of Crime and of Financing Terrorism and Relationship with Online Gambling)

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Absztrakt: Az értekezés célja elemezni bűncselekményből származó jövedelem legalizálásának és a terrorizmus finanszírozásának mértékét, de nem csupán Csehországban, hanem globálisan európai viszonylatban is. Az összefoglaló szerzői a bevezetésen és a történelmi áttekintésen túl fognak összpontosítani magyarázata fontos fogalmakra, az ún. pénzmosásra és terrorizmus finanszírozásra. Ez a szociálisan nem kívánatos, illegális tevékenység hagyományosan világszerte összekapcsolódik a szervezett bűnözéssel. Az összefoglaló másik része főleg helyi jellegű. Tekintettel a probléma globális jellegére a szerzők a figyelmet a nemzetközi méretekre, különösen a nemzetközi együttműködésre irányítják ami megmutatkozhat a nemzetközi szerződésekben de jelen lehet a nemzetközi szervezetekben és intézményekben is. A szerzők a figyelmet azokra az uniós intézkedésekre irányítják, amelyek célja megakadályozni a bűncselekmények legalizálását és terrorizmus támogatását. Rámutatnak továbbá a különféle pénzügyi szolgáltatók és azok ügyfelei alapvető jogaira és kötelességeire a hasonló jellegű tevékenységekből származó jövedelmek felhasználásakor, megelőzendő további bűncselekményeket. Az tanulmány utolsó része a csehországi bűncselekményből származó jövedelem legalizálásának és a terrorizmus finanszírozásának kialakulásával és annak jelenlegi mértékével foglalkozik, továbbá a cseh törvényhozással, kimelve a törvények megváltozásának pozitív hatását a hazai gazdaságra.

Kulcsszavak: pénzmosás, terrorizmus finanszírozása, online szerencsejátékok, bűncselekményből származó jövedelem törvényesítése, Pénzügyi Elemző Egység, Financial Action Task Force on Money Laundering.

1. Bevezetés

A bűncselekményből származó jövedelem legalizálásának és a terrorizmus finanszírozásának kérdését a cseh jogi környezet fiatal ágazataként lehet jellemezni. Ezt mutatja az ezzel a szakterülettel foglalkozó szakmai kiadványok nagyon alacsony száma is- összehasonlítva a külföldi szakirodalommal. Munkánkban bemutatjuk a jelenlegi helyzetet, jogszabályokat és intézkedéseket a pénzmosás és a terrorizmus finanszírozása ellen, főként összefoglaljuk és értékeljük a pillanatnyi állapotot. Tekintettel arra, hogy a kérdés számos különböző tevékenységet érint, jelenlegi munkánknak nem célja, hogy kimerítő értelmezést nyújtson. A fő problémát elsősorban az jelenti az átfogó elemzés során, hogy az úgynevezett szürkegazdaság adatainak azonosítása és analízise bonyolult a mai globalizált világban. Erre való tekintettel cikkünkben külön figyelmet fordítunk az online szerencsejátékok területén történő pénzmosás gyakorlati problémakörének.

2. Az adott alrendszer jellemzése

A bűncselekményből származó jövedelem törvényesítése (az ún. *pénzmosás*) Madinger (2006) szerint történelmileg összefügg a maffia működésével a múlt század 30-as éveiben az Amerikai Egyesült Államokban, és a kábítószer-kereskedőkkel, vagyis a szervezett bűnözéssel. Ma többnyire igyekeznek leplezni a pénzeszközök illegális eredetét, melyet a legkülönfélébb bűncselekmények elkövetésével szereztek, mint a kábítószer értékesítés, illegális üzleti tevékenység, deviza-előírások megsértése, prostitúció stb. úgy, hogy azok a törvényes hozzáférés benyomását keltsék. A világ sok országában *a pénzmosás elleni küzdelem* („AML" betűszó) keretében a bűncselekményből származó jövedelem törvényesítését tiltják, míg más országokban ez a tendencia a bűncselekmények növekedéséhez vezet.

A terrorizmus finanszíroza elleni küzdelem („CFT" betűszó) észrevehetően erősödött, miután sok ország felismerte annak növekvő veszélyét. Az USA-ban 2001 szeptemberében történt terrortámadás világossá tette, hogy a terrorizmusnak nem csak néhány állam van kitéve, hanem egy olyan probléma, amit globális méretben kell megoldani (pl. az Európai Unió Tanácsa által 2002. június 13-án elfogadott kerethatározat a terrorizmus elleni küzdelemről). Egyértelmű, hogy nem elég a büntetőjogi katalógus szerint büntetni a terrortámadást, de szükséges a megelőző intézkedések elfogadása is, hogy megállítsák, vagy legalább is nehezebbé tegyék finanszírozását.

Tekintettel a sok hasonló eljárásra, melyek célja a vagyonátruházás nyomainak megőrzése és származásának nyomonkövetése, így szüntetve meg a bűncselekményből való jövedelemkivonást; a bűncselekményből származó jövedelem törvényesítése és a

terrorizmus finanszírozása elleni intézkedéseket gyakran egységesen szabályozzák, és az együttes „AML/CFT“ rövidítést alkalmazzák rájuk.

3. A bűncselekményből származó jövedelem törvényesítése és a terrorizmus finanszírozása elleni intézkedésekre vonatkozó fogalmak

Hogy a tájékozódás könnyebb legyen az alábbi szövegben, meghatározzuk a legfontosabb szakkifejezéseket, melyek a bűncselekményből származó jövedelem törvényesítése és a terrorizmus finanszírozása elleni intézkedésekre vonatkoznak, úgy mint a pénzmosás, a bűncselekményből származó jövedelem és a terrorizmus finanszírozása.

A bűncselekményből származó jövedelem törvényesítése a cseh jogrendben a 253/2008 sz. törvény által definiált néhány határozatban, ami a bűncselekményből származó jövedelem törvényesítése és a terrorizmus finanszírozása ellen szól az alább leírt előírások értelmében (továbbiakban "AML Törvény"), mint a bármilyen gazdasági előny elfedésére szolgáló cselekmény, melynek célja a tulajdoni haszon látszólagosan törvényes létrejöttének igazolása. Nyilvánvaló tehát, hogy nem az számít, milyen konkrét bűncselekményről van szó, hanem az, hogy ebből a bűncselekményből gazdasági előny keletkezett, ami a bűncselekmény hozama. A bűncselekményből származó jövedelem törvényesítése a Büntetőtörvénykönyv 40/2009 sz. törvénye alapján, a módosított előírásokkal kiegészítve (továbbiakban „BT"), vagyon elleni bűncselekménynek számít, oka egyszerűen a bűncselekménnyel szerzett vagy az ezért járó ellenszolgáltatásként kapott tárgyi vagy egyéb vagyoni érték eredetének leplezése, olyan benyomást keltve, mintha a tárgyi vagy egyéb javakat a törvénynek megfelelően szerezték volna. *A bűncselekményből származó jövedelem* tehát gazdasági előny az AML Törvény szerint, vagy tárgy illetve egyéb érték a BT alapján.

A terrorizmus finanszírozása olyan, az AML Törvényben jogilag meghatározott fogalom, mely pénzeszközök (tehát készpénz vagy nem-készpénz formában) vagy egyéb vagyoni érték gyűjtésében vagy nyújtásában nyilvánul meg, azzal a tudattal, hogy ha még csak részben is, de terrorcselekmény bűntettének elkövetésére, terrortámadásra vagy bűncselekmény elkövetésére használják majd, hogy lehetővé váljon az ilyen bűncselekmény, vagy segítse annak megvalósítását; vagy olyan tárgyalások, melyek a bűncselekmény elkövetőinek jutalmazásához vagy kártérítéséhez vezetnek.

Az AML Törvény a bűncselekményből származó jövedelem törvényesítésének és a terrorizmus finanszírozásának területi kérdésével is foglalkozik, melyben meghatározzák, az AML törvénykezés értelmében nem lényeges, hogy hol történt az adott bűncselekmény- Csehország vagy más állam területén.

4. A bűncselekményből származó jövedelem törvényesítésének folyamata

A bűncselekményből származó jövedelem törvényesítésének többféle módja lehetséges, mint a kaszinóban történő „pénzmosás", vagy a határokon átívelő készpénz-mozgatás, de a leggyakoribb formája a bankrendszerrel történő visszaélés. A bűncselekményből származó jövedelem törvényesítésének folyamata három fázisra különíthető Hinterseer (2002) szerint: *elhelyezés, rétegzés* és *integráció*.

Az első szakaszban, vagyis az *elhelyezés* során szétválasztják a készpénzt annak forrásától, ezután forgalomba helyezik azzal a céllal, hogy a bankrendszer segítségével a nagymennyiségű, tehát gyanút keltő készpénzt átváltsák nem-készpénz formára, így lehetővé téve a gyors és egyszerű kezelhetőséget. A készpénzt és a betéteket különböző tranzakciókon keresztül számos bankszámlára osztják szét, ami mindig olyan szinten történik, hogy elkerüljék ezen tranzakciók jelentésének jogi kötelezettségét. Aztán a nem-készpénz jellegű tranzakciók útján a pénzeszközök összevonására kerül sor néhány bankszámlán a világ különböző országaiban, elsősorban ott, ahol a bankok diszkrét szolgáltatást nyújtanak, és a banktitok megőrzésére hivatkozva ügyfeleiknek teljes anonimitást biztosítanak (például Svájc, Lichtenstein, Luxemburg, Andorra, Bermudák, Bahamák, Kajmán-szigetek, Panama, Monakó, Mauríciusz, Málta stb.).

A második fázis, vagyis a *rétegzés* célja a bűncselekményből származó jövedelem illegális eredetének leplezése és a tőke megtisztítása, ami számos, szándékosan nem átlátható készpénz vagy nem-készpénz jellegű műveleten keresztül valósul meg, főként vagyoni érték vásárlásaként (ingatlan, értékpapír, régiség, műtárgy, ékszer, nemesfém stb.) vagy a pénz átváltásaként más pénznemre. Ezeket a műveleteket olyan vállalatok hajtják végre, melyek legális tevékenységük mellé illegálisat csatolnak, vagy melyek legális tevékenysége teljesen fiktív, kihasználva a nemzetközi környezet összetettségét és néhány ország bizalmi- és banki titok rendszerét.

A harmadik szakaszban(*integráció*) egyesítik a legális bevételt az illegálissal, vagyis összekapcsolják a klasszikus jövedelmet azzal, aminek valódi eredete homályos, így összességében azt a benyomást kelti, mintha törvényes gazdasági tevékenységből származna. Az így megtisztított eszközöket általában olyan tulajdon vásárlására használják fel, ami egyszerűbbé teszi a pénzmosás folyamatát, például építőipari vállalatok, kaszinók, pénzváltók vagy bankok, mint ahogy erről a Pénzügyi Elemző Egység 1996-2006-os jelentése beszámol.

5. Elsődleges AML/CFT intézkedések Csehországban

Az első törvény, ami a Csehország területén folyó pénzmosás elleni küzdelem problémakörét érinti, mint ahogy Kolesár (2002) is idézi, a 61/1996 sz. törvény, néhány, a bűncselekményből származó jövedelm törvényesítése elleni intézkedésről, a

kapcsolódó változtatásokról és módosításokról szól a későbbi előírásoknak megfelelően (a következőkben „Korábbi AML Törvény"), melynek az volt a célja, hogy megfelelő intézkedések révén felszámolja a szervezett bűnözés növekedését, és jelentősen csökkentse a pénzmosás mértékét.

A cseh jogalkotók tudatában voltak annak, hogy a bűncselekményből származó jövedelem legalizálásának kérdése vitathatatlanul nemzetközi probléma, amivel a fejlett gazdasági kapcsolatokkal rendelkező országoknak közösen kell szembenézniük (Korábbi AML Törvény Indoklása). A Korábbi AML Törvény alapja *a pénzmosásról, a bűncselekményből származó dolgok felkutatásáról, lefoglalásáról és elkobzásáról szóló Nemzetközi Egyezmény*, amit az Európa Tanács tagállamai 1990. november 8-án Strasbourgban fogadtak el. A Strasbourgi Egyezmény meghatározta az alapfogalmakat, megerősítette a nemzetközi együttműködésre vonatkozó elveket, és arra kötelezte az Egyezményt aláíró államokat, hogy hatékony mechanizmust dolgozzanak ki a pénzmosás ellen. A Cseh Köztársaságban a Strasbourgi Egyezmény 1997. március 1-én lépett hatályba. Egy másik forrás *az Európai Közösség Tanácsának 1991. június 10-i 91/308/EGK irányelve volt a pénzügyi rendszer pénzmosásra való felhasználásának megakadályozásáról.* Ez magában foglalja a hitel-és pénzintézetek ügyfeleinek kötelező azonosítására vonatkozó követelményt, a rögzített adatok meghatározott időtartamra vonatkozó megtartásának kötelezettségét, a tranzakció megszakítását, ha pénzmosáshoz való kapcsolat gyanúja merül fel, a vállalt intézkedések terén megőrizni a titoktartási kötelezettséget; és megköveteli, hogy főként a hitel- és pénzügyi intézmények hatékony rendszert hozzanak létre a pénzmosás felderítése érdekében. Az irányelv 1991. június 13-tól 2005. december 14-ig volt hatályban, 2005. október 26-án hatályon kívül helyezte az Európai Parlament és Tanács 2005/60/EK direktívája, mely a gazdasági rendszer pénzmosással és terrorizmus-finanszírozással való kihasználásának megelőzéséről szól.

Ahogy Taranda (2004) említi, a Korábbi AML Törvény végeredményképp olyan, a pénzmosás elleni alapintézkedések rendszerét vezette be, mely két fő pillérre támaszkodott. Az első pillér kötelezővé tette a jog által kijelölt személyek azonosítását, és az erről szóló nyilvántartás megőrzését legalább tíz évig. A második pillér kötelezte a bankokat, egyéb pénzügyi intézményeket és törvény által meghatározott személyeket bizonyos állami hatóság értesítésére gyanús tranzakció felbukkanása esetén. A Cseh Köztársaság területén levő állami hatóság, melynek a gyanús ügyleteket jelenteni kell, a Pénzügyi Elemző Egység (továbbiakban: „FAU"), ami 1996. július 1-én jött létre a Cseh Köztársaság Pénzügyminisztériumának önálló ágaként. Ez az ún. Financial Information Unit, melynek fő feladata a gyanús ügyletekről szóló bejelentések fogadása és elemzése a kötelezett személyektől, és bűncselekmény elkövetésének gyanúja esetén feljelentés benyújtása a büntetőjogi eljárásban érintett szervekhez.

6. A jelenlegi jogi helyzet

Tekintettel a követelményekre, melyek a közösségi jog és az ország belső jogi normáinak összehangolására vonatkoznak az Európai Parlament és Tanács 2005. október 26-i, 2005/60/EK irányelve alapján, amely a pénzügyi rendszer pénzmosással és terrorizmus-finanszírozással történő kihasználásának megelőzéséről szól, valamint a Tanács 2006.augusztus 1-i, 2006/70/EK direktívája alapján, melyben kijelölik az Európai Parlament és Tanács 2005/60/EK irányelvének kivitelezési intézkedéseit, amennyiben „politikailag exponált személyek" meghatározásáról van szó, vagy az egyszerűsített mélységi ügyfél-átvilágítási lépések technikai kritériumairól, és arról a mentességről, ami csak alkalmi vagy korlátozott mértékű pénzügyi tevékenység esetén jár, sok alapvető változást fogadtak el.

A cseh jogalkotók az áttekinthetőség kedvéért nem a további módosításokhoz vezető utat választották, hanem a Korábbi AML Törvény törlését, és az AML Törvény kibocsátását, amely 2008. szeptember 1-én lépett hatályba. Az aktuális jogi elöirások szabályzására kétségkívül nagy hatással voltak az Európai Közösség közvetlenül alkalmazható rendeletei, főleg az *Európai Parlamentnek és Tanácsnak az 1781/2006 sz. határozata 2006. november 15-ről, amely a pénzátutalást végzö személyekről való információról szól, és az Európai Parlament és Tanács 1889/2005 sz. határozata 2005.október 26-ról, ami a Közösségbe és onnan kifelé történő készpénz be- és kiáramlásának ellenőrzéséről szól.*

Az AML Törvény jelenlegi formájában meghatározza mind a bűncselekményből származó jövedelem törvényesítésének és a terrorizmus finanszírozásának fogalmát, mind a gyanús ügyleteket, és tartalmaz egy tényeket szemléltető listát, amik ezekre a bűncselekményekre utalnak. Az AML Törvény részletes és jelentősen bővített listát tartalmaz azon jogi és természetes személyekről (vállalkozók és nem-vállalkozók), akik számára kötelezővé teszi az ügyfelek azonosítását. Az így kötelezett személyek tehát kötelesek azonosítani kliensüket, ha az 1.000 Euro-t, vagy bármilyen pénznemben azzal egyenértékű összeget meghaladó üzlet részese. Az átváltáshoz a Cseh Nemzeti Bank által az adott napra bejelentett árfolyamot használják. Az AML Törvény a továbbiakban részletesen leírja az ügyfél azonosításának folyamatát (közvetlen és közvetett), alkalmazásának és elfogadásának feltételeiről, a kliens ellenőrzésének folyamatát, és előírja a kötelezett személy számára az információ megőrzésére vonatkozó határidőt (10 év). A kötelezett személy alapvető feladatai:

- ne folytassa az ügyletet, ha a kliens elutasítja az azonosítást, nem együttműködő, vagy ha kétsége merül fel az információkkal kapcsolatban;

- gyanús ügyletek haladéktalan jelentése a FAU felé, legkésőbb annak felderítésétől számított 5 naptári napon belül, beleértve az azonosítási adatokat és az ügylet körülményeit érintő információkat;

- a kliens megbízásának teljesítését el kell halasztania, ha annak veszélye fenyeget, hogy a kliens megbízásának azonnali végrehajtása meghiúsítaná vagy nehezítené a bűncselekményből származó jövedelem vagy a terrorizmus finanszírozására szánt alap lefoglalását. A kötelezett személy leghamarabb 24 órával azután hajthatja végre kliense megbízását, hogy a gyanús tranzakció bejelentését a FAU átvette, aki bizonyos, törvényileg meghatározott esetben meghosszabbíthatja a határidőt 72 órára.

Továbbá, a felelős személyek az AML Törvény előírásainak megfelelően kötelesek belső irányelv, eljárások és ellenőrző intézkedések kidolgozására, végrehajtására és érvényesítésére, a jelentési kötelezettség és a FAU-val való folyamatos kapcsolattartás érdekében konkrét munkatárs kijelölésére, és a munkavállalók képzésének vezetésére.

Az AML Törvény szabályozza a FAU tevékenységét is, különösen az információ megszerzése és feldolgozása során, a vizsgálatok eredményének használatakor, a nemzetközi együttműködések során, és a kötelezett személy kiválasztása során a kivételek engedélyezésekor. Itt jegyezzük meg, hogy a hatósági ellenőrzést nem csupán a FAU végzi, néhány kötelezett személy felett a Cseh Nemzeti Bank, a Cseh kereskedelmi felügyelet és közigazgatási szervek állnak, melyek hatáskörébe tartozik a szerencse- és hasonló játékok törvényes működésének ellenőrzése is. Az AML Törvény tartalmaz egy közigazgatási bűncselekményekről szóló jegyzéket is, melyek elkövetéséért a FAU vagy a felügyeleti hatóságok bírságot szabhatnak ki, melynek felső határát az AML Törvény határozza meg a bűntett természete és súlyossága szerint, valamint annak következményei és körülményei alapján.

Az AML Törvény értelmében közigazgatási bűncselekménynek minősülnek: titoktartási kötelezettség megsértése, kötelesség elmulasztása a kliens azonosítása és átvilágítása során, információs kötelesség elmulasztása, jelentési kötelesség elmulasztása, kliensi megbízás elhalasztásának elégtelensége, megelőzésre vonatkozó kötelesség hiánya, kötelességszegés a pénzátutalás során és jelentési kötelesség elmulasztása határokon keresztüli átvitel esetén. A pénzbírságot és az eljárási költségeket az a közigazgatási szerv szedi be, amelyik azt kiszabta, a vámhivatal hajtja végre, és az állami költségvetés bevételét képezik. A bírsághatárok: 1.000.000 CZK, 5.000.000 CZK, 10.000.000 CZK, és a különösen súlyos esetekben, amikor a bűncselekményből származó jövedelem lefoglalása vagy elkobzása gátolva volt, vagy lehetővé tette a terrorizmus finanszírozását, 50.000.000 CZK. A bírságok kiszabása mellett bizonyos feltételek teljesülése esetén a tárgy elkobzása is lehetséges.

7. Nemzetközi szerződések

A Cseh Köztársaság jelenleg két nemzetközi szerződést írt alá erre a problémakörre vonatkozóan, elsősorban a már említett Strasbourgi *Egyezményt a bűncselekményből származó pénz mosásáról, felkutatásáról, lefoglalásáról és elkobzásáról*, melyet az Európa Tanács kezdeményezésére fogadtak el 1990.november 8-án. A másik multilaterális nemzetközi szerződés a *Nemzetközi egyezmény a terrorizmus finanszírozásának visszaszorításáról*, melyet az ENSz indítványozására fogadtak el 1999. december 9-én New Yorkban, ezt a Cseh Köztársaság 2005. december 27-én ratifikálta. A szerződés kötelezi a szerződő feleket a terrorizmus finanszírozásával vádolt személyek üldözésére vagy kiadatására, és előírja a szerződő államok számára egyéni és szervezeti szinten is az illegális tevékenységek tilalmát, melyek tudatosan támogatják, ösztönzik, szervezik a bűncselekményeket vagy részt vesznek azok kivitelezésében. Ezenkívül előírja a pénzügyi intézmények és más, pénzügyi tranzakciókkal kapcsolatban álló foglalkozások számára a leghatékonyabb rendelkezésre álló intézkedések használatát a szokásos vagy alkalmi ügyfelek azonosításárakor és olyan ügyfelek esetén, akik érdekeltek a számlanyitásban; valamint hogy fordítsanak különös figyelmet a szokatlan vagy gyanús ügyletekre. Legutóbb az Európa Tanács védnöksége alatt 2005. május 16-án Varsóban fogadták el *a Pénzmosásról, a bűncselekményből származó jövedelmek felkutatásáról, lefoglalásáról és elkobzásáról, valamint a terrorizmus finanszírozásáról szóló egyezményt*, ami a Strasbourgi Egyezmény aktualizálása, hozzátéve a terrorizmus-finanszírozásra való alkalmazásának lehetőségét, és meghatározza, milyen kötelező intézkedéseket kell hozni nemzeti szinten. Az egyezmény 2008.május 1-én lépett hatályba, a Cseh Köztársaság mindeddig nem írta alá és nem is ratifikálta. Albánia, Örményország, Bosznia-Hercegovina, Horvátország, Ciprus, Magyarország, Málta, Moldovai Köztársaság, Montenegró, Hollandia, Lengyelország, Románia, Szerbia és Szlovákia már ratifikálták.

8. Nemzetközi szervezetek

A legfontosabb nemzetközi szervezet, mely globális szabványok felállításával és elvek kidolgozásával támogatja a pénzmosás és terrorizmus-finanszírozás elleni küzdelmet, a *Financial Action Task Force on Money Laundering* (továbbiakban: „FATF"), mely 1989-től működik az OECD kormányközi szervezet égisze alatt. Mint ahogy azt Lilley (2006) is említi, a FATF 1990-ben javaslat-csomagot hozott létre a pénzügyi rendszer pénzmosással való kihasználásának megszüntetésére, az ún. „40 ajánlás”-t, melyben meghatározzák a tagországok törvényhozására vonatkozó alapvető követelményeket, mint például a pénzmosás tényének megállapítása, ügyfél-azonosítási követelmények és adatok archiválása, nemzetközi együttműködés feltételei, stb. 1996-ban javasolták korszerűsítését a pénzmosás módszerei terén történt fejlődésre való

tekintettel, 2001-ben 9 speciális ajánlással bővítették ki, melyek figyelembe veszik a terrortámadások elviselhetetlenül megnövekedett számát, és melyek alkalmazzák az ENSz erre a területre vonatkozó intézkedéseit. Ezen ajánlások jogilag nem kötelező érvényűek, azonban az államok kulcsfontosságú tényezőként vették figyelembe a bűncselekményből származó jövedelem legalizálása és a terrorizmus-finanszírozás elleni belügyi intézkedéseik meghozatalakor. Így jut a FATF koordinációs- szabályozó szerephez. A Cseh Köztársaság még nem tagja a FATF- nak.

A következő fontos szervezet a Moneyval kormányközi szervezet, mely az Európa Tanács alatt 1997-ben jött létre, és azon országokról tesz közzé értékelő közleményeket a bűncselekményből származó jövedelem-legalizálás és terrorizmus-finanszírozás elleni intézkedések végrehajtását és alkalmazását illetőleg, melyek az Európa Tanács tagállamai, de nem tagjai a FATF-nak. A Cseh Köztársaság a Moneyval tagja.

A nemzetközi szervezetek fontossága a pénzmosás és terrorizmus-finanszírozás elleni harc terén abban rejlik, hogy értékelő ellenőrzések révén képesek informális nyomást kifejteni főként a nem-tagállamokra és a tagállamokra is, hogy a belső előírások jogi szabályzásának legalább minimális követelményei olyan szinten legyenek, hogy elkerülhető legyen a bűncselekményből származó jövedelem olyan államokba történő áramlása, ahol gyenge vagy teljesen hiányzik az ilyen irányú törvényi szabályozás.

9. Pénzmosás és online szerencsejátékok

A szerencsejáték történetét gyakran összekapcsolják a szervezett bűnözéssel. Az idők folyamán az egyes országok megtanultak küzdeni a pénzeszközök illegális tevékenységre váltása ellen, a jog és jogszabályok alkotta fegyvert használva e csorba kiküszöbölésére.

Azok az online szerencsejátékok, amelyek jelentős pénzáramlással járnak, de sem állami, sem uniós vagy globális szinten nem megfelelően szabályozottak vagy összehangoltak, így jelentős teret kínálnak a pénzmosásnak. Az egyes országok (pl.: Csehország) törekednek ezen terület szabályozására, azonban az internetes felületen ez nehéz, úgyszólván lehetetlen, mert nem lehet kitűzni a pontos határait annak, hogy az állam hol gyakorolhatja jog- és hatáskörét. Az elsődleges megoldatlan problémát az jelenti, hogy mód és lehetőség nyíljon meghatározni, hol, azaz melyik államban nyújtják a szolgáltatást, ill. hol használják, ha az az irányadó, hol található a játékos, melyik állam polgára, hol van regisztrálva az üzemeltető, hol van a székhelye, vagy hogy milyen „nemzetiségű“ a domain. Sok a tényező, és e terület „játékszabályai“ egyáltalán nem világosak. Fontos továbbá megjegyezni, hogy azokat a vállalatokat kivéve, melyek legálisan működtetik az online szerencsejátékot, túlnyomó többségben nem legálisan működő szerencsejáték-weboldalakat találunk. Európában a 14 832 aktív szerencsejáték- weboldal több mint 85%-át engedély nélkül működtetik. Az illegális, határokon átívelő kereskedelem egyrészt feketepiacot teremt, mely jogosulatlan, törvénytelen fogadásokon és játszmákon alapul (és

ezek akár harmadik, az Unión kívüli országokból is), és az ún. szürke piacot, ahol az üzemeltetők egy (vagy akár több) állam által kiadott engedéllyel terjesztik vagy szolgáltatják a szerencsejátékot más ország polgárainak anélkül, hogy ezekben az államokban engedéllyel rendelkeznének. Az utóbbi évek fejlődéséből következik, hogy az online szerencsejáték piac a szerencsejáték piac leggyorsabban fejlődő ágazata, és gazdasági jelentősége egyre nő. Ezért ilyen érdekes és kihasznált terület a pénzmosás szempontjából. Azáltal, hogy az online szerencsejáték működtetésének szabályai nem egyértelműen meghatározottak, nem olyan nyilvánvaló, ki tegyen gátló intézkedéseket a bűncselekményből származó jövedelem legalizálása és a terrorizmus finanszírozása ellen. Ebből következik, hogy ez a környezet megfelelő táptalajául szolgál a pénzmosás megvalósításának. Ebben az összefüggésben meghatározhatóak azok a kockázati területek, melyeket a pénzmosáshoz használnak fel, vagy melyek segítik azt:

- az online szerencsejátékból származó nyereséget vagy a játékos által fel nem használt eszközöket az üzemeltető más számlára utalhatja, mint ahonnan azt küldték,
- azok kihasználása, akiken keresztül lebonyolódik a tranzakció,
- alacsony költségű online játék játszása azzal a céllal, hogy a játék elvesztését vagy anyagi veszteséget eredményezzen,
- a kifizetések megvalósítása olyan pénzügyi közvetítőkön keresztül, akik nem tartoznak az AML szabályozása alá.

Az állam célja az kellene legyen, hogy csökkentse a pénzmosás kockázati szintjét, ezt részben az online szerencsejáték tulajdonjogának és tényleges működésének ellenőrzésével. Az államoknak következetes követelményeket kell felállítaniuk a bűncselekményből származó jövedelem legalizálása elleni harc során.

Az online játékipar ellenőrzése a következőkön kell alapulnia:

- ügyfelek azonosítása,
- a technológia ellenőrzése, így korlátozva a csalást és a csendes megállapodásokat,
- személyazonosság-lopás elleni védelem,
- az ügyfél hitelkártya- információinak biztonságos kezelése,
- az ellenőrzés során felhasználni a terrorista csoportok gyanúsított tagjainak jegyzékét,
- a játékból származó ki- és befizetések és a játékosok magatartásának követése
- a játékba való befektetések korlátozása,
- az ügyfelek közötti közvetlen kifizetések tilalma,
- az olyan országokból történő fizetések automatikus blokkolása, melyek eltérnek a regisztrált hazai ügyféltől,
- a pénzmosásra tett kísérlet észlelése után jelenteni azt a pénzügyi hírszerző szolgálatnak, a számla blokkolása, az üzleti kapcsolat megszüntetése.

Ez egyenlőtlen helyzetet vet fel a „kő” kaszinók üzemeltetői - akiknek a törvény szigorú feltételekként előírja, hogy megakadályozzák a pénzmosást - és az online szerencsejáték üzemeltetői között, engedéllyel vagy anélkül. Meg kell jegyeznünk, hogy az Európai Bizottság becslései szerint pl. 2008-ban az online szerencsejátékból származó bevétel elérte a 6,16 milliárd eurós összeget, vagyis összehasonlíthatatlanul több volt, mint a hagyományos kaszinók bevétele. Az online szerencsejátékkal kapcsolatban számos probléma merül fel, nem feledkezhetünk meg arról, hogy az ellenőrzés szinte lehetetlen, az adóelvezetés hiányos, és sok a csalás, amiket az üzemeltetők követnek el. Példaként említhető a nyereség ki nem fizetése a játékosok felé. A cseh Polgári Törvénykönyv szabályozza a játékból származó nyereség jogosultságát - amennyiben nem olyan szerencsejáték- vállalatról van szó, melyet az állam üzemeltet, vagy amelyik hivatalos engedéllyel rendelkezik - méghozzá úgy, hogy a játékból származó nyereség és azok a követelések, melyek azokból a kölcsönökből származnak, amit tudatosan a játékra adtak, nem behajthatóak. Ezek az ún. „nem perelhető kintlévőségek” (természetes kötelem). Ennek ellenére ezek a kintlévőségek érvényesek, ezért lehetséges ezek önkéntes teljesítése. Ezzel összefüggésben rá kell mutatnunk az illegálisan üzemeltetett szerencsejátékra, ahol ugyan a játék teljesíti a fentebb említett tulajdonságokat, de amíg ugyan a játékos befekteti a pénzeszközöket a játékba, számára a nyereség elérhetősége nem szavatolt. Ezért szükséges olyan globális vita kezdeményezése, melyben reagálnak ezen virtuális terület fejlődésére, és ezt nem csak a bűncselekményből származó jövedelem legalizálásával kapcsolatban.

10. Befejezés

A fenti elemzés alapján nyilvánvaló, hogy a bűncselekményből származó jövedelem legalizálása országhatárokon átterjedő folyamat nem csak a világgazdaság globalizáltsága miatt, hanem célzottan. A szervezett bűnözés képviselői a nemzetközi környezet heterogenitását előnynek tekintik- a bűncselekményből származó jövedelmet sokkal kevesebb erőfeszítéssel (és költséggel) tudják tisztára mosni.

Tekintettel arra, hogy a pénzügyi források hatékony eszközei a szervezett bűnözésnek, mely a társadalom egészét veszélyezteti főként azért, mert a piszkos pénz tömeges áramlása károsíthatja a pénzügyi szektor egészének stabilitását és jóhírét, meg kell hozni a szükésges, bűncselekményből származó jövedelem legalizálás és terrorizmus-finanszírozás elleni intézkedéseket nemcsak belügyi és európai, de nemzetközi szinten is.

A Cseh Köztársaságnak, az Európai Unió tagjaként, lényeges elérnie az összhangot a belföldi jog és elsősorban az Európai Közösségek jogi követelményeivel, és ezt meghatározott határidőn belül. A Cseh Köztársaság az AML Törvényt alkalmazva eleget tett az ezirányú követelményeknek, és teljesítette (noha egy kis késéssel) kötelezettségeit. Jelenleg a Cseh Köztársaság jogszabálya teljes mértékben megfelel az EU/EK törvénynek. A törvényhozói keret elérte a fejlett európai országokét, a kérdés azonban továbbra is annak

végrehajtása. Az AML Törvény értelmező jelentése szerint a fő ellenőrző szervnek, a FAU-nak nincs elegendő munkatársa, akik a kötelezett személyek ellenőrzését végeznék (2009-ben a FAU-hoz 2224 gyanús ügyletről szóló bejelentés érkezett, ebből 191 büntetőjogi feljelentés született). Létezik tehát némi kétely ezen intézkedések hatékonyságára és a végeredményre vonatkozólag.

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Model of Judicial Review of Tax Administration in Poland

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1. Outline of the origin of administrative justice

The principal objective of administrative justice is to protect of individual rights in the sphere of public law, of which tax law is a significant part. In the sphere of tax law we are always dealing with the inequality of taxpayers and authority. Tax administration rules on the duties to this administration – and is therefore a judge in its own case. The existence of administrative courts should guarantee effective protection of taxpayer rights and is an essential element of the rule of law[1]. For this reason, the analyzing model of judicial review of tax administration in terms of the level of observance of the rights of taxpayers may be useful.

Administrative justice in Poland has a rich tradition. Its origins date back to the democracy of the gentry, when, in 1613, impermanent committees to control the Treasury were established (Radom Commission). In 1717, these committees became the Court of Tax, which was equipped with the power of the judiciary to tax the debtors of the Treasury[2]. During the Polish partitions the administrative judiciary was varied depending upon the jurisdiction of the invaders. After Poland regained its independence, steps were taken to unify of the judiciary throughout the country, an important part of which was the establishment by the Act of 3rd September 1922 r. (Dz. U. Nr 67, poz. 601) of the Supreme Administrative Court with national jurisdiction.

After the Second World War for ideological reasons the administrative judiciary was not reactivated.

Rebirth of the administrative judiciary occurred on 1st September 1980 by the Act through 31st January 1980, which concerned the Supreme Administrative Court (SAC) and changed the Act – Code of Administrative Procedure (Dz. U. Nr 33, poz. 322). The SAC has become a special court, with one instance, and judicial supervision

[1] J. Małecki, O ciągłości konstrukcji podatkowych w świetle orzecznictwa Najwyższego Trybunału Administracyjnego i Naczelnego Sądu Administracyjnego, w: Sądownictwo administracyjne gwarantem wolności i prawa obywatelskich 1980-2005, (red.) J. Góral, R. Hauser, J. Trzciński, Warszawa 2005, s. 306.

[2] A. Kubiak-Kozłowska, w: W. Chróścielewski, K. Defecińska-Tomczak, Z. Kmieciak (red.), A. Korzeniowska, A. Kubiak- Kozłowska, Polskie sądownictwo administracyjne, Wydawnictwo C.H. Beck, Warszawa 2006, s. 29.

was transferred to the Supreme Court. With time authority of the SAC began to increase, especially after 1990. New procedures were introduced by the Act of 11th May 1995 pertaining to the Supreme Administrative Court (Dz. U. Nr 74, poz. 368 ze zm.)[3]

2. Reform of the administrative judiciary that became effective on 1st January 2004

The Constitution of the Republic of Poland of 2nd April 1997 (Dz. U. Nr 78, poz. 483 ze zm.) introduced major changes in the system of administrative justice. In particular, Article 176 para. 1 of the Constitution accepted the principle that court proceedings shall have at least two stages, although the implementation of this policy was postponed until five years after the Constitution (Article 236, para. 2 of the Constitution).

These legal regulations prompted discussion regarding the model of the proceedings before the administrative courts. Model for three stages of proceedings were proposed, indicating the possibility of claim for an individual administrative act and then the right to appeal against the second instance with cassation to the Supreme Administrative Court. In this case, the administrative court of first instance would seem substantive and issue administrative decision on the merits. This solution was met with criticism due to the infringement of the three power-sharing set out in Article 10 of the Constitution. In this case, the court would replace the executive administration. In addition, the three stages of administrative judiciary could significantly prolong the process of judicial review of administrative decisions, which would not serve the principle of hearing of cases without undue delay.

The concept of two instances for administrative justice. County administrative courts were established for one or more provinces. Currently, each province in Poland has a county administrative court. The reform of the administrative judiciary from 1st January 2004 brought justice in administrative matters much closer to the citizens.

The provisions that govern the structure and process of the administrative-judicial proceedings were concluded essentially in three acts: the Act of 30th August 2002 law on proceedings before administrative courts (Dz. U. z 2002 r., nr 153, poz. 1270 ze zm., further as l.p.b.a.c.), the Act of 25th July 2002 law on the system of administrative courts, (Dz. U. z 2002 r. nr 153, poz. 1269 ze zm. further as l.s.a.c.), and Act of 30 August 2002 introductory provisions to law on the system of administrative courts and law on proceedings before administrative courts (Dz. U. z 2002 r. nr 153 poz. 1271 ze zm.).

[3] R. Hauser, Kształtowanie się pozycji i ustroju Naczelnego Sądu Administracyjnego, *Zeszyty Naukowe Sądownictwa Administracyjnego*, nr 5-6 (32)/ 2010, s. 157-161.

According to Article 15 § 1 l.p.b.a.c the SAC shall hear means of appeal against the decisions of voivodship administrative courts, pursuant to the provisions of statute (cassations and grievances), with applications from a composition of the SAC, the President of the SAC, the Ombudsman and the Attorney General, adopt resolutions containing solution of legal issues raising considerable doubts in respect of a particular administrative matters, as well as legal issues raising considerable doubts in respect of particular administrative court matters. In addition, the SAC resolve jurisdiction disputes between public administrations.

All other cases are appropriately heard in a county administrative court.

3. Taxpayer`s right to a court

The scope of judicial review of administrative matters, including tax matters, was set out in Article 184 of the Constitution: The SAC and other administrative courts must exercise, to the extent specified by statute, control over the performance of public administration. Such control shall extend to judgments on the of organs of local self-government and normative acts of territorial organs of government administration conformity to statute of resolution.

The object of protection, i.e. the right to lodge a complaint, is regulated by Article 3 § 2 l.p.b.a.c. Review of the activities of public administration by administrative courts shall include adjudicating on complaints against:

1) administrative decisions,
2) orders made in administrative proceedings, which are subject to interlocutory appeal or those concluding the proceeding, as well as orders resolving the case in its merit,
3) orders made in enforcement proceedings or proceedings to secure claims, which are subject to interlocutory appeal,
4) acts or actions, other than those specified in subparagraphs 1-3, made within the area of public administration concerning the rights or obligations ensuing from provisions of law.

The Act of 16th November 2006 amending the Law-Tax and some others (Dz. U. Nr 217, poz. 1590) clarified the right to judicial review of the written interpretation of tax law issued in individual cases (Art. 3 § 2 point 4a l.p.b.a.c.).

Besides the subject of judicial review may be legal enactments of local government bodies (e.g. municipal councils of the resolution concerning the rates of property tax and exemptions) and the acts of supervision over the activities of local government bodies (e.g. regional accounting chambers)

An important taxpayer`s right is being able to complain to the county administrative court for idleness or chronic conduct proceedings in cases referred to tax authority in the issuance of individual administrative act (Art. 3 § 2 point 8 l.p.b.a.c.).

However, not all acts taken by the tax authorities are subjects to administrative court cognition. In light of Art. 3 § 2 point 2 l.p.b.a.c. the decision of the Appellate Body issued under Article 230 § 1 of the Act of 29 August 1997 Tax Law (Dz. U. Nr 137, poz. 926 ze zm.) on the referral authority of first instance to make a complementary dimension is not subject to appeal to an administrative court (Judgment of the SAC on 6 July 2004, ref. act FSK 38/04, publ. in M.Podat. 2004/8/3).

Generally, the scope of the review of administrative courts in tax matters should be considered wide.

Taxpayers, as well as other parties of administrative procedure, are entitled to protection granted before the administrative courts. According to Article 31 l.p.b.a.c. party to proceedings is the applicant and the authority. So may it be natural persons, legal persons and entities having legal standing. Therefore, a party to the proceedings relating to tax matters in administrative courts will be taxable (Article 7 of the Tax Law), payer (Article 8 of the Tax Law) or collector (Article 9 of the Tax Law). In addition, a complaint to the administrative court can to legal successors, transformed entities referred to in Chapter 14 of the Tax Law, and third parties, which shared responsibility as indicated in Chapter 15 of the Tax Law. Additionally, a right of complaint applies to a request to the minister in charge of public finance to provide a written interpretation of tax law (Article 14b of Tax Law). Further, a complaint may be filed in the administrative court by a person against whom the execution of tax obligations indicated in Chapter 3 of the Tax Law has been secured and the debtor against whom enforcement of monetary claims for unpaid tax liabilities in sought.

The presented overview of matters that are subject to recognition by administrative courts on grounds of material and personal scope is very broad. In the broad sense, the rights of taxpayers to access the court is of great importance in shaping the behavior of the taxpayers and influences tax administration decisions.

Judicial review in the light of Article 1 l.s.a.c. takes place in terms of legality. This means, especially when considering discretionary decisions (e.g. cancellation of tax arrears), the administrative court cannot examine the advisability of the contested decision.

The standards that apply to examining the legality of a decision are set out in Article 145 § 1 l.p.b.a.c. This provision obliges the court, granting the complaint against a decision or order, shall:

1) set aside the decision or order in whole or in part, if it finds that there has been:
   a) a violation of substantive law, that have affected the outcome of the case,
   b) a violation of law which provides the basis to reopen administrative proceedings,
   c) other breach of procedural provisions, if it would have substantially affected the outcome of the case;

2) find that the decision or order is invalid in whole or in part, if there exist grounds specified in Article 156 of the Code of Administrative Procedure or in other provisions;
3) find the decision or order to be issued in violation of law, if there exist grounds specified in the Code of Administrative Procedure or in other provisions.

In cases involving the legality of tax compliance, process will be carried out based on the provision contained in the Tax Law (Article 145 § 2 l.p.b.a.c.).

The county administrative court is not bound by the allegations and conclusions of the complaint and the legal basis referred to (Article 134 § 1 l.p.b.a.c.). In addition, the court shall apply the measures provided for by the law in order to remove the infringement in relation to acts or actions issued or taken in all proceedings conducted within the case to which the complaint if it is necessary to its final conclusion Article 135 l.p.b.a.c.). Cited regulations allow the administrative court on its own motion to investigate any deficiency of tax administration, regardless of whether the party raised such deficiency in the complaint, and eliminate the office of other malfunctioning organ within the limits of the case. However, the courts cannot worsen the situation of the applicant, i.e. the court may not issue a decision in disfavor to the complainant, unless the court finds that there has been a violation of law resulting in the declaration of invalidity of the challenged act or action (Article 134 § 2 l.p.b.a.c.).

4. The political position of the administrative judiciary in Poland

Locating of the administrative judiciary outside of the structures of the judiciary and not providing specific authority over the administration of the courts to the Minister of Justice or the Minister of Finance (which is important in the cases of tax matters) is a better guarantee of the independence from the legislature and the executive.

It is important, however, the supervision of the administrative work of the administrative courts shall exercise the President of the Supreme Administrative Court (Article 12 l.s.a.c.), who shall head the Court, direct its work and represent it in its external relations (Article 34 l.s.a.c.) . The selection process for the President of the SAC is democratic in nature and guarantees the independence of the administrative judiciary. The President of the SAC shall appointed by the President of the Republic of Poland for a term of six years from among of two candidates presented by the General Assembly of Judges of the Supreme Administrative Court (Article 44 l.s.a.c.).

In addition, the method of financing the administrative judiciary and especially setting and administering the budget adds to the independence of administrative courts (Article 14 l.s.a.c.).

The guarantees of judicial independence are contained in the l.s.a.c statute. Firstly and foremost, judges of administrative courts, within the exercise of their office, shall be independent and subject only to the Constitution and statutes (Article 4

l.p.b.a.c.). Article 6 § 1 point 2 and Article 7 § 1 of the previously mentioned statute indicate that the judge should be of good character and have particularly high qualifications. Also, to perform their duties judges must be honorable people with high levels of compliance with moral principles.

A. Gomułowicz draws attention to the need to preserve the actual authority of the judge througt the various aspects of judicial independence, competence, impartiality, dignity and integrity of the administrative judge[4].

An important safeguard of the right to a fair trial is that the case be heard by an independent and impartial court. This principle is executed in accordance with the provisions of Chapter 5, Articles 18 to 24 l.p.b.a.c. They were the subject of the Constitutional Court ruling of 13th December 2005, ref. act SK 53/04 (publ. in OTK-A 2005/11/134), which states that Article 18 of the l.p.b.a.c. statute is compliant with Article 45 para. 1 of the Constitution and is not inconsistent with Articles 2, Article 10 para. 1 and Article 178 para. 1 of the Constitution. In contrast, to the extent that the premise is limited only to the judge`s exclusion of a personal relationship, apart from other circumstances that may affect the impartiality of the judge`s assessment, Article 19 l.p.b.a.c. is not compatible with Article 45 para. 1 of the Constitution. Article 19 l.p.b.a.c. is also not compatible with Article 2, Article 10 para. 1 and Article 178 para. 1 of the Constitution.

As a result of the above mentioned ruling, an Act of 22th September 2006 (Dz. U. Nr 208, poz. 1536) amended the wording of Article 19 l.p.b.a.c., the present text of which provides that regardless of the reason specified in Article 18, a judge is excluded by the court at his request or at the request of the party if there is such circumstance that could cause reasonable doubt as to his impartiality in the case. Thus, expanded grounds for disqualification of a judge include not only the judge`s personal relationship with one of the parties or the council but also to such other circumstances that, could raise doubts about the impartiality of the judge. This means that, if the administrative judge is such a high official of the Ministry of Finance, who previously held an official position on the interpretation of the tax law at issue, the administrative judge should be excused from hearing the case.

5. Taxpayer`s right to have his case heard within a reasonable time

Another right contained in Article 45 of the Constitution is the parties right to hear the case within a reasonable time.

[4] A. Gomułowicz, Aspekt prawotwórczy sądownictwa administracyjnego, Wolter Kluwer, Warszawa 2008, s. 65-75.

The reform of administrative courts was aimed at bringing justice to the taxpayer. In early 2004, 14 county administrative courts were established, and, in mid-2005, two more administrative courts were established in Kielce and Gorzów Wielkopolski for Lubelskie County. Effective 1st January 2007, the Department Branch in Radom County Administrative Court in Warsaw was created[5].

The number of judges in the county administrative court, court assessorsand assistance was significantly increased. These organizational changes have significantly reduced the backlog in administrative judiciary. In small county administrative courts, judges are up to date in hearing cases. Some of the backlog of judicial review should be noted when considering appeals of complaints because of the far greater flow of this kind of remedy to the SAC and the lack of simplified procedures (occurring before the Supreme Court), which could significantly speed up the proceedings in tax matters.

The general rule set out in Article 7 l.p.b.a.c. is to pursue a rapid settlement of the matter. This provision states that the Administrative Court shall take steps towards a rapid settlement of the matter and seek to resolve it at the first session. The rule requires the concentration of the material process to settle the matter at its first session. Adjournment of hearings may be made only with good reason, even if the parties request it (Article 99 l.p.b.a.c.)[6]

A administrative court cases are heard in order of their arrival. Where appropriate at the request of the President of the County Court and the President of a Chamber of the Supreme Administrative may order examination of the case or certain issues out of sequence.

Many lost cases by Poland in front of European Courts of Human Rights forced the authorities to enact the Act of 17th June 2004 to provide the complaint of infringement of the parties right to hear the case in court without undue delay (Dz. U. nr 179, poz. 1843). Regulations promulgated under this statute allow the party to complain about the length of the proceedings and to obtain compensation from the Treasury and a ruling ordering to take appropriate action by the court hearing the case on the merits. The statute defines "excessive length of the proceedings" as a situation in which the proceedings on the case take longer than necessary to clarify the facts and law relevant to the resolution of the matter (Article 2 of the statute)[7].

It is appropriate for the SAC of three judges to hear complaints about the excessive length of the proceedings.

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[5] Rozporządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 16 grudnia 2005 r. w sprawie utworzenia Wydziału Zamiejscowego w Radomiu Wojewódzkiego Sądu Administracyjnego w Warszawie (Dz. U. Nr 256, poz. 2144).

[6] B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, Prawo o postępowaniu przed sądami Administracyjnymi. Komentarz, Oficyna Wydawnicza Zakamycze, Kraków 2005, s. 240.

[7] Szerzej na temat przewlekłości postępowania A. Mudrecki, Prawo podatnika do rozpoznania sprawy bez uzasadnionej zwłoki przed sądami administracyjnymi (referat opubl. w materiałach po Konferencyjnych Konferencji z Kazimierza Dolnego, maj 2008 r.).

Initiation of the above mentioned statute worked preventively and, from year to year, has decreased drastically the number of complaints about the length of proceedings, and matters pending before the county administrative courts art dealt with on a regular basis.

Analysis of the data leads to the conclusion that disputes between taxpayers and the tax authorities are dealt with relatively quickly. Resolving appeals recorded in the SAC has lagged behind, because they involve a significant flow of such remedies.

6. Summary and conclusions

Adopting the two instance of administrative judiciary model provides the taxpayer with the right to a fair trial set out in Article 45 of the Constitution.

The scope of control of administrative courts in tax matters should be considered broadly and does not require changes.

Regulations regarding the location of administrative courts and the institution of a process for the exclusion of a judge guarantee that cases will be heard by an impartial and independent court.

The reform of administrative courts brought taxpayers closer the justice and significantly accelerated the deadlines for the settlement of cases before the county administrative courts.

The Influence of the Spa and Recreation Charge on the Autonomy of Municipalitites in Czech Republic

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Abstract: This article describes the influence of local taxes on the autonomy (self-government) of municipalities in Czech republic. The author explains the autonomy of municipalities by way of the specific example. As the example, the author chose the spa and recration charge and their present effective regulation.The purpose of this article is to critically consider, if the muinicipalities have sufficient authority when administrating these taxes. The author also suggests what should be changed to become contributive to extend the powers of municipalities.

Keywords: spa and recrestion charge, tax, charge, local tax, municipality, rate, base.

1. Introduction

The spa and recreation charge is one of the nine local taxes, which are in Czech republic collected pursuant to the Act no. 565/1990 Coll., local taxes act, as amended by latter acts (hereinafter reffered to as LTA). Together with the real estate tax these nine taxes can be termed local taxes. The word „tax" is used in the meaning of „payment". Czech legal theory has always distinguish between terms „charge" and „tax". The tax is the regular payment and the taxpayer does not receive any valuable consideration. The point is that this payment is not equivalent. On the contrary the charge is supposed to be the irregular equivalent payment. In the course of time the differences between taxes and charges are being removed. The term tax in this article is used in the meaning of legislative compression, which was contained in the former Act. No. 337/1992 Coll., The Tax and Charges Administration Act, as amended by latter acts. The legislative compression „tax" included taxes, charges, levies, advances on these kinds od payments and levies paid for the breach of budgetary discipline[1].

The spa and recreational charge mostly plays the fiscal role. The municipality, which is spa and tourist center needs more resources to be able to maintain itself and provide services than the other municipialities. The spa and recreation charge is the service contribution of visitors, who spent some time in that place.

All local taxes (charges) are payments and profits of them are local budgets incomes. This incomes contribute to the autonomy of municipialities. The municipiality

[1] § 1 article 1 Act no. 337/1992, the tax and charges administration act, as amended by latter acts.

should have the power to tailor these taxes according to their demands. On the author´s opinion, this kind of power (authority) is one of the ways how to express the real autonomy of municipality.

This article desribes the legal regulation of spa and recreation in Czech republic and points out its dark and brigh sides. The author evaluates how the regulation contributes to the autonomy of municipalities and also suggests appropriate changes , which would strenghten the autonomy. The chosen charge is the example of the tax autonomy in Czech republic. The possibilities of minucipalities to influence other local taxes are actually similar.

Each charge has eight constructive elements. The tax is made of these elements and these elements distinguish the tax from the others. It is the legal regulation which leaves or doesn´t leave enought for the application of the autonomy. The article analyses the legal regulation of the spa and recreation charge on the basis of the eight structurak elements.

2. The spa and recreationa charge de lege lata

2.1. The charge subject

The financial theory speaks about two different kinds of tax subjects. One is the payer, the other one is the remitter. The payer is someone whose property, incomes or activity are subject to tax. The remiter is someone who calculates the payment, collects it and pays it to the tax administrator. The remiter is responsible[2] for the tax calculating and paying. There are some kinds of taxes where the payer and remiter are the same person.

While exploring the subjects of spa and recreational charge we can find the legal definition of payer and remitter. According to the § 3 art. 1 LTA the payer is every natural person[3] regardless of his or her citizenship ar permanent resindece. The spa and recreation charge is obligatory for Czech citizens and foreigners as well. It is not even important if the person has legal capacity. The payer could be a person without legal capacity or with restricted legal capacity. There are legal exaptions which depends on the age of payers. The point is that the payer can´t be a child. This topic is desribed in details in part 1.5.

To become a payer, the natural person must stay in the municipality (town, city) in the way and for the reason which are described in law. The way and the purpose of the stay are connected with the object, which is described in part 2.2.

Accoding to the § 3 art. 3 LTA the remitter is the accommodation provider. The LTA says that the accommodation provider is the natural or legal person which

[2] RADVAN, M. a kol. *Finanční law and financial administration.Tax law.* Brno : Doplněk a Masarykova univerzita, 2008. page.33-34.
[3] §3 art. 1 Act no. 565/1990 Coll., local taxes act, as amended by latter acts.

provides accommodation against payment[4]. The legal definition of accommodation provider is not more specific, so we can deduce that it is any person which got paid for providing accommodation. The accommodation provision doesn´t need to be the line of business, the accommodation provider doesn´t even need to be the self-employed person. It means that the spa and recreation charge covers all kinds of accommodation. If you meet a stranger on the steet of the city you are visiting and this stranger offers you accommodation against payment, the stranger is also supposed to collect the tax and pay it to the authorities.

The amendment of LTA from the year 2009 toughened the duties of the accommodation provider. The former sentence: „the spa and recreation is collected by the accommodation provider" was replaced with the formulation „the spa and recreation is collected and paid by the accommodation provider". The new formulation poits out provider´s payment duty. The amendment took out of the § 3 art. 3 the information about the payer´s liability[5]. The payers liability expired. The information about the payer´s liability was part of implementing regulation[6], which had been effective till the year 2010. The liability provision, which is inculed in § 171 of the the tax order[7], doesn´t determine any relation between the payer and the remitter.

The termination of the liability relation brought two difficulties. First, the exaction of the spa and recreation charge became more complicated. Second, lot of municipalities do not notice that the regulation doesn´t exist any more and they will demand taxes from remitters as they stand surety for payers. Ignoratia legis non excusat, but the termination of liability can cause pointless arguments. According to the author´s opinion, there was no sufficient information about that issue.

The remitter is very importatnt, because the payers stay in the municipality for very short time. It is neccesary to use remitters as the intermediary[8]. The accommodation provider is in everyday touch with the payers during their short stay.

That was the reason why the LTA set down one non-property obligation – the obligation to keep the record of accommodated people. The LTA lays also down the requirements of that record, like registration book, first name, surname, place of residence, the lenght and purpose of stay and the ID number[9].

The record keeping enables the municipality better control of collection of charge and recreation charge. The record keeping obligation has not been in the legal regulation before and that situation means lot of diffculties. Although the record keeping obligation was set down by public notice, the remitters didn´t respect it. So the

[4] §3 art. 3 Act no. 565/1990 Coll., local taxes act, as amended by latter acts.
[5] BŘEŇ, J. Local taxes administration changes. [online]. Last update 30. 6. 2010 [quote 14. August 2011]. Available from: http://moderniobec.ihned.cz/c1-44587710-zmeny-ve-sprave-mistnich-poplatku.
[6] Act no. 337/1992, the tax and charges administration act, as amended by latter acts.
[7] Act no. 280/2009, the tax order, as amended by latter acts.
[8] PELC, V. *Local charges.* 3. vyd. Praha : LINDE PRAHA, a.s., 2008. page 77.
[9] §3 art. 4 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.

municipalities called for legal regulation. The confirmation of record keeping obligation in law made the situation better, becuase the remitter do not mostly break the law[10].

The registration book must be clearly, intelligibly and chronologically arranged. The records must be kept for 6 years[11]. The record keeping must meet the requirement of the Personal Data Protection Act[12].

2.2. The charge object

The charge object is always some certain reality which the law connects with the charge. The law must desribe the certain reality unambigously to be clear to the tax payers what exactly should they pay. The reality is usually evident from the tax designation[13]. It is also evident in our case – spa and recreation charge.

The object of the spa and recreation is the spa or recreational stay[14]. The law includes details, but the „stay" is not legally defined. Let´s assume that the „stay" means any kind of staying in the spa resort or tourist center. It doesn´t matter if the person stays in a hotel, in a cottage, in a tent or sleeps in the open air in the accommodation provider´s garden. But the stay must always be temporary and paid. The payment is very important sign. If the stay is free of charge, it is not the object of the tax (charge) .

The purpose (the treatment or recreation) of the stay is also very important. If the natural person stays in the municipality for a different reason, this person does not pay the spa and recreation charge. Since July the 7th 1994 the act has been supplemented with the staying person´s obligation to prove the purpose of his or her stay. The staying person must always pay the spa and recreation charge if the other purpose of the stay (than treatment or recreation) is not proved. The tax payer carries the burden of proof. This is the way how to eliminate problems with non-payers. If the municipality carries the burden of proof, it will cause many complications and expenses. The collection of the tax charge wouldn´t be worth it. The purposes of the stay, which are free of charge, are e.g. business trip, festival or scientific congress[15].

To be the object of charge the stay must be realized in the municipality which is the spa resort of the tourist center[16]. The status of the spa resort is given by the government according to The Spa Act[17]. The status of tourist center is given by the municipality itself. If the municipality decides to be the tourist center, it can introduce

[10] PELC, V. *Local charges.* 3. vyd. Praha : LINDE PRAHA, a.s., 2008. page 77.
[11] §3 art. 4 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[12] Act no. 101/2000 Coll., Personal Data Protection Act, as amended by latter acts.
[13] RADVAN, M. a kol. *Financial law and financial administration.Tax law.*Brno : Doplněk a Masarykova univerzita, 2008, page 34.
[14] §3 art. 1 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[15] PELC, V. *Local charges.* 3. vyd. Praha : LINDE PRAHA, a.s., 2008. page 75.
[16] §3 art. 1 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[17] Act no. 164/2001 Sb., The Spa Act, as amended by latter acts.

the spa and recreation charge. It is importatnt to say that it is always the right, not the obligation.

2.3. The charge base

The designation of the charge base is the designation of the object of the charge. Firstly, the tax object must be specified to determine the tax base. After that, the tax (charge) is assessed. The tax base is conditional on the kind of the tax and its units of measurement could be different. Speaking in general terms, the units of measurement could be the weight, the amount or the monetaryunit[18].

The base of the spa and recreation charge is the day of stay. The unit of measurement is the number of days spent in the spa resort of tourist center for the recreational reason. Every commenced day counts[19]. We have to subtract the arrival day from the number of days spent in the spa resort or tourist center and we get the number which we multiply by the charge rate. The result is the charge amount of one natural person.

2.4. The tax/charge rate

In general, the charge rate is the assessment of the charge amount in relation to the charge base. The procentual rate determines the tax by the procentage of the tax base value. The fixed rate is constant, which does not take the tax base into consideration[20]. The spa and recreation charge rate is the fixed rate.

According to the § 3 art. 5 LTA the spa and recreation charge rate amounts to maximum 15 CZK per person per day. The arrival day is not taken in to account. The law allows the municipality to determine the tax rate as a week´s, month´s or year´s flat rate[21]. But the law doesn´t say how to proceed by counting the tax if the stay is shorter than the flat rate. The flat rate converted into the day rate mustn´t exceed 15 CZK.

The 15 CZK amount it the legal maximum. It means that the municipality can set up the rate equal or lower to this maximum. No minimum limit is given. Theoretically speaking, it is possible to set up the rate of 1 CZK per day. But it depends of the fact if the collection of this amount of money is wort it. There is no municipality which collects charges with expenses higher that incomes. The minimum rate is in relation to the administration expenses. The charge amount is set up by municipality regulation.

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[18] RADVAN, M. a kol. *Financial law and financial administration.Tax law*. Brno : Doplněk a Masarykova univerzita, 2008. page 34.
[19] 3 art. 5 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[20] RADVAN, M. a kol. *Financial law and financial administration.Tax law*. Brno : Doplněk a Masarykova univerzita, 2008. page 35.
[21] 3 art. 5 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.

In practice the rates are 5, 10 or 15 CZK. Most of the municipalities set up the rate as a maximum 15 CZK, some of them distinguish between the summer and winter season. The lowest rate found in Czech conditions is 4 CZK in Radostin village[22].

The possibility of determination the tax rate as a lump sum was conditioned. The condition was the agreement of the tax payer. In 1994 this provision was modified into a present form[23]. Today´s regulation says that the municipality can set up the flat rate without payers agreement. If the municipality wants to set up the flat rate, it makes it through the regulation according to the LTA[24]. It is celarly arranged if the flat rate is regulated in the same regulation as the spa and recreation charge.

The author´s research shows that the municipalities do not use this possibility very much. There was no regulation using the flat rate in 15 regulations, which were researched.

2.5. The corrective elements

The correction elements provide the way how to influence the tax. In general, it is going on sales, concessions and exceptions. Correction is not only the reduction of the tax, but also the tax rise. Two kinds of corretions are distinguished. The first are legal correction, the others are corrections by the individual act. The individual acts can be issued by administrative authority only[25].

LTA includes two corrective elements.The first correction is the exemption of taxation for handicapped persons and their accompaniment. It is going on people who are helpless, blind or seriously disabled. People, who are zdravotně postižení, must be awarded the III. level of special privileges according to the § 86 Act. No 100/1988 Coll., Social Security Act, as amended by latter acts[26]. Theseriously disabled person with the III.level of special privileges must own the certification. The certification of the III. level of special privileges is mared with abbrevation ZTP/P.

The helpless person was defined in the regulation to the Pension Insurance Act. By January the 1st 2007 the institute of the helpless person was abolished and replaced by the institute of the person who is dependent on the other person´s care. The law distinguish 4 levels of dependence – light, medium, serious and total[27].The LTA does not take into consideration that the institute of helpless person was abolished, so the exemption of taxation for helpless persons is ungrounded.

The second corrective element is the exemption of people of some age or property issues or the people connected with the military service. People, who are exempt from charge, are people under 18 and over 70 years, people who receive child

[22]The regulation (public notice) no. 3/2010, Radostín village, about thespa and recreation charge.
[23] PELC, V. *Local charges.* 3. vyd. Praha : LINDE PRAHA, a.s., 2008. page 78.
[24] 14 art. 1 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[25] RADVAN, M. a kol. *Financial law and financial administration.Tax law.*. Brno : Doplněk a Masarykova univerzita, 2008. page 35-36.
[26] §3 art. 2 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[27] § 8 Act. No 108/2006 Coll., Social Security Act, ad amended by latter acts.

allowance according to the law, soldiers doing compulsory military service or civilian service[28]. The cumpolsary military service and the civilian service have been abolished since 2004, so the regulation of this kind of exemption is ungrouded too.

The enumeration of the corrective elements is not exhaustive, the municipalities can set up other kinds of exemptions and adapt the charge to their own conditions. During the author´s research came out the fact, that the municipalities do not use their right to set up other kinds of exeptions. On the contrary, they narrow the enumeration. The regulations, that narrow the enumeration, are against the LTA, so they are not valid, but neither the taxpayers, nor the accommodation providers know that. The non-valid regulations are included in acts issued by the town Poděbrady[29] and Radostín village[30]. The town Poděbrady exempts from the tax also people on the business trip, congress or on-the-job- training. These exemptions are irrelevant in the view of LTA. Due to these exemptions other non-recreational stays seem to be chargeable. And it is possible, taht they really are chargeable.

The Radostín village doesn´t include people, who receive child allowance according to the law, soldiers doing compulsory military service or civilian service into the charge exemptions. In the laymen´s point of view the exemption enumerations could look like finite. The whole structure of Radotín´s regulation comes over as the town really charges the stays of people who receive child allowance. That is, of course, against the LTA. If the stays of people mentioned above are not chargeable than the way how Radostín regulates this area is at least inauspicious.

2.6. Terms of payment

The terms of payment include the principles of paying and the time limits, which need to be kept. The term of payment is e.g. the fact that the tax is one-time payment or instalment. It is also necessary to mention the technical specifications, such as the account number, variable symbol, or other ways how to indentify the payer and the purpose of his or her payment[31].

The LTA does not state the terms of payment for the spa and recreation charge. It is just said that all the details should be set down by the municipality regulations. It is always up to the municipality, which terms of payment states. The LTA includes only demonstrative enumeration of terms, which need to be part of the regulations[32].

The municipality regulations provides for the formation and the termination of the payment duty, time limits for the reporting duty, the charge maturity and the time

[28] §3 art. 2 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[29] Poděbrady, city in our hearts. Spa and recreation charge [online]. Last update 18. 1. 2011 [quote 14. August 2011]. Available from: http://www.mesto-podebrady.cz/vismo/dokumenty2.asp?id_org=12349&id=1778&p1=1769.
[30] The regulation (public notice) no. 3/2010, Radostín village, about thespa and recreation charge.
[31] RADVAN, M. a kol. *Financial law and financial administration.Tax law.* Brno : Doplněk a Masarykova univerzita, 2008. page 36.
[32] §14 art. 2 Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.

limit for the change announcement. The LTA includes also the enumeration of data, which must be in the announcement[33]. The best way how to obey all these rules is to create a form. |Each remitter can just fill in the form. The form can prevent mistakes made in announcements. The form exists e.g. in Olomouc city[34].

In relation to the terms of payment the LTA states the penalties for breaking the time limits or for paying less. In that cases the municipal authority assess the charge by payment assessement. The next steps are made according to the Tax Order, which says that the charge is mature in 15 days since the assessement is legallly effective[35]. According to the LTA one of the punishments for the bad payers it to multiply the charge by three. The charge rise is considered as accessories of the charge. Other punishments included in the Tax Order are not used. The municipal authority mustn´t assess the interests on overdue payment or fines, except disorder fine[36].

If the payment obligation is not fulfiled, the limitation period starts running. The limitation period can last 6 or 20 years. The municipal authority can collect the arrears 6 years from the maturity of the charge. If someone perform act which interrupts the 6 years limitation period, this limitation period starts to run again from the day in which the act was performed. This is the way how to extend the limitation period, but the extension is not neverending. The limitation period ends in 20 years from the maturity of charge. The objective limitation period of the arrear secured against the lien ends in 30 years from the maturity of the charge[37].The expiration of the limitation period means the termination of the right and payment claim.

2.7. The charge administrator

According to the tax theory the tax administrator is the body of public administration. Not any kind of the authority, but the only one, which is as the tax administrator designated by the law. This authority should take measures to correct tax assessement. The authority should provide the possibility to fulfil the payment obligation. According to the Czech law, the tax administrators are local financial authorities, customs offices and courts[38].

The tax administrator is defined in the Tax Order[39] as a administrative authority or different state authority. This authority is the tax administrator within the bounds of its legal authority[40]. The Tax Order states the obligations of the tax administrator , such

[33] §14a Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[34]The regulation (public notice) no. 9/2010, Olomouc city, about the spa and recreation charge.
[35] §139 art. 3 Act no. 280/2009 Sb., The Tax Order, as amended by latter acts.
[36] §14a Act no. 565/1990 Coll., Local Taxes Act, as amended by latter acts.
[37] §160 art. 3 Act no. 280/2009 Sb., The Tax Order, as amended by latter acts.
[38] RADVAN, M. a kol. *Financial law and financial administration.Tax law.* Brno : Doplněk a Masarykova univerzita, 2008. page 36.
[39] Act no. 280/2009 Sb., The Tax Order, as amended by latter acts.
[40] RADVAN, M. a kol. *Financial law and financial administration.Tax law.* Brno : Doplněk a Masarykova univerzita, 2008. page 36.

as tax and other proceedings, searching, control of the subordinate bodies, appeals to the remitter for fulfilment of their duties and the tax collection itself[41].

The tax administrator for the spa and recration charge is the municipal authority. The charge assessement belongs to the self-government. The municipal authority sets up the spa and recreation charge by the regulation. But the charge proceeding is regulated in the §15 The Tax Order within the bounds of delegated authority. Within the delegated authority the charges are collected and the non-payers are punished.

If there´s no regulation inthe LTA, the Tax Order is used[42]. The LTA is the special regulation.

2.8. The budgetary determination of the charge yield

The budgetary determination says in which public fond the charge yield goes. It could be the state budget, the municipial budget ot the state fond. The yield can go to more than one budgets. Tax yields are devided and go into several different fonds[43]. The proportion of these amounts cannot be determined at will, they are set in The Budgetary Determination of Taxes Act[44].

The yield of the spa and recreation charge goes to the budget of the municipality which has collect it. The amount of money, which is collected, increase the municipal budget just a little. As mentioned above, the charge yield is just the service contribution of visitors. The purpose of the spa and recreation charge is not to cover all expenses connected with the tourism. In relation to the municipal budget the yield is notvery big. The less municipality is, the more important the spa and recreation charge is.

With regard to the purpose of the spa and recreation charge this charge complies with the definition of charge according to the financial theory. The spa and recreation charge can be marked as the typical charge. The collection of this charge is basically irregular.The charge yield contributes to the municipality budget to improve the visitors services. It is the typical example of the equivalent payment.

3. The spa and recreation charge de lege ferenda

The next articels emphasize problematical parts of the LTA and try to suggest possible changes. These chages are considered to extanse the powers of municipalities.

At the very beginning the author wants to mention that the following chages are just suggetions and their effective practical application needs more time. A lot of

[41] § 11 Act no. 280/2009 Sb., The Tax Order, as amended by latter acts.
[42] Act no. 280/2009 Sb., The Tax Order, as amended by latter acts.
[43] RADVAN, M. a kol. *Financial law and financial administration.Tax law*. Brno : Doplněk a Masarykova univerzita, 2008. page 36.
[44]Act no. 243/2000 Sb., The Budgetary Determination of the Charge Yield, as amended by latterr acts.

municipalities actually do not use of the opportuinities the law gives them. This is the matter of small municipalities. The governements in this kind of municipalities are the same for 20 years. That is one of the reasons why are the small municipalities so conservative are not able to use of theit opportunities so flexibly.

The author wants to emphasize,that the extent of the authonomy is not just up to the legislative bodies, but also up to the municipalities themselves. It is just their issue, if they are able to know the law and gain the benefits the law offers. This is the only way how to extend their powers. The legal possibility of power extension will be more reasonable. If municipalities are not interested, there is no reason for the legislature to give them these possibilities.

3.1. The tax/charge subject

There are two small discrepancies connected with the charge subject. The first are the necessary data the accommodation provider has to write down into the registration book. When there was payer´s liabillity, there was no reason why to write down the ID number into the registration book. The data, which were written down, served only as the control. But the control could be also effective, if the the accommodatio provider kept a record about the visiotr´s date of birth. The payer´s liability is now abolished, so the keeping of the ID numbers is of great importance because of better identification of payer´s in the case of charge enforcement.

The invalidation of the payer´s liability in § 3art. 3 LTA will cause problems with the charge inforcement. The invalidation of payer´s liability deprive municipalities of the possibility to enforce the charges from the local population which is under the control of the local governement. Now the municipalities have to exact charges from people all over the Czech republic. The proces of enforcement is too complicated and expensive, so the local governemets give the enforcement up.

3.2. The charge object

As for the charge object the author of this article was surprised, that the regulations (public notices) do not mostly include regulation of the payer´s obligation to prove the purpose of his or her stay. Payers and remitters of the spa and recreational charge are mostly laymen, who do not know the legal regulation. That is the reason, why that kind of payer´s obligation should be accented. Examples of purposes are also fitting.

The law says, that as a charable stay is considered stay in spa resort or tourist center. But the law does not say, how can the municipality pronounce itself the spa resort or tourist center. The fact it, that the status of the spa resort can be declared by government only. The declaration has a form of decree according to The Spa Act[45].

[45] Act no. 164/2001 Sb., The Spa Act, as amended by latter acts.

The tourist center status is given by the municipality itself. Municipality has no obligation to pronounce the status publicly, it can only start to collect the recreational charge. According to the author´s opinion it would be suitable if the law set up the way how can municipalities declare themselves the tourist center. The frequency of collection the recreational charge is not high. The author thinks, that the reason for low frequency is the ignorance law. The municipalities do not know if they can pronounce themselves tourist center. Some „instructions manual“ would be fitting.

3.3. The charge base

The appraisal of the charge base regulation begs the question, if the charge payer should consider the number of children and animals, which stay in the spa resort of the tourist center with the payer.

The charge is the visitor´s contribution for maintenance and services, which need to be provided because of the tourists. But not every tourist is the tourist. Municipality expenses for the family with four kids and two dogs are higher than expenses for old married couple. According to the author´s opinion the charge base should allow for that criterion by setting some coefficient, which multiply the charge base. The coefficient should be possible not obligatory influence on the charge amount. It would be up to each municipiality if it use this possibility to rise the charge amount.

The administration demans of the possibility mentioned above are not big. There would be two more entries in registration books.

3.4. The charge rate

There is only one change sugeested for the charge rate, but this change is fundamental. The legal restrrction of 15 CZK per day is useless. In today´s world it that amount of money almost ridiculous. The collection of 15 crown charge is not lucrative. Statistics indicate that collection of spa and recreational charge is not frequent[46]. The charge rate has not changed a lot since its establishement in 1992. The author´s suggestion is to rise tha charge rate for maximum 50CZK. The rate rising and changes of charge base could multiply higher municipality incomes that the present regulation.

3.5. The corrective elements

The legal regulation of corrective elements is little bit strange. The charge exemption for people who do compulsory military service or civilian service is now, in the time of professional army, totally irrelevant. As mentioned above, the compulsory military service and civilian service were abolished in 2004. Another nonsencial regulation is the exemption of helpless persons. The definition of helpless person has no

[46] Daily public administration. Local charges – possibility and reality [online]. Last update 26. 6. 2008 [quote 14. August 2011]. Available from: http://www.dvs.cz/clanek.asp?id=6325369.

longer exist. These correction elements are the prove of imperfect amendment of the law.

3.6. The terms of payment

On author´s mind is just few changes of terms of payment. The charge regulation does not set up the way how to fulfill the payment obligation. Municipalities do not have information about the way of payer´s identification or account numbers for payments. This information are available on the websites or in municipality offices. But this information should definitely be in regulations too. The regulation should provide all necessary information, so the payer does not have to look for it. Some municipalities solved this problem by providing the necessary information on the form. The author suggets to introduce that forms.

Another obligation the law should include is the obligation to present registration book to inspection. The presentation should be at regular intervals. The control should prevent the charge evasion. The author doubts there is any kind of inspection. The registration book do not suite the purpose.

Since the last amendment in 2011 the LTA does not include the possibility to release somebody from the charge and its accessories. The author does not know why the legislator abolished that regulation, but it was the step back. The municipalities are not subordinated to the Finance Ministry, so the § 260[47] The Tax Order can not be used. The § 260 The Tax Order says, that the Minister can forgive the tax or its accessories, but only if the tax is administrated by subordinated authorities[48]. For better extension of municipality powers is necesary to intorduce the regulation back.

4. Final summary

This article analysed all institute of spa and recreational charge and put emphasis on the extension of municipality authority. There are many loopholes in the law. The authonomy needs to be strenghten. But that is not just a question of law, but also of the behaviour of municipalities itself. They must be interested in their options and start to use them. Then will be more pressure to extense the powers. It is a long-distance sprint.

If the legal regulation respect basic principles connected with the charge, it will be closer to the authonomy. The basic principles are the optionality and relation to specific place. It means the relation to the surroundings, demography or real costs. State should provide municipalities the option to consider all principles in charge regulation.

[47] Act no. 280/2009 Sb., The Tax Order, as amended by latter acts.
[48] BŘEŇ, J. Local taxes administration changes. [online]. Last update 30. 6. 2010 [quote 14. August 2011]. Available from: http://moderniobec.ihned.cz/c1-44587710-zmeny-ve-sprave-mistnich-poplatku.

There is one more thing that can extend the authonomy of municipalities. It is the ability to clearly rationalize the necessity of tax and charge collection. If the purpose of collection is clear, it can not cause an outcry when the charge is higher. The municipality will no longer be afraid of increasing of charges, so they can really fulfill their role.

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Tax Revenues as a Tool for Municipal Autonomy

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Abstract: In my entry titled "Tax revenues as a tool for municipal autonomy," I focus mainly on the definition of community and its position in the system of local government in the Czech Republic. The community in the legal environment of the Czech Republic is the basic territorial unit of local citizens who live in this area. These citizens also have the right to self-government, but also entrusts them to the state administration in the delegated powers. The term community is defined by the Act No. 128/2000 Coll. Municipalities (Local Government), as amended. In my work I also defined the community budget process, including specification of their income and expenditure. I focused mainly on the income of the community, which in sufficient quantities allow the community to gain some autonomy and decision-making and at the same time strengthen its independence. I devoted an independent part of this work to income of municipalities. Tax income of municipalities represent a part of community budget, of which the amount cannot be influenced by the community, because it's determined across the board for the whole country. It is so on the basis of tax assignment. I believe that the autonomy of municipalities in the Czech Republic, is out of competences that the state lends them, affected also by the financial independence, which just might affect tax revenues.

Keywords: municipality (communities), local self-governing unit, budget, municipalities, municipal authorities, budget process, revenues, expenditures, tax revenues, autonomy.

The concept of autonomy comes from the Greek word "autonomos"[1], which means managing their own laws. The concept of autonomy also means self-governmenting then, in a broader sense of independence, autonomy and independence. The autonomy of territory then is the specific part of the territory, whose administration is different, and yet has a greater degree of authority than other territories. The autonomy of territory from the viewpoint of an independent state is a form of broad autonomy and that of specific parts of the state. Therefore it always depends only on the arrangement of the given state and its legislation. An autonomous area is always part of a unitary state, so it cannot be part of a federal state. As an example of an autonomous territory of some states you can list Corsica as an autonomous territory of France, Greenland and the Faeroe Islands as an autonomous territory of Denmark, Tibet, Inner

[1] Drawn from www.wikipedie.org

Mongolia, Hong Kong and Macao as an autonomous territory of China or the Azores as an autonomous territory of Portugal. In the world there are many examples of autonomous territories. Czechoslovakia in its historical development had also its own autonomous territory. It was the Carpathian Rus in the period 1920 - 1939 and Slovakia in the years 1938 -1939 and 1945 - 1968. Autonomy in the broader sense also means any act having the character above standard in terms of discretion and autonomy of any part of the organization, which is related to the organization as a whole.

As for the an autonomous territories of the Czech Republic, most are currently discussing the autonomy of municipalities, which was also part of the reform of public administration. Gradual evolution has changed perspective on local autonomy, which resulted in the attitude to these establishments. Municipalities and counties acquired new powers to solve local problems and were thus free from interference of organizationally senior authorities and state bodies. In his work titled "Tax revenues as a tool for community autonomy", will focus both on the legislation, which regulates municipal autonomy, but also as the means by which the community gains its independence and strengthen.

Definition of the community[2]

Definition of the term community can be found in the legal right of CR. Specifically, this term is regulated by Act No. 128/2000 Coll. On Municipalities (Municipal Establishment) as subsequently amended. Already § 1 states that "The village is the basic territorial self-governing community of citizens, forming a territorial unit, which is defined by boundary of the municipality." "In terms of territorial division of the state belongs (along with districts, county and military domains) to the basic territorial unit. The community forms a territorial unit, which is defined by boundary of the municipality. Each part of the Czech Republic (with the exception of military areas), is part of a territory of of the community"[3]. A two-stage local government exists in the Czech Republic, where there is a breakdown in basic local government units, representing municipalities and higher territorial governments, which in Constitution[4] of the Czech Republic represent the county. The municipalities are always part of the relevant region. Specific detailed breakdown, including labeling and numbering counties have been detailed in the constitutional law on the establishment of higher self-governing units and amending Constitutional Act No. 1/1993 Coll.[5] when Act No.

[2] This chapter was prepared mainly on the basis of Act No. 128/2000 Coll. Municipalities (Local Government), as subsequently amended and Act No. 1 / 1993rd Coll. Constitution of the Czech Republic.
[3] Brodska, S., KUS, P. *Municipal establishment*. 1st publ. Prague Institute for Local Administration Prague, 2008. p. 7
[4] Law No. 1 / 1993rd Coll. Constitution of the Czech Republic.
[5] Act No. 347/1997 Coll. Constitutional law on the creation of higher territorial administrative units and changed the Constitutional Act of the Czech National Council No. 1 / 1993rd Coll. Constitution of the Czech Republic.

176/2001 Coll.[6] there has been little change in the organization and renaming some counties. The community is not only the basic territorial unit of the state. This is essentially a community of citizens who live in this area."These people have the right to self-government, and the laws also entrust them by the state administration. In the Czech Republic for public administration i.e. the elected coupled model where local governments in addition to performing its own independent powers (government) and the devolved powers (state report in cases stipulated by special laws).[7]While performance management is carried out in practice through their own municipal authorities, who represent elected bodies, municipalities are represented separately by the municipal other municipal authorities are the municipal council, mayor, municipal authority and separate authority of the community.

The community is a public corporation that owns property and manages its own budget according to the terms of the legislation. The community stands alone in the relations of legal nature in its own name as well as responsibility, which results from these legal relationships. In carrying out its activities, however, the municipality must pay attention to the needs of its citizens and development of its territory, while not to protect the public interest primarily.

Legal status of the municipality

The legal status of municipal is determined by the Constitution[8] of the Czech Republic, where in chapter seven it's regulated by local government There is also shown breakdown of the basic and higher self-governing units, as I have already mentioned above. The Constitution of the CR also states that local governments are territorial communities of citizens who have the right to self-government.While the possibility of state interference with regard to the activities either by municipal or other local government units, is permitted only in those cases where it requires protection of the law and only law by the procedure. Furthermore, as the name implies a territorial conception of autonomy, this autonomy is a capacity which privileges and the possibility of civic community (communities) to manage its own affairs independently. According to current legislation, the municipality forms a territorial unit, that is given by a border of the municipality and the municipality must have at least 3,000 inhabitants. Each village represents one or more cadastral territory. While part of the Republic is part of some municipality. Municipalities can also merge or join, and in case that municipalities are neighboring. Municipalities can also lead to new municipalities, either by separation of the existing municipality, or change or cancellation of the military area.

[6] Act No. 176/2001 Coll. Change the constitutional law on the establishment of higher self-governing units
[7] Brodska, S., KUS, P. *Municipal establishment*. 1st publ. Prague Institute for Local Administration Prague, 2008. p. 7
[8] Law No. 1 / 1993rd Coll. Constitution of the Czech Republic.

Municipal authorities

The authorities of the municipality I have mentioned above. This is a council of the municipality council, mayors, local authority and other bodies of the municipality; the municipality is administered by of the municipality council. This arrangement is almost identical to the cities that are managed separately by the city council and other bodies of the town including the town council, mayor, municipal authorities and special bodies of the city. Among the municipal authorities are the Metropolitan Police[9], which on the basis of generally binding decree establishes a municipal council or repeals them. In the case of cities, then it's the city police, whose role is identical to the municipal police.

Municipal council

Municipal council is composed of members of the municipal council. Number of council members is determined by each term and by the number of inhabitants and size of the regional circuit. Number of council members can be between 5 - 55 members. The mandate of a member is elected. Each member of the council carries out its mandate in person, in accordance with the promise that he says in front of the village council and subsequently confirms by his signature.In carrying out the mandate of the council, members are not bound by any mandatory instructions. For this function, members of the council receive commission and that is both, monthly and at the end of the year pay. Membership of the council is a public function. Competence of the municipal area falls within the scope of individual communities, as council decides.

At the same time, essentialtasks anddecision-making powers, whichcan greatlyinfluence thefurther development and evolutionof the municipality, are reserved for the municipal council. This is essentially about the permission to approve the community development program, approve the budget and the state closing account of the village, to decide on temporary and permanent cash fund community, to decide on the allowance of organizations and organizational units of the municipality, including founding documents;further powers to issue generally binding regulations, to decide on the proclamation of a local referendum, to propose changes in the cadastral territory within the municipality, including agreements to change the boundaries of the municipality and the merging of municipalities. Further the council establishes or abolishes local police, decides on the cooperation with other municipalities, and the particular form of this cooperation further it establishes and dissolves committees, elects its chairman and other members, and removes them from their position, etc. The specific enumeration of powers of the municipal law is given in 128/2000 Coll. on

[9] Act No. 553/1991 Coll. Municipal police, as amended

Municipalities, as amended, and in § 84 paragraph 2.In addition to these fundamental acts, decision on property operations fall within the competence of a council.

These include the acquisition and transfer of immovable assets including real estate issues under special laws, transfer of flats and commercial premises from the property of the municipality;providing donations worth more than 20 thousand CZK and the cash donations amounting to over 20 thousand CZK, providing subsidies, renunciation and remission of debts amounting to over 20 thousand CZK; stopping movable or immovable assets or issuing municipal bonds for example.

As you can see from the list of tasks listed here, privileges and powers, status and role of the municipal is highly important, because their decisions may well affect the development of the village not only for the current and the following term.

The municipal council

In contrast, the municipal council is a powerful body with independent responsibilities and in exercising its function it corresponds with the village council. Council members are the mayor, deputy mayor or vice mayors of the community and other elected members. The minimum number of Council members is 5, the maximum number is 11. However, there always must be an odd number, up to one third of the members of council. /Village council has reserved the activities listed in § 102 paragraph 2 of Act 128/2000 Coll. on communities. This is especially the security management of the municipality according to the approved budget and budgetary measures to the extent determined by the municipal.In addition, the municipal council decides on matters of the village as the sole shareholder of the company, issues regulations of municipalities, sets out the division of powers in the municipal officeestablishes and abolishes departments and units of the municipal authority, proposes the Secretary of municipal authority, appoints and dismisses the head of local authority departments, etc.The municipal council also establishes the organizational rules of the municipality, the total number of employees of the village, municipal office or the organizational units, in matters covered by a separate municipality has authority to impose fines, it may eventually entrust this responsibility to the relevant department of the municipal authority, either whole or in part. Complete list of powers is given in the above regulations.

Besides these tasks the municipal council prepares proposals for council meetings and also ensures the implementation of decisions taken. The local authority of municipal council is obliged to always act on the proposals of the board. The Council also has authority to issue orders and communities in the area of delegated powers.

The mayor

Mayor is an elected municipal body, which represents it externally. He is elected by the council from its members, which must be a person who is a citizen of the Republic. By doing his function as a mayor, he is amenable to the municipality council.The mayor while performing his functions also has the responsibility for the timely review of the order of management of the municipality for the previous calendar year; he has the duty to inform the public about the activities of the municipality, after a consultation with the Director of the Regional Office he may entrust the Commission delegated power in certain matters, in matters falling within the scope of independent community he decides on matters which have been entrusted to the village council.The mayor of the village also has such powers to ensure local public order and the cooperation of Police of the Czech Republic.

The mayor while performing his functions shall convene meetings of council and municipal council. In addition, he, together with the verifier, signs minutes from council meetings and municipal council meetings. Deputy Mayor represents the mayor. The mayor with the deputy mayor sign law regulations of the municipality. At special events and ceremonies the mayor has the right to wear a badge, which has the state symbol on it, as well as the title Czech Republic around. The whole list of functions is listed in the law of municipalities.

Town hall

The town hall, where the mayor is head, are representatives: mayor, deputy mayor, or deputy mayors, secretary (who doesn't always have to be established) and employees of the town hall. The town hall is usually divided into individual branches and unions to which is the council of the town hall entitled to set up. The town hall performs either over taken or individual force.Council and municipal council municipal authority may impose duties, assist the committees and commissions. In the case of the legislation they have a decision-making power.

Committees and commissions

Council has the statutory authority to establish committees as the initiative and control bodies to which councils submit their views and suggestions. The council always establishes the financial and audit committees.Furthermore, often municipal committees for national minorities are set up and not only in the event that more than 10% of the population of the village belong to a nationality other than Czech. This is based on data collected during the last census. Committees that are established in the village, carry out those tasks which were entrusted by the municipal.Similarly, committees are responsible for their activities of the village councils. In the municipalities also may be set up parish or local committees. Authorization for the

establishment of new institutions, however, has only council. Initiative and advisory bodies may be established by Council.Again in this case, the Commission presents its ideas and opinions to the Board, of which the Commission is also responsible. But in matters of performance figurative powers entrusted area to the committee department is responsible to the mayor of the village.

The jurisdiction and laws of the municipality

Under current legislation the municipality carries out delegated and independent powers, while the Municipalities Act states that "unless a special law regulates the competence of municipalities and provides that it is the delegated powers of the village, it applies that it is always a separate application"[10]. Self-scope corresponds to the right to manage their community affairs independently in their own name and on his own responsibility.The village at this acts as a legal entity. The intervention of other state bodies in the independent authority of the village is possible only in cases where the law allows it to or directly in the case of protection of rights. An important activity that falls within the scope of a separate municipality is its management, which is not only asset management but also the creation of a municipal budget and its subsequent compliance. The transferred responsibility is in the event of a transfer of some responsibilities of the state to the municipalities which therefore ensure the performance of these activities. However, this is only possible in cases where the law allows it to. It does so in general, for all municipalities.

As in the exercise of separate and delegated powers it's essential that the community handles the power issue legal provisions of the community through which the community should have the opportunity to modify the rules of conduct both physical and legal people.Among the laws municipality falls generally binding regulations in the area of self-regulation and competence in the delegated powers of the village. The legislation signed by the mayor and deputy mayor of the village. Generally binding regulation issued by municipality council and that only in those areas to which it has authorization. Regulation municipality can then be issued only in those matters to which the municipality has permission.The municipality must have a record of which laws have been released. Legislation issued by the municipality must be accessible to citizens and citizens have the opportunity to familiarize with their content.

Financial management of the municipality

Municipalities, as well as other local government units (counties), manages on the basis of fixed rules, which sets the law on budgetary rules of regional budgets[11]. Since it is the management of public and government funds it is not possible to deal

[10] Act 128/2000 Coll. on Municipalities, as amended, § 8
[11] Act No. 250/2000 Coll., On budgetary rules of regional budgets, as amended.

with this money freely.It is necessary to respect and strictly observe the budget process, and but also the budget revenues and budget expenditures, the management of these resources, their reporting and accounting. Municipalities and counties are subject to the budget, which is compiled for a period of one year and budget outlook.These financial transactions of the municipality or county keep records. The difference between the budget outlook and the budget of the municipality lies in the specificity of individual items, and time range. The budgetary outlook is only an auxiliary tool of financial planning. The elaboration of the time period is 2-5 years following the budget drawn up and already based primarily on the agreed commitment and planned projects, which is necessary to implement.Planned projects, long-term payables and receivables and financial resources allow such a view assemble the funds that will be necessary to realize the planned objectives and intentions of helping to adapt to these annual budget of the village. By contrast, the village budget is compiled only for one year and is identical to the calendar year.In the process of compiling the annual municipal budget it is based on the budget outlook, which reflects the needs of communities. When drawing up the budget management of the municipality it is calculated with the planned revenues and planned expenditures. The difference between these two items then determines whether the budget is deficit, surplus or balanced. In the event that revenues are at the same rate as expenditures, it is a balanced budget. This should be the goal at its establishment. In the event that it is possible to cover possible budget deficit, it may be approved the budget is deficit, where the annual expenses exceed annual revenues of the village community. Such a difference may be paid for by funds that were used in management in previous years, possibly a loan, credit or financial bailouts and sale of bonds of the village. Recurrent deficit budget of the village is not a positive effect, since it may lead to large debts and reduce the municipality's financial stability. Furthermore, there is the fact that the municipality is limited in its decision-making and management of some resources, as it has a commitment to institutions which provided the funds to cover the deficit. According to current legislation are contained in the municipal budget revenues and expenditures and other cash transactions, including the creation and use of money funds, which the municipality can establish.

Expenditure of municipality

Given that the community as a whole covers a wide range of activities, it is necessary to cover the costs of expenses associated with their performance while running from the municipality , which are contained in the municipal budget. According to the law on budgetary rules of regional budgets are among the expenses of the village including:

a) „obligations which arise for the municipality from the obligations imposed by laws,

b) expenditure for its own business in its independent jurisdiction, especially costs associated with caring for their own property and its development,
c) expenses related to the state administration, to which the municipality is authorized by law,
d) the obligations which arise for the municipality of contractual relationships entered into its economic and contractual relations of the respective organizations, if they proceed,
e) the commitments made in cooperation with other municipalities or other entities, including contributions to joint activities,
f) payment of interest on borrowings and loans
g) expenditure on the issue of its own bonds and to pay the proceeds of them belonging to their owners,
h) expenditure on the support of organizations engaged in community activities and promote private business which is beneficial to the community,
i) other expenditures made under the jurisdiction of the municipality, including donations and contributions to social or other humanitarian purposes."[12]

In addition to these expenses the municipality also pays its obligations to which they are committed, that is repayments of loans, repayable loans and assistance, provided by other side paid by the village from its annual budget. Furthermore, the municipality paid principal repayments of its own bonds to their owners.

Revenue of villages

Just as municipal expenditure items are strictly defined by law, also revenue of municipal legislation is specified. According to § 8 paragraph 1 of Act no. 250/2000 Coll., On budgetary rules of regional budgets, these are the following items:

a) "income from its own assets and property rights,
b) income from the results of its own activities,
c) income from economic activities of the organization if they are under this Act or another Act income of the county budget, which the organization set up or established,
d) Income from management activities, including income from the from interventions of state administration, which is a county authorized pursuant to special laws, in particular, administrative fees from this activity and income from fines imposed in selected counties powers under this Act or special acts, unless stipulated otherwise ,
e) income taxes or shares on them under a special law, 8)
f) subsidies from the state budget and state funds,

[12] Act No. 250/2000 Coll., On budgetary rules of regional budgets, as amended,§ 9, paragraph 1

g) received cash donations and contributions,
h) other income, which under special laws belong to the county revenue,
i) funds received by administrative activities of other government authorities, by them imposed fines or other monetary payments and penalties if the laws are in accordance with special income of the region"[13].

Administrative fee, which is associated with issuing a permit to operate gaming machines, is the income of the village only 50% of that amount. The remaining 50% is the income of the state budget.Furthermore, a municipality in its budget may take into consideration funds provided through the National Fund and the recoverable resources, such as the above-mentioned loans, credits and financial assistance.The financial management can also lead to a situation where it is necessary to cover the time gap between revenue and expenditure. In this case it is possible to use the financial assistance from the state budget, the budget of the county or another municipality.

Tax income of municipalities

Like other units of local government and nonprofit organizations, municipalities are obliged to keep accounts in accordance with the rules applicable laws and all revenue and expenditure in the accounts record and subsequently assign it. Income and expenditure are divided, in accounting.In my work I will primarily focus on the revenues of municipalities, which are referred to as tax. Given their importance in the municipal budget they allow enough income to gain greater community stability and autonomy, as it leads to greater independence. Dependence on other subjects reduces the independence of decision-making community. Tax revenues represent such an item of the municipal budget, the amount of which is for the community difficult to influence because it is annually determined by legislation across the board for the whole country. This is so on the basis of tax assignment, which represents a set of rules on the basis of individual tax revenues which are divided into each municipal budget. Basically it is an allocation of profit from taxes between the state and local governments just like municipalities, counties and cities.This is done based on clearly defined rules. Tax income of municipalities represent a very important item of the municipal budget, the flow is influenced by the manner in which taxes are selected and the various deadlines for paying taxes. Tax revenues are ranks among ordinary income.

Tax revenue municipalities can be divided or assigned into duties, taxes exclusive and shared. Assigned taxes are collected in a way that is single nationwide and for all municipalities, cities and counties identical. Revenue from assigned taxes then results from only one budget, in this case, the municipal.Among the entrusted tax is primarily included real estate tax, which is further divided into two sub-tax , land tax

[13] Act No. 250/2000 Coll., On budgetary rules of regional budgets, as amended, § 8, paragraph 1

and building tax. The tax is levied under the provisions of Act No. 338/1992 Coll. Real Estate Tax. The beneficiary tax is always the municipality in whose cadastral property it's located. The municipality with entrusted taxes cannot modify or set the tax rate. there may be a correction factor applied, which multiplies the amount of the tax rate. This is determined by the size of the municipality identified by the last census. Among the entrusted taxes is included more tax on corporate income in cases where the taxpayer is the relevant community. However, withholding tax levied according to specific rates, don't fall under this.

Shared taxes, which are income for municipalities are distributed to municipalities from state taxes. It is personal income tax from employment and functional benefits, tax on personal income from self-employment tax, personal income tax on capital gains, corporation tax and value added tax.

The exact amount of shares into which municipalities receive their budget is given by law No. 243/2000 Coll., the budgetary allocation of some income assigned taxes local government and some state funds (Act on Budgetary Allocation of Taxes), which in its § 4 indicates that tax revenue budgets of for municipalities are:

a) "Property tax revenue, the the beneficiary is the municipality on which territory the property is located
b) share of 21.4% of gross national income taxes on value added
c) share of 21.4% of gross national income tax (advance tax) from personal income from employment and functional benefits, levied by the employer as a tax payer under the Law on Income Tax
d) a share of 21.4% of gross national income tax (advance tax) personal income tax collected under special rates, with the exception of the proceeds referred to in letter c),
e) share of 21.4% from 60% of gross national income entrusted taxes (advance tax) personal income less the proceeds referred to in subparagraphs c) and d).
f) share of 21.4% of gross national income taxes on corporate income, excluding income referred to in point h) and § 3, paragraph 1 point. a)
g) 30% from the proceeds of advances 5) for tax on personal income to who have residence in the municipality at the date of maturity, and income taxes (settlement and subsequently granted compensation or additionally assessed tax) from personal income who was a resident in the municipality on the last day of the taxable period to which the tax is obligated, except for tax collected by a special rate of 6) with the exception of taxes (advance tax) income from employment and functional požitků7) withheld discharged by the taxpayer. Domicile for the purposes of this Act means a place of permanent residence of an individual,
h) tax on corporate income in cases where the taxpayer is the relevant municipality, except for tax collected by a special rate,

i) share of 1.5% of gross national income tax (advance tax) from personal income from dependent activities and functional benefits levied by the employer as a payer of income tax, except taxes on personal income tax collected according to specific rates don't fall under this."[14]

It is necessary to determine the percentage by which the municipalities contribute on the percentage of gross national income taxes. The exact procedure and formula for calculation is given in the Act on the budgetary allocation of Taxes and in § 4 paragraph 2 etc. Anyway, the amount of the share is influenced by the total measured area of the cadastral territory of the municipality, which takes into account the extent of the total cadastral area of all municipalities. For the capital city Prague, Brno, Plzen and Ostrava, the procedure is similar when taking into account the cadastral territory of the municipality and the population. To this is the conversion added, given by the legislation.

The overall level of interest, by which is municipality participates in the nationwide income tax is determined annually by decree. The Ministry of Finance has the permission to take this step, which does so in agreement with the Czech Statistical Office Czech Office for Surveying, Mapping by Cadastre by this percentage can change repeatedly.With the percentage change there is also changes the actual amount of funds collected into municipal budgets. With this, of course is related, the degree of autonomy with which they can dispose of. Decree determines the overall percentage, with which Prague, Plzen, Ostrava and Brno participates in the national gross income from taxation and the amount of percent, which is shared by all other municipalities on these revenues.Another quantity which is determined by decree of the Ministry of Finance is the percentage by which the municipality participates in these tax profits depending on the number of employees in the municipality and that is in relation to the total number of employees in the country.

Conclusion

In my work called "Tax revenues as a tool for municipalities autonomy," I tried to define the municipality, as the basic local government unit, as it is defined in the legislation of the Czech Republic. Municipalities carry out their activities both in individual as well as delegated powers.Sufficient cash flow to the municipal budget can position the municipality as well as affect its autonomy. In this work I also mentioned the municipal authorities so that it is possible to get an idea of what powers various authorities have. During the budget process it’s based on the budget outlook, which is processed for a period of 2 to 5 years.Tax revenue on which the funds are based on are

[14] Act No. 243/2000 Coll. the budgetary allocation of some income assigned taxes local government by some state funds (Act on Budgetary Allocation of Taxes), § 4 paragraph 1

tax revenues distributed to municipalities; however, they are determined only for one year in advance. This can cause discrepancies between expected and planned income tax revenues and the amount that is determined by the State municipalities currently.I think that municipal autonomy is composed of by levels of competence that individual communities have, but this independence is largely influenced by and also determined by a sufficient amount of cash flows that flow into the village. Given that tax revenues distributed to municipalities by the State constituted a major item in municipal budgets, in this work I tried to at least partly explain this issue and give an idea about it. Municipalities shouldensurea balancedor, better off, surplus the budgetso that theirdecision-makingautonomy andindependence wasstrengthened.

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7. Act No. 553/1991 Coll. Municipal police, as later amended.
8. Act No. 250/2000 Coll., On budgetary rules of regional budgets, as later amended.
9. Act No. 338/1992 Coll. Real Estate Tax, as later amended.
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Соглашение как форма корректива предусмотренного законом разделения публичных задач в Польше между правительственной администрацией и территориальным самоуправлением

(Agreement as a Correction Form of Statutory Division of Public Tasks in Poland between the Government Administration and a Local Government)

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Abstract: Agreements reached between the organs of the government administration and local government units constitute a category of administrative agreements, thus they are a form of administration's action giving the parties to the agreement the right of choice to possibly sign such agreement, as well as the scope of public tasks handed over for the realization to a party to such agreement and details of financing such tasks. The legislator has determined general legal frames of such agreements, i.e. the areas for public administration's actions where it is possible to apply agreements, types of tasks that may be put to realization with the agreement and the legal form used to transfer the financials means necessary for the realization of the tasks specified in the agreement. The legal form applied to transfer the financial means shall be a restricted grant constituting a State budget expense.
In Poland the agreements between the organs of government administration and the units of the local government are relatively popular. This form is used for giving to realization the tasks of the government administration scope of various areas of the government administration activity e.g. safety and public order, monuments security and care, maintenance of military cemeteries, fire protection. This way they constitute a form of correcting the statutory division of public tasks, performed relatively independently by the organs of the government administration and the units of the local government.

Keywords: administrative agreement, grant for designated tasks.

Аннотация: Предметом соглашений административных являются обязательства касающиеся выполнения задач из круга администрации публичной. Они могут предусматривать совместное выполнение задач или передачу определённых задач из одного субъекта на другой. Всегда опираясь на отчётливую законную основу. Юридические положения регулирующие правила заключения обсуждаемых соглашенй и финансирования задач в них определённых рассеянные во многих юридических актах, так нормирующих строй и задачи е.м.с. кака и правила их финансового хозяйства, а тоже в отдельных законах регулирующих подробные аспекты функционирования публичной администрации. В результате заключаемых соглашений осуществляется не только поручение реализации определённой задачи из круга правительственной администрации для выполнения конкретной е.м.с., но тоже определение реольных расходов такой задачи. В этом случае происходит трансферт финансовых средств из бюджета государства в бюджет единицы местного самоуправления. Сумма передаваемой намеренной дотации даёт возможность тоже финансирование вознаграждения лиц, которые в данной е.м.с. непосредственно участвуют в реализации таких задач.

Ключевые слова: административное соглашение, намеренные дотации.

1. Вступление

Круг и категории публичных задач исполняемых публичной администрацией данного государства подчиняются историческому процессу развития[1]. Их разделение между правительственную администрацию и территориального самоуправления, в случае, когда в данном государстве вообще сформировано территориальное самоуправление, зависит от принятых в конституции решений относящихся к государственному строю. Фактический круг публичных задач зависит однако от многих различных и взаимно обусловливающихся явлений напр. политических, общественных, экономических[2].

В современную этоху публичная администрация исполняет всё больше задач, а их круг постоянно расширяется в следствие законных урегулирований очередных общественных явлений[3].

В вязи с тем появляется проблема соответсвующего разделения публичных задачмежду разные субъекты и структуры публичной администрации

[1] Е. Кносала, Рассужденияиз теории администрации, Тыхы 2004, с. 126; А. Блась, Изпроюлемавтики приватизациизадачтерриторального самоуправления, Acta Universitatis Wratislaviensis „ОбзорПраваи администрации" 2000, нр 45, с. 33-34.
[2] Е. Малиновска – Мисёнг, В. Мисёнг, Публичные финансыв Польше, Варшава – Жешув 2006, с. 14.
[3] М. Табернацка, Законная конструкцияпубличной задачи, Acta Universitatis Wratislaviensis „Право" 2005, нр 295, с. 420-422.

с целью их как можно нийболее эффективного выполнения и при ограниченных средствах (вещественных и финансовых) предназначенных на выполнение задач. Часто разделение задач законодателем является несовершенное, потому что не он не располагает полным знанием о личных и организационно - финансовых условиях, в которых такие задачи будут выполняемые. Это создаёт нужду внесения многократных коррективов первоначально принятого разделения задач и его приспособления для конкретных условий, в которых действует указанный по закону законодатель. С другой стороны это не должно вести к полному изменению концепции принятой законодателем, но только к её частичной модификации с сохранением возможности возврата к первоначальному разделению публичных задач в случае прекращения причин вызывающих внести коррективы.

Необходимые с этой целью являются определённые формы воздействия публичной админимстрации, предоставляющие возможность эластичного реагирования на изменяющиеся условия выполнения публичных задач. К таким формам принадлежат прежде всего двусторонние формы воздействия публичной администрации[4]. В этой категории помещается административное соглашение, которое заключается тогда, когда такую волю выражут не менее два субъекта публичной администрации Соглашения могут заключаться в пределах администрации местного самоуправления, в пределах правительственной администрации и между органами администрации правительственной и местного самоуправления, а даже с субъектами вне структур публичной администрации[5].

Сутью соглашений является прежде всего добровольность их заключения. Законодатель зато определяет вид задач, которые могут быть включены в соглашение, способ и форму пердачи средств необходимых для выполнения таких задач, а тоже правила ответсвенности сторон соглашения[6]. Это невластная форма воздействия администрации похожа на гражданские действия, потому что основывается на принципе равенства сторон. Соглашения заключаются между субъектами, которые не связаны отношениями подведомственности организационной или служебной. Предметом соглашений административных являются обязательства касающиеся выполнения задач из круга администрации публичной. Они могут предусматривать совместное выполнение задач или передачу определённых задач из одного субъекта на другой, но всегда опираясь на отчётливую законную основу. Органы публичной администрации не могут без отчётливого полномочия предусмотренного законом изменять круга своих

[4] З. Цеслик, Административный договор в государстве права, Кракув 2004, с. 109.
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[6] М. Офярска, Публично – правовые формы совместного действия единиц территориального местного самоуправления, Варшава 2008, с. 371–376.

компетенции. Могут зато обязаться применять эти компетенции определённым образом[7].

2. Соглашение по делу выполнения задач из круга правительственной администрации – аспекты административно – правовые

К категории административных соглашений принадлежат соглашения заключающиеся между единицами местного самоуправления (е.м.с.) и органами правительственной администрации по делу выполнения е.м.с. задач из круга правительственной администрации. Их выделение является возможным после применения критерии субъективных, предметных и функциональных. Они заключаются е.м.с. (гмина, повят или воеводство) с органом правительственной администрации. Стороны соглашения являются равными и независимыми субъектами, не соединены организационной связью; в особенности никакая из них, особенно орган правительтственной администрации не имеет доминирующего положения[8]**.** Предметом соглашения являются определённые публичные задачи из круга правительственной администрации, в функциональном аспекте является способ выполнения этих задач.

Согласно ст.16 отс. 2 Конституции РП[9] местному самоуправлению гарантируется участие в осуществлении публичной власти. С этой целью е.м.с. принадлежит в пределах определённых законами, важная часть публичных задач, которые выполняются от собственного имени и под свою ответственность (собственные задачи). Согласно же постановлениям ст. 166 отст. 2 Конституции РП, если это вытекает из обоснованных потребностей государства, закон может поручить е.м.с. выполнение других публичных задач, определяя тоже порядок передачи и образ выполнения поручённых задач. В Конституции РП не названо прямо соглашений как формы реализации е.т.м.с. задач из круга правительственной администрации.

В законах регулирующих строй и задачи[10] е.м.с. определено суть и цели, а тоже субъекты уполномоченные заключать соглашения с единицами правительственной администрации, но одновременно оставлено е.м.с. свободу

[7] А. Викторовска, Правовые формы воздействия администрации (в:) Право административное, ред. М. Вежбовски, Варшава 2007, с. 276-278.
[8] Приговор НСА от 5 декабря 1995 г., С А/Р 1109/95, „Территориальное самоуправление" 1995, нр 12, с. 116.
[9] Конституция Республики Польши от 2 апреля 1997 г. (З. В. Нр 78, ст. 483 с изм.).
[10] Закон от 8 марта 1990 г. О гминном самоуправлении (текст одн. З. В. z 2001 г. Нр 142, ст. 1591 с изм.) дальше з.г.с. ; закон от 5 июня 1998 г. о повятовом самоуправлении (текст одн. З. В. от 2001 г. Нр 142, ст. 1592 с изм.) дальше з.п.с.; закон от 5 июня 1998 г. о самоуправлении воеводства (текст одн. З. В. от 2001 г. Нр 142, ст. 1590 с изм.) дальше з.с.в.

выбора относительно заключения соглашения и возможного предпринятия выполнения задач из круга правительственной администрации. Итак это положение является разным от этого, в котором законодатель накладывает на е.м.с. обязанность выполнения поручённых задач из круга правительственной администрации, а тоже из круга организации подготовки и проведения всеобщих выборов и референдум. В этом случае е.м.с. не оставляется выбора, потому что обязанность выполнения определённой поручённой задачи вытекает прямо из закона, напр. ведение гминой списка избирателей[11]; с организацией и проведением выборов на территории гмины, повята или воеводства являются поручёнными задачами этих е.м.с[12]**.;** приём, передача и уничтожение гминами предложений по делу записи в Центральную Регистрацию и Информацию о Хозяйственной Деятельности[13]; присуждение и выплату гминами целенаправленных пособий на покрытие расходов связанных со стихийным или экологическим бедством[14].

Согласно ст. 8 отст. 2 и 2б з.г.с., задачи из круга правительственной администрации гмина может выполнять тоже на основе соглашения с органами этой администрации, а имущественные споры возникнувшие из таких соглашений рассматривает всеобщий суд. По мнению суда так сформулированное правило закона исключает возможность дальнейшей передачи задач правительственной администрации гминой за пределы гмины, субъектом оставающимся вне широко понимаемой организационной структуры гмины[15]. Более эластичный взгляд выражен в доктрине. Признано, что гмина, которой поручено задачи из круга правительственной администрации не может без согласия „органа поручившего" передавать эти задачи другим субъектом[16]. Согласно постановлениям ст. 18 отст. 2 пкт. 11 з.г.с. к исключительной компетенции гминного совета принадлежит предпринимание решений по делу приёма задач из круга правительственной администрации. Выполнение такого решения – согласно ст. 30 отст. 1 з.г.с. – принадлежит к кругу компетенций войта (бургомистра, президента города), итак заключающим соглашение является исполнительный орган гмины.

Согласно постановлениям ст. 5 отст. 1 и 3 з.п.с., повят может заключать соглашения с органами правительственной администрации по делу реализации

[11] Ср. ст. 18 § 11 закона от 5 января 2011 г. Избирательный кодекс (З. В. Нр 21, ст. 112 с изм.).
[12] Ср. ст. 156 § 1 Избирательного кодекса.
[13] Ср. ст. 26 отст.. 6 закона от 2 июля 2004 г. о свободе хозяйственной деятельности (текст одн. З. В. от 2010 г. Нр 220, ст.. 1447 с изм.).
[14] Ср. ст. 18 отст. 1 пкт 4 закона от 12 марта 2004 г. о социальной помощи (текст одн. З. В. От 2009 г. Нр 175, ст. 1362 с изм.).
[15] Приговор НСА от 27 сентября 1994 г., СА/Лд 1907/94, ОНСА 1995, с. 4, ст. 162.
[16] З. Леонски, Формы взаимодействия в местном самоуправлении, „Местное Самоуправление" 1995, нр 4, с. 55.

публичных задач из круга правительственной администрации. Настоящие соглашения

подлежат объявлению в воеводском законодательном вестнике. Такого правила не помещено в законе о гминном самоуправлении, но объязанность объявления соглашений заключающих гминами вытекает из отдельных правил, по которым в воеводском законодательном вестнике объявляются соглашения по делу реализации публичных задач заключённые между е.м.у. (тзв. коммунальное соглашение) и между е.м.с. и органами правительственной администрации[17].

Согласно ст. 12 пкт. 8а з.п.с., к исключительной компетенции повятового совета принадлежит предпринимание решений по делу приёма задач из круга правительственной администрации. К кругу компетенции повятового управления - соответственно постановлениям ст. 32 з.п.с. – принадлежит реализация решенений повятового совета.

Важным является то, что в законе о воеводском самоуправлении не помещено конкретных урегулирований допускающих заключение соглашений воеводским самоуправлением с органами правительственного самоуправления. В ст. 14 отст. 2 з.в.с. принято, что законы могут определять дела принадлежащие к сфере действия воеводства как задачи из круга правительственной администрации, выполняемые воеводским управлением, напр. ведение реестра хранителей актов личных и оплаты труда[18], оценка обязанности ведения рационального рыбацкого хозяйства в рабацком округу имеющего право на рыболовство[19], управление округом в сфере рыболовства[20]. Итак в законе о воеводском самоуправлении не урегулировано прямо возможности заключения соглашений с органами правительственной администрации с целью реализации задач из круга правительственной администрации, ин не указано органа соответсвующего предпринимать решения в этом предмете. Однако в ст. 46 отст. 3 з.в.с. принято, что от административных решений касающихся единоличных дел из круга публичной администрации, порученных на основе соглашения с воеводой, можно подать апеляцию к соответсвующему министру.

В связи с этом, что закон о воеводском самоуправлении не регулирует прямо возможностей заключения соглашений воеводством с органами правительтственной администрации по делу реализации публичных задач из круга правительственной администрации, в доктрине нет единого взгляда

[17] Ср. ст. 13 пкт. 6 закона от 20 июля 2000 г. О объявлении нормативных актов и некоторых других правовых актов (текст одн. З. В. от 2010 г. Нр 17, ст.. 95 с изм.).
[18]Ср. ст. 4 отст. 2 и ст. 51б закона от 14 июля 1983 г. О национальном архивальном фонде и архивах (текст одн. З. В. от 2011 г. Нр 123, ст. 698).
[19]Ср. ст. 1а отст. 2 і ст. 6 отст. 2а закона от 18 апреля 1985 г. о речном рыболовстве (текст одн. З. В. от 2009 г. Нр 189, ст. 1471 с изм.).
[20]Ср. ст. 7 закона от 13 октября 1995 г. Охотничье право (текст одн. З. В. от 2005 г. Нр 127, ст. 1066 с изм.).

касающегося допустимости заключения таких соглашений на основе правил этого закона или других законов.

Некоторые авторы допускают такую возможность[21], а даже признают, что воеводское самоуправление может по собственной инициативе расширить круг реализованных задач на основе общих полномочий по ст. 2 отст. 2, ст. 6 отст. 1 пкт. 1 и ст. 14 з.в.с.[22].

Согласно другому взгляду ст. 8 отст. 2 з.в.с. бесспорно ограничается круг субъектов, с которыми воеводство может заключать соглашения по делу поручения публичных задач (это только другие воеводства и единицы местного самоуправлениияиз из территории воеводства)[23].

Правовое учреждение соглашения между воеводой и е.м.с. и их союзами урегулирована правилами закона от 23 января 2009 г. о воеводе и правительственной администрации в воеводстве[24]. Согласно ст. 3 этого закона, воевода является м.др. органом прасительственной администрации в воеводстве, к компетенциям которого принадлежат все дела их круга правительственной администрации в воеводстве необсуждённые в отдельных правилах к компетенциям других органов этой администрации. Цитированное правило этого закона о воеводе не должно составлять самостоятельной правовой основы выдавать воеводой административных решений касающиеся определённого круга дел, но всегда следует указать контретное правило материального права, который относит к числу задач воеводы определённое дело и предусматривает компетенции воеводы решить её**.**[25].

Согласно ст. 2 пкт. 4 цитированного закона, задачи правитльственной администрации в воеводстве реализуют тоже е.м.с. и их союзы, если реализация этими субъектами задач правительственной администрации вытекает из отдельных законов или заключённого соглашения. Соответственно постановлениям ст. 3 отст. 2 этого закона, воевода контролирует в отношении легальности, экономности, добросовестности выполнение органами местного самоуправления задач из правительственной администрации, реализованных этими субъектами на основе закона или соглашения с органами

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[21] Напр. Я. Леманьска, Концепция воеводского самоуправления на сравнитльном фоне, Кракув 2006, с. 163; Р. Клыщ, Законы о повятовом самоуправлении и о воеводском самоуправлении. Комментарий, Вроцлав 1999, с. 137-128; Я. Выпорска, Союзы, соглашения и общества сверхгминного самоуправления (в:) Й. П. Тапно, М. Сенюць, Й. Сулимерски, Й. Выпорска, Местное самоуправление в Польше, Варшава 2004, с. 233; К. Бандажевски, Допускаемость заключения соглашения с воеводой (в:) комментарий к закону о воеводском самоуправлении, ред. П. Хмельницки, Варшава 2005, с. 87.

[22] В. Гонет, Правила передачи задач единицам местного самоуправления правительственной организацией, „Коммунальные финансы" 2011, нр 1 – 2, с. 43.

[23] Б. Дольницки, Местное самоуправление, Варшава 2009, с. 287.

[24] З. В. Нр 31, ст.. 206 с изм.

[25] Д. Салуда, предположение компетенции воеводы по делах из круга правительственной администрации в воеводстве, „Цасус" 2011, нр 1, с. 11.

правительственной администрации. В ст. 20 данного закона принято, что воевода может поручить ведение, от его имени, некоторых дел из круга своих компетенции м. др. е.м.с. В соглашении надо определить правила осуществления контроля по делу правильной реализации поручённых задач. Поручение происходит на основе соглашения воеводы с исполнительным органом е.м.с. Соглашение вместе с составляющей его неотлагаемую часть приложениями, подлежит объявлению в воеводском законодательном вестнике. Характерном является это, что ни в выше цитированных правилах закона о воеводе, ни в других правилах этого закона регулирующих правовое учреждение соглашений заключаемых между воеводой и е.м.с. (напр. определя доступ к тайным информациям или осуществление контроли осуществляемых в этом порядке задач) не употреблено прамо апределения „воеводское самоуправление". В каждом же случае употребляется более общее понятие „единицы местного самоуправления". К этой категории бес сомнения относится тоже воеводское самоуправление.

Закон о воеводе содержит только общее постановления касающиеся заключения соглашений воеводой с е.м.с. Только в отдельных законах уточнено предмет и порядок заключения таких соглашений, напр.:

- согласно ст. 96 отст. 2 и 3 закона от 23 июля 2003 г. о охране памятников старины и уходе за памятниками старины[26] воевода, по предложению воеводского реставратора памятников старины может поручить, путём соглашения, ведение некоторых дел из круга своих компетенции, в этом выдачу административных решений гминам и театром, а тоже союзом гмин и повятов на территории воеводства (с исключением дел касающихся ведения реестра и воеводского учёта памятников старины, а тоже выдачи по этому делу административных решений);

- согласно ст. 6 отст. 3 закона от 28 марта 1933 г. о могилах и военных кладбищах[27], воевода может, путём соглашения, поручить е.м.у. обязанность ухода за могилами и военными кладбищами, с одновременной передачей соответствующих финансовых средств, если е.м.у. не примёт ютой обязанности бесплатно;

- согласно ст. 14ц отст. 3 закона от 24 августа 1991 г. о противопожарной охране[28], воевода может путём соглашения, поручить организацию центров спасательного уведомляния старостом или президентом городов на правах повятов. В соглашении слевует определить права и обязанности сторон и правила софинансирования центров спасательного уведомляния.

[26] З. В. Нр 162, ст. 1568 с изм.
[27] З. В. Нр 39, ст. 311 с изм.
[28] Текст одн. З. В. от 2009 г. Нр 178, ст. 1380 с изм.

В анализированных правилах заметным является отсутствие последовательности законодателя в употреблении определений важных для заключаемых соглашений, напр. в ст. 8 отст. 2 з.г.с. употреблено определение „задачи из круга правительственной администрации”, в ст. 5 отст. 1 з.п.с. употреблено более точное определение „публичные задачи из круга правительственной администрации”, зато в законе о воеводе употреблено более общее определение „задачи правительственной администрации” и „задачи из круга правительственной администрации”.

В свете постановлений закона о гминном самоуправлении и закона о повятовом самоуправлении соответсвенно гмина или повят могут заключать соглашения с каждым органом правительственной администрации по делу реализации задач из круга правительственной администрации. Закон о воеводском самоуправлении в принципе не содержит постановлений регулирующих возможность заключания таких соглашений с органами правительственной администрации, но они могут заключаться на основе правил закона а воеводе или на основе отдельных законов. Однако следует подчеркнуть, что это будут соглашения более узкого субъективно – предметном круга, т.е. заключаемые не с каждым органом правительственной администрации, но исключительно с одним из таких органов т.е. своеводой и только из круга его компетенции.

3. Соглашения е.м.с. с органами правительственной администрации – финансово-юридические аспекты

В результате заключения соглашения е.м.с. принадлежат финансовые средства необходимые для реализации задач из круга правительственной администрации, в размере гарантирующим реализацию этих задач. Такое предложение можно сформулировать опираясь на постановления ст. 8 отст. 3 -5 з.г.с. Данная гарантия относится не только к соглашениям заключаемым гминами с органами правительственной администрации, но тоже к повятом заключающим такие соглашения, так как в ст. 5 отст. 4 з.п.с. помещено ссылку направила закона о гминном самоуправлении в сфере соглашений заключаемых повятами. В законе о воеводском самоуправлении не заключено таких гарантий, а ссылку на правила закона о гминном самоуправлении в сфере соглашений заключаемых воеводским самоуправлением следует ограничить единственно к коммунальным соглашениям, так как это вытекает из конструкции правила ст. 8 з.в.с. В законе о воеводе не сформулировано тоже гарантий касающихся финансовых средств необходимых для реализации задач из круга правительственной администрации включеных в соглашение заключённое между воеводой и воеводским самоуправлением. Такие гарантии сформулированы зато в некоторых отдельных законах, регулирующих заключение соглашений воеводой с е.м.с. по делу

поручения этим единицам определённых задач из круга правительственной администрации, напр. в законе о охране памятников старины и уходе за памятниками старины, в законе о могилах и военных кладбищах.

Принимающая е.м.с. для реализациизадачи из круга правительственной администрации, на основе заключённого соглашения, должна получить финансовые средства в размере необходимом для выполнения задачи. Эти средства должны быть действительно переданы, а не обещаны для передачи[29]**.** Их передача должна происходитьдосрочно гарантируя реализацию задачи в срок[30]**.**

Несмотря назаключённое соглашение не изменяется статус задач заключённых в таком соглашении. Они остаются задачами из круга правительственной администрации, а изменяется только их исполнитель. Им не является уже орган правительственной администрации, но е.м.с., которая однако не обязанна финансировать из собственных средств задач реализированных на основе соглашений[31]**.** Выражен тоже взгляд, по которому, в случае, если средства не будут переданы на реализацию задачи из круга правительственной администрации, е.м.с. не может прекратить реализацию принятых задач[32], т.е. была бы обязана финансироватьреазизацию задач из собственных средств.

Стороны соглашения не могут однако вводить других правил финансирования выполнения задач реализованных из круга правительственной администрации, чем установленные законодателем. Ни соглашения ни никакое правило закона не регулирует допустимости прекращения пратязаний какие возникли для сторон при реализации соглашения. Прекращение соглашения обозначает только прекращение обязательства. Не обозначает же прекращения притязаний, которые возникли во время продолжения этого отношения. Средства необходимые для реализации задачи не должны быть ограничены только к расходам задачи в предметном понимании, но должны учитывать личные расходы связяны с реализацией задачи являющейся предметом соглашения, напр. дополнительное вознагграждение для рабочих выполняющих задачу[33]. В соглашении следует определить подробные правила и сроки передачи финансовых средств необходимых для реализации задач содержащихся в соглашении.

Важной, из точки зрения юридических последствий для сторон соглашения, является юридическая форма использована для передачи

[29] А. Шевц, Сфера действия и задачи гмины (в:) А. Шевц, Г. Йыж, З. Плавецки, Закон о гминном самоуправлении – коментарий, Варшава 2010, с. 124.
[30] З. Невядомски, В. Гжелчак, Закон о местном самоуправлении с коментарием и тексты других законов местного самоуправления, Варшава 1990, с. 14.
[31] Л. Керес, Оплаты за освещение улиц (национальных и воеводских дорог). Стороны и предмет спора, „Местное самоуправление" 1995, нр 12, с. 102.
[32] М. Й. Климашевски, Административное соглашение, „Ежеквартальник Публичного Права" 2001, нр 3, с. 155.
[33] Приговор Апелляционного суда в Варшаве от 5 июня 2001 г., I АЦа 1484/00, „Хозяйственное Право" 2002, нр 7 – 8, с. 91.

финансовых средств необходимых для реализации задач из круга правительственной администрации, порученных е.м.с. на основе соглашения. Она не определена в правилах законов регулирующих строй и задачи е.м.с., ни в законе о воеводе. Решение этой проблемы делает возможным только анализ содержания законов регулирующих источники доходов е.м.с.[34] и бюджетную процедуру в сфере бюджетов е.м.с.[35]

Согласно ст. 8 отст. 1 пкт. 2 з.д.е.м.с. доходами этих единиц могут быть намеренные дотации из государственного бюджета на задачи реализованные е.м.с. согласно соглашениям заключённым с органами правительственной администрации. Субъектом передающим намеренную дотацию - согласно ст. 45 этого закона – является соответствующий орган правительственной администрации. Размер намеренной дотации вытекает из заключённого соглашения, но надо помнить об этом, что она должна гарантировать реализацию задачи. Подробные задачи и сроки передачи дотации на реализацию задач е.м.с. согласно обсужданным соглашениям определяют эти соглашения.

Юридические гарантии охраны положения е.м.с. реализующей задачи из круга правительственной администрации на основе заключённого соглашения, определяют постановления ст. 49 з.д.е.м.с. Пазмер намеренной дотации должна гарантировать реализацию этих задач. Суммы намеренных дотаций устанавливается согласно правилам принятым в бюджете государства для определения расходов подобного рода.

Намеренные дотации передаются воеводами, насколько отдельные правила не предусматривают иначе,на началах опредалённых в отдельных правилах. Намеренные дотации следует передавать образом дающим возможность полную и срочную реализацию поручённых задач. В случае невыполнения этого условия е.м.с. принадлежит право добиваться причитающегося ассигнования вместе с процентами в размере установленном как за налоговые недоимки, в судебном производстве.

Указывается в доктрине, что предметом притязания добивающегося перед судом является сумма намеренной дотации установлена несогласно заключённому соглашению[36].

В правилах закона о публичных финансах не связывается просто намеренной дотации с соглашением заключённым между органом правительственной администрации и е.м.с. Намеренная дотация приводится в более широком контексте определённым понятием „задачи из круга

[34] Закон от 13 ноября 2003 г. о доходах единиц местноо самоуправления (текст одн. З. В. от 2010 г. Нр 80, ст. 526 с изм.), дальше з.д.е.м.с.
[35] Закон от 27 августа 2009 г. о публичных финансах (З. В. Нр 157, ст.. 1240 с изм.), дальше з.п.ф.
[36] А. Бородо, Финансовая система местного самоуправления в Польше, Торунь 2011, с. 141; Е. Руськовски, Й. Салахна, Закон о доходах единиц местного самоуправления – комментарий, Варшава 2004, с. 294

правительственной администрации". В связи с этим, что в этом же самом правиле ст. 127 отст. 1 пкт. 1 б. а) з.п.а. речь идёт одновременно о „других порученных задачах е.м.с. законами", в публикациях предметом интереса являются прежде всего намеренные дотации на реализацию задач из круга правительственной администрации порученных е.м.с. путём законов[37]. Подобный образ регулирования применено в ст. 129 з.п.ф., а одновременно повторено одну из юридических гарантий содержащихся в ст. з.д.е.м.с. т.е. обязанность определения сумм намеренных дотаций распорядителями бюджетных частей по принципам принятым в государственном бюджете для определения расходов подобного рода, насколько отдельные правила не предусматривают иначе.Такой образ регуляции законодатель последовательно применил тоже в ст. 132 отст. 2 пкт. 6 б. б) з.п.ф., согласно которому из государственного бюджета могут предоставляться намеренные дотации на финансирование или дополнительное финансирование расходов реализации инвестиции реализованных е.м.с. как задачи изи круга правительственной администрации.

В цитированным выше правиле закона ограничено цель этих дотации до инвестиционных задач. Кроме этого законодатель применяет два определения „финансирование" или „дополнительное финансирование". В первом случае следует понимать полное финансирование расходов данного предприятия, что не вызывает никаких сомнений, потому что данная инвестиционная задача остаётся задачей из круга правительственной администрации. Однако в другом случае финансирование обозначает финансирование таких расходов только частично, в связи с этим в остальном пределе е.м.с. была бы обязана финансировать часть инвестиционной задачи из собственных средств. Однако это было бы противное концепции передачи задач из круга правительственной администрации для реализации е.м.с.

Кажется, что это является только эффектом неудачного составления содержания правила ст. 132 отст. 2 з.п.ф., в котором после передового предложения о содержании „из государственного бюджета могут предоставляться намеренные дотации на финансирование или дополнительное финансирование расходов реализации инвестиции" названо несколько возможных случаев, а среди них инвестиции реализованные е.м.с. как задачи из круга правительтственной администрации. Таким образом, в этом конкретном случае надо принять, что сумма намеренной дотации должна быть установлена в размере гарантирующим полное финансирование расходов задачи. Решающее значение имеют однако отдельные правила определяющие возможностьполучения намеренной дотациина

[37] А. Островска, Комментарий к ст. 127 и ст. 128 з.п.ф. (в:) Новый закон о публичных финансах вместе с законом - введением. Практический комментарий, ред. Е. Руськовски, Й. М. Салахна, Гданьск 2010, с. 420 и 429-431.

конкретную инвестиционную цель[38]. Дополнительное финансирование, т.е. частичное финансирование расходов инвестиционной задачи, должно относится к другим случаям названных в этом правиле, напр. единц не принадлежащий к сектору публичных финансов или инвестиций реализованных е.м.с. как собственная задача.

Тенденция сочетания намеренной дотации с общим понятием „задач из круга правителтственной администрации" заключается тоже в правилах регулирующих бюджетную процедуру в пределах бюджета государства. Согласно ст. 143 отст.1 пкт. 2 з.п.ф., распорядители бюджетных частей, в срок до 25 октября, передают е.м.с. информации м. др. о принятых Советом Министров в проекте бюджетного закона суммах дотаций на задачи из круга правительтственной администрации и о суммах доходов связанных с реализацией задач из круга правительтственной администрации. Соответственно же постановлениям ст. 148 пкт. 1 з.п.ф. в срок 21 дней от дня объявления бюджетного закона распорядители бюджетных частей передают е.м.с. информации м. др. о суммах дотаций на задачи из круга правительственной администрвции и о суммах связанных с реализацией задач из круга правительственной администрации. Согласно ст. 149 отст. 1 з.п.ф., намеренные дотации на реализацию задач из круга правительственной администрации передаются е.м.с. воеводой в срок дающий возможность полную и срочную реализацию задач. Это правило повторяет регулировки содержащиеся в ст. 49 з.д.е.м.с.

Направленная дотация является типичной формой расходов государственного бюджета[39] на публичные задачи, в этом задачи изкруга правительственной администрации реализованные е.м.с. на основе соглашений заключаемых е.м.с. с органами правительственной администрации. В связи с этом её планирование и использование требует соблюдения основательных правил действующих в секторе публичных финансов, в этом правила гласности и правила ясности[40]**.**

Использование формы намеренной дотации для финансирования задач распространяющихся наобсуждаемые соглашения обозначает применение разных решений дисциплинирующих, напр. согласно ст. 168 отст. 6 з.п.ф.. намеренные дотации предоставленные е.м.с. на реализацию задач из круга правительственной администрации в части неиспользованной в данном году подлежат возвращению в государственный бюджет в части, в которой задача не была выполнена, в срок до 31 января следующего года. Процесс финансирования задач из круга

[38] Р. Трыкозко, Закон о публичных финансах. Комментарий для единиц местного самоуправления, Варшава 2010, с. 217.
[39] А. Бородо, Польское финансовое право– общий очерк, Торунь 2005, с. 152.
[40] В. Войтович, Правила публичного финансого хозяйства (в:) Общий план публичных финансов и финансового права, совместная работа под редакцией В. Войтовичz, Закамыче 2005, с. 42.

правительственной администрации подвергается тоже контролю Сейма РП, потому что согласно ст. 182 отст. 1 и отст. 2 пкт. 1 з.п.ф.. реализация бюджетного закона подвергается контролю Сейма, а Совет Министров представляет Сейму и Верховной контрольной палате, в срок до 31 мая следующего года, годовой отчёт о реализации бюджетного закона и м.др. отчёт о доходах и расходах связанных с задачами из кругаправительственной администрации, реализованными е.им.с.

Передаванные финансовые средства из государственного бюджета, связанные с реавлизацией задач из круга правительственной администрвции, относятся тоже к бюджетным расходам е.м.с. соответственно постановлениям ст. 216 отст. 2 пкт. 2 з.п.ф. Согласно постановлениям ст. 237 отст. 2 пкт. 1 и 2 з.п.ф. в плане доходов и расходов бюджета е.м.с. выделяется доходы и расходы связанные с реализацией задач: из круга правительственной администрации и реализованных в силу соглашенийс органами правительственной администрации. Расходы должны быть запланированы в суммах не менее планированных на эту цель дотаций[41]. Их подробное представление наступает в финансовом плане задач из круга правительственной администрации и других поручённых задач е.м.с. отдельными законами. Этот план имеет специальный[42] характер и составляет акт необходимый для правильной реализации бюджета е.м.с. Данный план согласно ст. 249 отст. 1 з.п.ф. подготовляет исполнительный орган е.м.с. в срок 21 дней от дня принятия бюджетного постановления, принимая за основу для этого плана сумму дотации признаных на эту цель в бюджетном году и размер доходов связанных с реализацией задач из круга правительственной администрации, которые подвергаются передачи в государственный бюджет.

4. Избранные соглашения заключённые между е.м.с. и органами правительственной администрации с 1 января 2010 г. по 30 июня 2011 г.

В виду на большое количество заключаемых соглашений сделано анализ содержания только их частей т.е. заключённых в течение 18 месяцев с момента всупления в законную силу в данный момент действующего закона о публичных финансах, а исследование распостранялось на четыре воеводства: мазовецкое, опольское, подляское и западнопоморское. В остальных воеводствах предметом таких соглашений являются подобные дела, как в случае четырёх исследованных

[41] Й. М. Салахна, Комментарий к ст.. 237 з.п.ф. (в:) Новыйзаког о публичных финансах вместе с законом введением. Практический комментарий, ред. Е. Руськовсий, Й. М. Салахна, Гданьск 2010, с. 420 и 429-431.

[42] М. Карликовска, Бюджет единицы samorządu местного самоуправления (в:) Бюджетный справочник местного самоуправления на 2005 год, совместная работа под редакцией Б. Мемец и Б. Цибульского, Варшава 2005, с. 38.

воеводствах, таким образом проведение некоторых общих оценок на основании проанализированного материала является правомочным.

В анализированный срок заключено в этих воеводствах всего 146 соглашений. Больше всего т.е. 79 заключено в опольском воеводстве (64 соглашения в 2010 г. и 15 соглашений в первой половине 2011 г.), в мазовецком воеводстве заключено 46 соглашений (5 соглашений в 2010 г. и даже 41 соглашений в первой половине2011 г.); в подляском воеводстве заключено только 7 соглашений (5 соглашений в 2010 г. и 2 соглашения в первой половине 2011 г.).

Заключённые в это время соглашения касаются реализации задач разных категорий из круга правительственной администрации. В предметно – географическом обзоре формируются однако определённые тенденции.

В опольском воеводстве заключено 79 соглашений и в сравнении с остальными воеводствами, подвергнутых в этой сфере анализу, это были соглашения заключаемые воеводой с е.м.с. всех трёх степени т.е. с гминами, повятами и воеводским самоуправлением. Доминирующее положение занимают соглашения касающиеся выдачи от имени воеводы бланков полномочий на покупку топлив в случаях временных ограничений продажи топлив[43](это были все т.е. 64 соглашения заключённые в 2010 г.). Размер намеренных дотаций в каждом соглашении обусловлено количеством выданных полномочий.

В 2011 г. в опольском воеводстве заключено 15 соглашений касающихся 3 категории задач из круга правительственной администрации. В это время доминировали задачи связанные с подготовкой и проведением военной квалификации[44] в 2011 г. В этой сфере заключено 12 соглашений, в этом 1 с гминой и 11 с повятами. Гмине передано намеренную дотацию в размере 23.000 ЗЛ., зато намеренные дотации для повятов составляли от 12.000 ЗЛ. до 32.000 ЗЛ., а дифференциация их размеров была связяна с разными размерами расходов реализации этих задач в отдельных повятах. Во всех случаях намеренные дотации были передаваны в 3 взносах соответсвенно дню: 8 апреля 2011 г., 6 мая 2011 г. и 10 июня 2011 г. Сроки передачи отдельных намеренных дотаций были связяны прежде всего с установленном сроком проведения военной квалификации. Данную задачу надо было выполнить с 4 апреля 2011 г. по 31 августа 2011 г.

Следующей задачей из круга правительственной администрации, реализованной е.м.с. на основесоглашений заключённых с воеводой, было ограничение преступности и антиобщественных поведений – в пределах

[43] Закон от 16 февраля 2007 г. о запасах нефти, нефтяных продуктов и природного газа а тоже правилах поведения в ситуациях угрозы топливной безопаности государства и перебоев на нефтяном рынке (З. В. Нр 52, ст. 343 с изм.) и распоряжение Министра Хозяйства от 24 апреля 2007 г. по делу органов упрлномоченных выдавать получателям полномочий на покупку топлив и образцов этих полномочий (З. В. Нр 87, ст. 582 с изм.).

[44] Ср. ст. 35 закона от 21 ноября 1967 г. о всеобщей обязанности обороны Республики Польши (текст одн. З. В. от 2004 г. Нр 241, ст. 2416 с изм.).

правительственной программы п.з. „Вместе безопаснее”. В этой сфере заключено 2 соглашения. В порядке соглашения воеводы с гминой гмине поручено:

- анализ явление насилия в семье (без определения расходов этой задачи),
- бесплатные консультации в консультационном пункте – дежурства специалистов т.е.
- информационные кампании (в виде листовок, плакатов, в местных медиях),
- тематические обучения (для социальных работнилов, полицейских, санитарной службы, членов междисциплинарной группы и рабочих групп),
- организование групп помощи для жертв насилия.

Полная стоимость порученной задачи составляла 38.380 ЗЛ., в этом дополнительное финансирование в форме намеренной дотации в размере 16.030 ЗЛ. (41,77% расходов задачи), а гмина из собственных средств передала 22.350 ЗЛ. на реализацию задачи (58,23% расходов задачи).

На основе соглашения заключённого между воеводой и воеводским самоуправлением поручено реализацию задачи п.з. „Есть альтернатива” в пределах правительственной программы „Вместе безопаснее”. В связи с этом воеводское самоуправление исполнил:

- конференцию п.з. „Предотвращение преступности и виктимизация среди детей и молодёжи”,
- конкурс для детей и молодёжи п.з. „Есть альтернатива”,
- тематическое обучение для полицейских, учителей и педагогов (работа с детьми проявляющими расстройства в поведении, прдотвращение деморализации и преступности малолетних (полицейские),
- пикник прфилактический п.з. „Спорт, наука и искусство как альтернативные способы проведения свободного времени”.

Полная стоимость порученной задачи составляла 83.340 ЗЛ., в этом дополнительное финансирование в форме намеренной дотации в размере 77.100 ЗЛ. (92,5% стоимости задачи) выплачиваемой в 4 траншах согласно графику реализации задачи. Остальные расходы в размере 6.240 ЗЛ. воеводвское самоуправление финансировало из собственных средств (7,5% расходов задачи).

Последнее соглашение, заключённое между воеводой и повятом, касалось поручения ведения некоторых дел из круга правительственной администрации, принадлежащих к компетенциям Воеводского Рестовратора Памятников Старины, напр.:

- выдача разрешений на помещание на памятниках старины вписанных в реестр технических устройств, плит, реклам и надписей,
- выдача разрешений на предпринимание других действий, которые могли бы нарушить или изменить вид памятника старины вписанного в реестр,

- приём уведомлений от собственников или владельцов памятников о повреждении, уничтожении, пропажи или другом угрозы для памятника,
- согласование разрешений на стройку или разборку по отношению к строительным объектам и площадей не вписанных в реестр памятников, а вписанных в гминный учёт памятников,
- выдача свидетельств по делам земель и зданий вписанных единолично в реестр памятников с целью освобождения от налога с недвижимого имущества.

Размер намеренной дотации на релизацию этих задач установлено на сумму 9.775 ЗЛ.

В мазовецком воеводстве в исследованный срок в пределах 46 соглашенийвыступило 5 категорий задач:

- соглашение между воеводой и столичным городом Варшава по делу поручения создания центра спасательного уведомления по правилам определённым в законе от 24 августа 1991 г. о противопожарной безопасности (воевода гарантировал финансовые средства в форме намеренной дотации 2010 г. в сумме 1.300.000 ЗЛ. предназначенной на работы строительные и по переделке помещений и покупку оборудования сетевой инфраструктуры для Центра, а во время следующих годов – в размере установленном ежегодно путём дополнительных соглашений. Соглашение заключено на неопределённый срок);
- соглашения (всего 41) между воеводой и гминами по делу поручения задач касающихся ухлда за могилами и военными кладбищами находящимися на их территориях (предохранительные работы, уход за зеленью,сохранение чистоты и порядка, создание могилы неизвестного солдата, ремонтные работы). Суммы намеренных дотаций были дифференцированы, в зависимости от расходов задач и составляли от 1.000 ЗЛ. до 20.000 ЗЛ. ежегодно (4 гмины обязались реализовать данные задачи из собственных средств);
- соглашения (всего 2) между воеводой и самоуправлением воеводства мазовецкого по делу передачи передачи средств из государственного бюджета на досрочное финансирование квалифицированных расходов и неквалифицированных касающихся налога от товаров и услуг – ВАТ понесенных на реализацию действий, предявленных с целью финансирования в пределах действий „Улучшение и развитие ифраструктуры связанной с приспособлением сельского хозяйства и лесоводства”. Схема II – Заведование сельскохозяйственными и водными ресурсами, Оси I – Улучшение конкурентности

сельскохозяйственного и лесьного сектора на основе Программы Развития Сельских Районов в годах 2007 – 2010;

- соглашения заключённые между воеводой и столичным городом Варшава по делу передачи недвижимостей из ресурсов Государственного Казначейства для делопроизводства в пользу города, через освобождение занимающим да сих пор недвижимость Воеводским Учреждением Охраны Памятников Старины (стороны соглашения согласовали, что только представление их намерений и деклараций, которые не вызывают гражданских обязательств);
- соглашение между воеводой и гминой касающиеся реализации правительственной программы ограничения преступности и антиобщественных поведений „Вместе безопаснее" (задача касалась улучшения безопасности детей и молодёжи в школе в Легионове в 2011 г.). Не эту цель предназначено дотацию в сумме 100.000 ЗЛ.

В подляском воеводстве соглашения, заключённые между воеводой и гминой (сельской или городской) или воеводой и повятом, касаются двух категорий задач. Доминируют задачи касающиеся ухода за могилами и военными кладбищами на территории принадлежащей гмине, в этом выполнение, эвентуально продолжение реализованных ремонтных работ общих могил, продолжение ремонтных работ центрального памятника на кладбище; выполнение, эвентуально продолжение ремонтных работ кладбища (всего 12 соглашений). Финансирование этих задач происходит в форме намеренной дотации. В зависимости от отрасходов этих задач отдельные намеренные дотации, в годовом размере составляли от 2.000 ЗЛ. до 16.000 ЗЛ. Осталтные 2 соглашения, заключённые соответсвенно с повятом и городской гминой, касались реализации правительственной программы ограничения преступности и антиобщественных поведений п.з. „Вместе безопаснее" (в пределах деятельности „Охрана национального наследия" и в пределах деятелтности „Насилие в семье"). Для повята гарантировано сумму намеренной дотации в размере 33.150 ЗЛ. (передаваемой в двух взносах, соответственно 6.400 ЗЛ. по 20 апреля 2011 г. и 26.750 ЗЛ. по 20 сентября 2011 г.), а для городской гмины сумму намеренной дотации в размере 94.434 ЗЛ. (передаваемой в трёх взносах, соответственно 47.217 ЗЛ. по 15 мая 2011 г.; 32.217 ЗЛ. по 15 августа 2011 г. ; 15.000 ЗЛ. по 15 ноября 2011 г.).

В западнопоморском воеводстве соглашения, заключённые исключительно между воеводой и гминой (сельской или городской), касаются прежде всего поручения задач ухода за могилами и военными кладбищами на территории принадлежащей гмине (5 соглашений). Финансирование этих задач происходит в форме намеренной дотации передаваемой в 12 месячных взносах, с тем, что суммы средств на реализацию этих задач во время года составляли от

500 зл. до 1500 зл. Остальные два соглашения касаются соответсвенно: выступления с инициативой предприятий касающихся противодействия насилию в семье и действительности в пользу общественного сознания (1 соглашение с суммой намеренной дотации в размере 87,5 тыс. ЗЛ.); поручения ведения дел и выдачи административных разрешений касающихся охраны памятников старины и ухода за памятниками (1 соглашение). В этом последнем случае воевода не передал никаких финансовых средств, а в соглашении установлено, что гмина реализует задачу в пределах собственных техническо – организационных и финансовых средств, что вызывает определённые сомнения в контексте общих нормативных предпосылок поручения е.м.с. реализации задач из круга правителтственной администрации.

Из анализированных выше соглашений вытекает, что они заключаемые или на определённых срок (как правило на 1 год), или на неопределённых срок (в этом случае актуализация содержания соглашения, особенно по отношении к суммам намеренных дотаций на очередные годы просзодит путём дополнительных соглашений). Среди анализированных соглашений преобладают соглашения заключаемые воеводами с местными е.м.с. (гминами и повятами), а только в нескольких случаях заключено соглашение с региональными е.м.с. (самоуправлением воеводства). В некоторых случаях в соглашениях заключались очень неэффективные постановления напр. касающиеся передачи по месячным частям низких сумм намеренной дотации (500 ЗЛ. изи 600 ЗЛ.), что вело к этому, что месячный взнос передаван на банковский счёт е.м.с. составлял около 45 ЗЛ. до 60 ЗЛ. При этом были понесены добавочные расходы банковских оплат за реализацию переводов. Передача больших сумм намеренных дотаций в 3 или 4 взносах является обоснованной, потому что происходит вместе с постепенной реализацией порученной задачи и даёт возможность осуществлять контроль воеводой, как орган поручавший реализацию задачи.

Кроме этого контроль финансового хозяйства е.м.с. касающуюся задач правительственной администрации, реализованных этими единицами на основе законов или заключаемых соглашений, осуществляют региональные счётные палаты по критериям соответствия с правом и соответствия документации с наличным составом, а тоже с учётом критерия целенаправленности, честности и экономности[45].

[45] Ср. ст. 5 закона от 7 октября 1992 г. о региональных учётных палатах (текст одн. З. В. от 2001 г. Нр 55, ст. 577 с изм.).

5. Заключительные примечания

Юридические положения регулирующие правила заключения обсуждаемых соглашенй и финансирования задач в них определённых рассеянные во многих юридических актах, так нормирующих строй и задачи е.м.с. кака и правила их финансового хозяйства, а тоже в отдельных законах регулирующих подробные аспекты функционирования публичной администрации.

В результате заключаемых соглашений осуществляется не только поручение реализации определённой задачи из круга правительственной администрации для выполнения конкретной е.м.с., но тоже определение реольных расходов такой задачи.В этом случае происходит трансферт финансовых средств из бюджета государства в бюджет единицы местного самоуправления. Сумма передаваемой намеренной дотации даёт возможность тоже финансирование вознаграждения лиц, которые в данной е.м.с. непосредственно участвуют в реализации таких задач.

Как указывают опыты прошлых годов задачи первоначально заключённые в обсуждаемых соглашениях становятся – после соответствующего изменения законодательства – собственными задачами е.м.с. (такие изменения призошли по отношении к некоторым задачам касающимся публичных дорог, здравоохранения или общественной помощи, напр. уплата жилищных прабавок). Таким образом углубляются процессы децентрализации в публичной администрации, которых начальным этапом становятся соглашения заключаемые между органамиправительственной администрации и е.м.с. По отношению к остальным задачам т.е. находящихся в кругу действительности правительственной администрации, соглашения дают возможность осуществление текущей и соответствующей конкретным потребностям корректуры законного распределения задач между органы правительственной администрации и метсное самоуправление. После истечения срока соглашения существует возможность или продолжения этого процесса (через заключение следующего соглашения), или возврата к состаянию определённому законодателем. Ввиду этого можно подходить к обсуждаемам соглашениям как к форме эластичного реагирования на изменяющиеся условия реализации определённых публичных задач. Одновременно является одним из самых важных инструментов реализации правила пособничества находящейся в преамбуле Конституции РП. Идея субсидярности имеет динамический характер, что обозначает необходимость постоянной проверки эффективности принятого распределения публичных задач и возможность осуществления по мере потребностей передачи компетенций[46].

[46] А. Шпор, Государство а субсидярность как закон права в ЕС и в Польше, „Территориальное самоуправление” 2001, нр 1-2, с. 3.

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Administrative Discretion and its Limits in the Matters of Administrative Punishment

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Abstract: This contribution deals with administrative discretion in administrative punishment, criteria which are important for imposing sanction by administrative bodies (one of the fundamental principles, namely the prohibition of winding a fine effect, and the question of legal succession to the obligation to pay the penalty imposed) and the limits of judicial review of administrative decisions on the issue of administrative punishment, which is an important tool for creating limits to the administrative discretion of administrative authorities.

Keywords: punishment, administrative discretion, administrative authorities, criteria, penalty.

1. Introduction to administrative discretion in administrative punishment

Administrative punishment[1] is a mean of enforcing state laws interfering often significantly into the property rights and other rights of subjects. For this reason it is necessary for the law to determine authorized administrative bodies for these issues very carefully, prudently and transparently and to set limits to the administrative authority regarding the issue of administrative punishment in order to reduce the likelihood of abuse of this authority and with maximum possible consideration of the circumstances of the specific case. The administrative punishment takes place in the limits of the so-called administrative discretion; it is the right of discretionary administrative authority to impose a punishment within the range specified by relevant legal standard.

The so-called discretionary authority of any administrative body is a necessary law institute, as well as an institute which brings in some cases the disruption of the principle of legal certainty of addressees of legal norms. On the one hand, it is

[1]Administrative punishment means granting sanction for an *administrative offense*, which means the unlawful conduct of the responsible person, whose characteristics are listed in the law and with which the law connects the threat of sanctions of criminal nature imposed in the performance of public administration. In the Czech theory the typical types of administrative offenses with regard to legislation considered are: misdemeanors, also called the other administrative offenses of individuals, the administrative offenses of legal persons, administrative offenses of mixed nature, public disciplinary offenses also called the police administrative offenses. For more information see the Mates, P. et al. Principles of administrative criminal law. Prague: C.H. Beck, 3 edition, 2002, p. 7 and following.

necessary to express the possibility of a specific form and the amount of punishment only within a certain borders, within which the final amount of administrative sanctions should be and which would then be specified more precisely by the administrative authority after taking into account the circumstances of each specific case, without the legislation provided to be setting an accurate and uniform character and amount of the penalty for all cases without exception, on the other hand, it is necessary to know the exact, certain, clearly declared, limited by its amount and by the court in the frame of its judicial activity[2] to set sufficiently effective controllable rules under which the administrative authority will impose a specific sanction, because without which the administrative discretion, even with the possibility of subsequent judicial review, would be a mean of no "refinement" of certain rules within predetermined limits, which are to their potential recipients generally known, but a mean of an unsustainable "expansion" of legal norms, which could have a fatal consequences for the legal certainty of legal entities and it could become a tool for "creating" or "completing" the law regarding the question of sanctions.

In the following text I will focus on the limits of discretionary authority of administrative bodies in matters of administrative punishment (especially business entities)[3], namely the imposition of fines, and limits of judicial review of decisions of administrative bodies regarding the same issues, all in light of the current law of Czech courts[4].

The most typical and most frequent sanctions which may be imposed for an administrative offense is a fine. Discretion of administrative authorities on the issue of imposing a fine is possible, if *the law provides free space in deciding the borders, which it sets*[5]. This space is usually expressed differently. It may be *alternative decisions* of administrative authorities to impose a fine (for example, a combination of the maximum, fixed boundaries of the fine and moving criteria such as criteria of

[2] In principle, the procedure according to § 65 et seq. Act No. 150/2002 Coll. Administrative Procedure Code, as amended (hereinafter the "Administrative Procedure Act").

[3] Here I would like to point out that under Czech law can prosecute and impose criminal sanctions on legal persons for administrative offenses (subject of liability is a legal entity as a whole), but not for criminal acts. his is due to the fact that Czech law No. 140/1961 Coll. Penal Code, as amended, is based strictly on the principle of individual criminal responsibility of individual persons and does not recognize the so-called collective responsibility. However, at present times there is a growing trend to also introduce criminal liability of legal persons. For more details see Musil, J., Powder, H., Faldyna, F. Reflections on the criminal liability of legal persons de lege ferenda. Criminal Law, 2001, No. 3, p. 6 et seq.

[4]Although also in the field of administrative punishment, the principle of "ne bis in idem"is valid, is not excluded a concurrent sanction of two administrations bodies at the same time for the same activity, fulfilling the constituent elements of two offenses under two different legislations, if the sanctions should be legally decided by two different administrations. It is the legislature that - if it considers that such a punishment, which appears as a double punishment of the same thing, is materially inadequate – to change the legislation. For more details, see Judgement of the High Court in Prague of 25 May 1998, sp. 6 A No. 168/95.

[5] Hendrych, D. et al. Law Dictionary. New York: C.H. Beck, 2001, p. 884

turnover[6] or criteria of minimum income[7]) with the fact that it is at the discretion of the administration, how to use these options . This space may also be expressed by *current setting minimum and maximum limit of a fine* or by specifying *only maximal*[8] or *minimum amount of the fine* with a possible indication of the criteria for its determination, etc.

The last mentioned threshold of discretionary rights when imposing the fine, that is the *exclusive setting of the lower the fine*, is problematic, it could be contrary to the principle of legal certainty regarding the maximum limit of the fine that would "discourage" from the violation of legal obligations, although effectively, but not limitedly. There would be a danger to the "too free" discretion of administrative authorities, as it would have sufficed, "logical" and at first glance transparent justification to impose a fine in the amount and the court would not review it, respectively. Very problematically, the administrative authority's decision to cancel, and respectively.exercise their moderation right (more below). Determination of only the lower limit of the fine without setting the current upper limit of fines would mean unlimited discretion of administrative bodies, which should presently in modern law state be strictly avoided.

The upper limit of the fine can not be exceeded, administrative authority can not impose a fine higher than the law sets (as well as impose a fine of not less than a specified lower limit). The question of legal regulation of *the lower limit of the fine* was now the subject of two decisions of the Constitutional Court of the Czech Republic.

The first decision of the Constitutional Court stated[9] that a "statutory minimum amount of the fine must be set to allow at least to some extent, to take into account assets and personal circumstances of the offender, in the given case so that, imposing a fine, even though the minimum amount, would not have a liquidation effect on the offender, or it would not cause that business activity after a large (several years) time period would loses any sense. If this principle is not respected, it becomes such interference to individual property rights, which due to its intensity represents a violation of Article 11, paragraph 1 of the Charter of Fundamental Rights and Freedoms[10] and Article 1 of the Additional Protocol to the Convention for the

[6] For example Act No. 143/2001 Coll. On Protection of Competition, as amended (hereinafter the "Law on Protection of Competition, or" ZOHS ") in its provision § 22 paragraph 1 point. a) provides that the Office for Protection of Competition may decide to impose a fine "up to 300.000, - CZK or up to 1% of net turnover reached by the competitor for the last completed financial year ...." The administrative authority must choose whether a fine will be imposed in accordance with the criteria of percentage of turnover or criterion of limitations on the absolute amount.

[7] For example Act No. 344/1992 Coll. Cadastre, as amended, published in its § 24, in calculating the upper limit of the fine three times the minimum wage set by government decree.

[8] Comparing for example provisions of § 22, paragraph 3 ZOHS, that "for conduct contrary to an enforceable decision of the Office may impose a fine of up to 1.000.000, - CZK."

[9] Finding of the Plenum of the Constitutional Court of 13 August 2002, sp. Pl. U.S. 3 / 02.

[10] See Resolution of the Presidium of the Czech National Council of 16 December 1992 proclamation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, published under No. 2 / 1993 Coll. (hereinafter the "Charter of Fundamental Rights and Freedoms").

Protection of Rights and Freedoms. At the same time it constitutes a breach of Article 1 of the Charter, as it causes a fundamental inequality of the social subjects."

In its second decision the Constitutional Court stated[11] that a "penalty may, under certain circumstances, constitute interference in the fundamental right under Article 11, paragraph 1 of the Charter of Fundamental Rights and Freedoms, and this is in the case, if it interferes in the property rights of individuals with considerable intensity. Anchoring the minimum amount of fine in the law, in principle pursues a legitimate aim, since it allows to differentiate dangerousness or severity of different types of offenses. It may seem like a mean of protection against possible discrimination, on the other hand, it tends to reduce the possibility of an administrative body to take into account the specific circumstances of the case, of the individual offender and his circumstances. Setting and raising the lower limit of sanctions does not always enable it to apply the appropriate intervention and it may have a relation to entities to which the penalty of a fine imposed, sometimes even the character of liquidation."

There, where the decision was issued based on a legally allowed discretion law of the administrative body, it is also the *obligation of this body discretionary use* to deal with all aspects that are like the premise of such considerations necessary, to obtain for that use the necessary evidence, use the evidence, draw from the evidence the factual and legal findings, and then an administrative account, however, while respecting the statutory criteria in accordance with the rules of logical discretion to reach a decision. The reasons for the decision of the administrative authority must therefore be readable, what considerations led him to impose a sanction of this or that amount[12] and so that the amount of the fine was set with consideration of the considered criteria and meeting the statutory limitation on the condition of proportionality, and that was not related to any delinquent as a penalty of liquidation. If the law sets directly rules, which administrative authority is required to keep in determining the amount of fines, the administrative body is obliged to consider each aspect separately and then all at the same time, and deal with the objections put forward by a participant during proceedings[13].

According to the Supreme Administrative Court, we can not ignore the fact that although the administrative authority has a freedom of discretion in imposing a fine, it *is bound* by the fundamental principles of administrative decisions, including the obligation to make decisions in similar cases similarly[14].

Part of the discretion in deciding on the imposition of penalties for administrative offenses can be objectified as a foundation and basis for considerations of administrative authority on determining the sanctions also expressed mathematically

[11] Finding of the Plenum of the Constitutional Court of 10 March 2004, sp. Pl. U.S. 12/03.
[12] See Judgement of the High Court in Prague of 26 March 1999, sp. No. 7 A 52/96, both cited the High Court in Prague of 25 May 1998, sp. 6 A No. 168/95.
[13] Judgement of the High Court in Prague of 25 May 1998, sp. 6 A No. 168/95.
[14] Judgement of the Supreme Administrative Court of 29 June 2005, sp. As No. 8 5 / 2005.

by model situations or calculations. They can not replace discretion thou or eliminate it[15].

2. Criteria for imposing sanction by administrative bodies

2.1. Basic criteria for imposing sanctions by administrative bodies

Laws often differentiate the amount of fine based on the type and seriousness of the illegal conduct. When imposing (charging) sanctions, the administrative authority examines all the circumstances of the offense committed, redress for those responsible, ensuring the protection of public interests.

Criteria for the imposition of sanctions by administrative organs are diverse. In some cases, legislation alone determines what specific criteria must the administrative authority when imposing administrative sanctions take into account, and this list can be exhaustive (in particular, it is the offense severity, duration, circumstances of the infringement, the extent caused by damage) or taxative (it is rather rare).

If the law does not contain a taxative list of factors, to which the administrative authority in determining the amount of the fine, must take into account, but only a list of examples, where out of possible, and into consideration coming aspects mentions at least some, then such legislation binds the administrative body in this way that these very legal aspects it must always consider (but not only them) when in addition to the administrative authority retains the discretion whether to even take into account other aspects, not mentioned in the law directly, but for the present case significant. In the case that the administrative authority does not express itself to the issue of fine amount, justifying its decision as required by law, this is a mistake, resulting in cancellation of the contested action of decision[16].

With regard to the specific criteria that the administrative authority when imposing administrative penalties must consider, it is a criteria, which appropriate legal standard, usually demonstratively, prescribes to consider, as well as on criteria beyond the legal standard prescribed, taking into account the findings of fact state of affairs for substantial administrative authority itself, as well as the criteria, whose considering, usually logically considered as mitigating circumstances, the parties argue during the penalty procedure. Such criteria may be objectionable conduct and the severity of its consequences, its possible recurrence, the duration of the infringement, the criteria related to the subjective aspect of the offense, the fine internal proportionality in relation to the application of the principle of legitimate expectations and other. Its indispensable place also has considerations regarding risk of winding up effect of a sanction.

[15] Judgement of the High Court in Prague of 21 February 1997, sp. 7 A No. 19/95.
[16] Judgement of the High Court in Prague of 27 December 2001, sp. 7 A No. 77/9

When imposing sanctions it is necessary to ensure *its adequacy in terms of its purpose.* For proper and fair sanction is an important to observe the principle of legality and the principle of individualiation of punishment. *The principle of legality of punishment* lies in the fact that the administrative authority must strictly follow the rules on penalties, which are contained in the relevant regulations. *Individualisation of sanctions* reflects that the type, combination and intensity of sanctions must be in a particular case designed to fit all circumstances and the specifics of the case[17] is in line with the principle of individualization of punishment, which applies in an administrative punishment, so that the administrative authority took into account materially infringement when deciding on the penalty, i.e. to its "importance", a concept similar to the concept of "social dangerousness" in the criminal law[18].

In connection with the individualization of sanctions, necessarily raises the question of *equality* in *the imposition of sanctions.* When the law sets certain constraints on the imposition of sanctions, it is necessary to take into account the financial circumstances of the person whom it is imposed sanction and to stay out of the flat setting of any fine (there could be the risk of breaching the principle of equality in the social sphere). This relates particularly to the principle of *prevention and repression sanction[19]*.

The above, also commented the Constitutional Court[20], one who does not understand equality as an absolute but as relative (and, moreover, an accessory in relation to other fundamental rights and freedoms). The notion of relative equality is closely related to the concept of proportionality of interference into fundamental rights. The nature of fines as a property sanction naturally derives that if it has to be individualized and reasonable, it must reflect the financial situation of the punished person. The same amount of fine imposed on a rich individual will seem ridiculous and ineffective, while in the case of a poor individual it may be draconian and result in liquidation. So it is no violation of the principle of relative equality, when two people should be fined very differently, depending on their financial circumstances. Penalty as a punishment must be differentiated to effectively act as a punishment and deterrence (individual and general prevention).

Preventive role of penalties and its effect is not just against the person to whom the penalty is imposed. Sanctions must have the power to discourage from illegal procedure other carriers of the same legal responsibilities, this effect can then lead to a punishment corresponding to the importance of the protected interest, timely and fairly inferred. In the case of a financial penalty it should be noticeable in the sphere of property of the offender, therefore, not to be rather insignificant for him, and it

[17] Judgement of the Regional Court in Brno on 12 April 2007, sp. No. 57 Ca 49/2006.
[18] Judgement of the Regional Court in Brno on 12 April 2007, sp. Well. 57 Ca 49/2006.
[19] The Supreme Administrative Court emphasizes the role of preventive and punitive sanctions. Cf. decision of the Supreme Administrative Court, no. As No. 2 8 / 2007.
[20] Finding the Plenum of the Constitutional Court of 9 March 2004, sp. Pl. U.S. 38/02.

necessarily must contain in itself a punitive component, but may not be for that person a question of liquidation. Otherwise, the sanction would have no meaning to the offender[21].

Administrative authority in determining the obligations *of legal entities* to fulfill (usually pay) penalty for an administrative offense in the field of public law is governed, unless the law says otherwise, by similar principles as the court in the field of private law when deciding on their general liability regarding the damage. The basic precondition for the imposition of sanctions will be especially the fact that the damage or threat to legally protected interest came from operations of a legal person, or if the reason was the activity of a legal person, any act or omission of those people, whose legal entity used for this activity. Responsibility for the administrative offense has an objective character, it is not therefore a liability for fault, nor the responsibility for the result[22]. Finally, it should be noted that the responsibility for an administrative offense in the field of public law, according to the High Court in Prague can not be generally avoided in reference to the contractual arrangements between private actors (business) relationship, and breach of contractual obligations by the other party of the contract[23].

2.2. Short polemic on the inadmissibility of winding up effect of administrative penalties

As mentioned above, under current law it is not possible to fine a person, who violated his legal duty with a penalty that would be liquidating in its character. It is of course dependent on a case by case basis, what amount of penalty will be for a particular individual liquidating, and therefore there will be especially crucial financial status of the offender, when a certain amount of fine can be for one person liquidating and for another it may not constitute even a partial fulfillment of the its repressive function. The basic principles for forming limit for issuing fines in the field of administrative sanctions is the principle of individualization of sanctions and principle of repression, but it must find limit in the form of the "higher level" - the principle of non-liquidation effect of fines.

Arguments for the inadmissibility of the effect of winding up of administrative penalty

Inadmissibility of winding up effect of administrative penalty comes from the current law (many decisions have already voiced above), but also from the supreme legal force. The prohibition of liquidation of administrative penalties is shown directly in the first provision of Article 1 of the Charter of Fundamental Rights and Freedoms,

[21] Cf. Judgement of the Municipal Court in Prague of 16 November 2004, sp. No. 10 Ca 250/2003.
[22] The Supreme Administrative Court, sp. As No. 2 8 / 2007, referring to the Judgement of the High Court in Prague of 25 November 1994, sp. No. 6 A 12/94.
[23] Judgement of the High Court in Prague of 23 September 1994, sp. 6 A No. 197/93 .

which states *the principle of equal rights* (in this case the right of no interference by an administrative body as a form of administrative punishment for persons possessing significant financial resources, and for persons whose financial circumstances are slim), and from the provision of Article 11, paragraph 1 of the Charter of Fundamental Rights and Freedoms, under which everyone has the right to own property, and ownership of all owners has the same content and protection.

According to Article 26, paragraph 1 of the Charter of Fundamental Rights and Freedoms is enshrined *the right to engage in commercial and other economic activity.* Limitations to this right provided for in paragraph 2 shall be interpreted so that it serves to clarify the course of the business activities for various business sectors in particular with regard to the nature of the business and the role of the public interest to carry out certain activities, not as a mean of disabling the course of the business activities for the violation of the provisions of legislation due to a penalty which is due to the amount liquidating.

Punishment (the decision on guilt and punishment for violation of law) is divided into judicial punishment or administrative punishment. In the area of administrative punishment *can* be according to the European Court of Justice, the European Court of Human Rights and the Constitutional Court *be applied the principles of criminal law*, it is justified by the fact that the area of sanctions for violation of provisions of the administrative code may be subsumed under the scope of "delinquent administrative law" and constantly interpreted unjustified distinction forms of "criminal charge" within the meaning of Article 6 of the Convention for the Protection of Human rights and Fundamental Freedoms[24], to "criminal charges" and "allegations of other offenses" in the case of an administrative process in the detection and prosecution of anticompetitive conduct must necessarily apply the same principle guarantee of rights as in the cases of detection and prosecution of crimes.

There is no distinct and permissible boundary between criminal law and administrative offenses and concrete subsample of offense under any of these areas has only a relative value, we should take into account the general character of the relevant standards and preventive and punitive purpose of a sanction and to the competent administrative sanction grant the nature of the criminal offense within the meaning of Article 6 of the Convention regardless of exploring a certain severity or social danger, the crucial one for the qualification as a criminal offense. If, for example, according to the conclusion of the European Court of Human Rights, which made regarding Öztürk[25], contrary to the object and purpose of Article 6 of the Convention to allow the state to remove from this provision, a group of offenses that will be characterized as "light" and therefore not as a crime, then it would be inconsistent in the same range to

[24] Convention for the Protection of Human Rights and Fundamental Freedoms was proclaimed Communication Federal Department of Foreign Affairs No. 209/1992 Coll. (hereinafter the "Convention

[25] The decision of the Supreme Administrative Court on 8 As 17/2007 dated 31.5.2007, published to prejudikatura No 565/2005 Coll. NSS, No 772/2006 Coll. NSS No 832/2006 Coll. NSS

remove from the same group administrative offenses. Moreover, also according to the Supreme Administrative Court[26] it should be in the area of administrative punishment used the principles of criminal law.

The argument for the inadmissibility of the liquidation by administrative punishment is also to protect the interests of creditors rights from the infringer of law (in the sense of "why should bear the consequences also the creditors of the infringer"?). Against this, one has to consider the question whether it would be a sufficient deterrent, and therefore correct, if it also punished those who traded with the infringer ... This means that just as in criminal law it is forbidden as a penalty for an offense the liquidation of a physical person (here understand the prohibition of the death penalty) and legal persons, the same applies for the administrative punishment. We can also understand it so that a very high fine for someone can have a certain degree of similarity of the death penalty (lack or absence of funds could, for example get a specific person to the very "bottom" of its existence).

Arguments against non-liquidation effect of administrative sanction

Based on the Convention on the Protection of Human Rights and Fundamental Freedoms, specifically from Article 1 of Protocol No. 1 "any physical or legal person *is entitled to the peaceful enjoyment of his property, no one can be deprived of his possessions except in the public interest and subject to conditions provided by law* and general principles of international law. "From this follows, therefore, that the very Convention on Human Rights and Fundamental Freedoms does not mean that when a person violates the law, which allows the administrative authority to grant such behavior some kind of penalty, a sanction that could be liquidating, if the conditions of it and the amount is set by law (whether a specific amount or by setting minimum and maximum limits at the same time or only its upper limit above) and if is imposed in the public interest (the fulfillment of this condition will be largely guided by any disputes).

As mentioned above, in Article 26, paragraph 1 of the Charter of Fundamental Rights and Freedoms is enshrined *right to do business and engage and other economic activity*[27]. In the second paragraph of that article is contained restriction to that right "the law may impose conditions or limitations for the exercise of certain professions or activities."

When provided, for example that the law on protection of economic competition, whereas it is also forbidden to enter into agreements that lead or may lead

[26] Decision of 21 February 1984; it was a case where the challenged decision of committing an administrative offense violation of the rules of road.

[27] If the limitation of basic rights (in this case the fundamental right contained in Article 26, paragraph 1 of the Charter of Fundamental Rights and Freedoms) resulted in a legal obligation, it could be done only on the basis of law within its boundaries. In the limits of fundamental rights and freedoms is yet to be considered any restriction of free will by the authorized body, ie the restrictive conditions also determine the performance of the business license. Cf. Finding the Plenum of the Constitutional Court of the Czech Republic on 2 April 1996, sp. Pl. U.S. 31/95.

to distortions of competition (cf. § 3 paragraph 1 ZOHS), this can be considered a limitation on the exercise of business activities in accordance with the above-mentioned Article 26, paragraph 2 of the Charter of Fundamental Rights and Freedoms.

The Office for the Protection of Competition in accordance with § 22, paragraph 2 ZOHS can impose on the competitor who has violated the provisions of § 3 paragraph 1 ZOHS, a fine of up to 10 million (alternatively, with 10 percent of the net turnover for the last completed financial year), this raises the following question, why such penalty should not be a liquidation, particularly if the legislation clearly and transparently prohibits certain acts, the penalty for such behavior in very specific amounts and if based on the competitor's own choice (decision) a prohibited agreement distorting the competition he closes, he voluntarily "meets" the administrative proceedings for a penalty that would, after considering all the circumstances of the case particularly with regard to the seriousness of the violation of legal norms and the consequences of such actions should be real "sanction" and objective in order to be the deterrent for other competitors and to fill its real punitive function.

3. The limits of judicial review of administrative decisions on the issue of administrative punishment

The right to a fair trial, whose major component is the right to hear the case by an independent court, occupies a prominent place in a democratic society. The person concerned must be able to have a decision issued against her *by the court to review* that complies with the guarantees of Article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to a fair trial)[28]. This also applies to administrative decisions regarding the determination of the amount fines.

Determination of the amount of fine[29] for an administrative offense is a result of administrative discretion that can be reviewed by an administrative court. Pursuant to § 78 paragraph 2 of the Administrative Procedure the court may, unless the reasons for the *annulment of the decision* pursuant to § 78 paragraph 1 of the Administrative Procedure (this occurs when the administration overstepped lawful discretionary authority or discretion not abuse; administrative Court in this case does not have "option", but "responsibility" to cancel the administrative authority's decision), *wave from punishment for an administrative offense* or if permitted by law, *reduce* the sentence, if the sentence is manifestly inadequate in amount (on this issue for details see above)[30].

In both cases, moderation is the right of the court.

[28] Constitutional Court of 3 June 2003, sp. No. II. U.S. 71/2000.

[29] The amount of fines must be set to match the legislation in force at the date of violation of law. See Judgement of the Regional Court in Brno on 15 April 2007, sp. No. 57 Ca 19/2005.

[30] However, the court may do so only if such a decision can be made on the basis of the facts, from which came the administrative authority and possibly their own court of inquiry in fundamental ways not added,

If the court has to consider whether the decision exceeded the limits and criteria established by law[31], it is not sufficient, that the amount of the sanction is in the range, which the law permits, shall be possible to review also in this sense, whether and how were taken into account the views set out in the law[32].

However we can not ignore the fact, that the court *can not replace the discretionary authority of an administrative authority's* own discretion and can not conclude that the remaining violation of the law imposing a fine in the amount of concrete is sufficiently justified, by this he would impersonalize the authority of executive body, which it does not have[33].

If the court finds all the considerations regarding the administration of the fine as a logical and transparently administered, the fine does not appear in any way unfairly and fulfills the function of both repressive and preventive, then secondly, the decision on the issue of fines is reviewable and following the constraints of judicial review of administrative discretion also legal and there is no reason for applying moderation right of court to cancel the administrative decision for reviewability.

According to the current legislation, for the *lack of reasons* of the administrative decisions imposing fines for administrative offenses, *non-reviewable by the court* (and is therefore the reason for the annulment of an administrative authority) if it is justified only by the fine imposed in the legal range[34] or not detecting the administrative authority in proceedings to impose sanctions facts relevant to assessing whether the statutory requirements for imposition of sanctions, so that it can assess the matter in legal terms, to such non-reviewability the court takes into account even without the objection from the prosecutor of official responsibility[35]. Also, if out of the fundamental reasons for the decision it is not obvious reflection of the administrative body about why the reasons that the facts meet the specific merits of an administrative offense and why it is such a fine for a certain amount was given, the incomprehensibility of such reasoning excludes reviewability of a decision under review[36].

The lack of justification of the fine imposed can not be cured by simply incomplete statement of the competent authority in the response that "it was evident that the administrative body of first instance respected the legal provisions and imposed

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and suggested if such a procedure the plaintiff in the action (cf. the provisions of § 78 paragraph 2 of the Administrative judicial Procedure).

[31] For example, said the administrative authority of the reasons for its decision that a fine is imposed "on the very lower end of" possible rate for an administrative offense, and it assessed the amount of CZK 200 000, although the law lays down range "to 750 000 CZK", apparently went out of range other than legal. Such decision by the Administrative Court for lawlessness canceled. Cf. Judgement of the Supreme Administrative Court of 29 December 2004, sp. 6 A No. 160/2002.

[32] Judgement of the High Court in Prague of 27 August 1993, sp. No. 6 A 82/93.

[33] Judgement of the High Court in Prague of 28 March 1997, sp. No. 6 A 10/95.

[34] Judgement of the High Court in Prague of 25 February 1994, sp. No. 6 A 24/93.

[35] Judgement of the High Court in Prague of 29 December 1995, sp. 6 A No. 191/93.

[36] Judgement of the Municipal Court in Prague of 22 June 2006, sp. 11 Ca 42/2006.

a fine amounting to one tenth of the statutory rate." Fails even the claim that "for reasons of economy" administrative absence management did not occupy itself with the fine[37].

If, the administrative body of higher instance reaches the conclusion that individual starting points for further reflection of the administrative body the lower court and, moreover, and his conclusions drawn from these assumptions are justified, not impede, in the part in which the decision issued by the lower instance align on the findings referred, expressed agreement with them, and that is assumed in its decision. Such a procedure in itself does not make a decision issued in a higher court non-reviawable[38].

4. A few words on the legal succession in case of administrative punishment

Regarding the legal succession in case of administrative punishment professional discussions are lead. The essence of the problem is that if the administrative authority shall grant a legal person a fine for infringement and the entity legally extinguished without liquidation, ie, typically merges with another entity, without, however, disappeared de facto, the question arises whether the legal successor of his passes are also obliged to pay a fine or not. To answer the implied question, it is necessary to look into the legislation. It developed as follows: Prague High Court in its decision (1996)[39] said that "if the appeal filed in proceedings to impose administrative fines for the offense disappeared legal entity with which the proceedings were conducted, the decision to reject the appeal and uphold the decision of first instance to deliver universal sukcesoru, who joined the rights of the time of extinction of existing precursor, including the procedural rights stemming from his participation in the proceedings. Such delivery has resulted in the *emergence of formal legal decision can not, however, that the legal obligations of the successor formed substantive (material legal power),* such as the obligation to pay the fine, which at the time of the transfer of rights were not. "

In its ruling of 1996, above the High Court in Praze[40] reaffirmed, stating that "the decision on the fine for an administrative offense is a decision of the constitutive character; the reasponsibility to pay the fine arises ex nunc by legal power of a decision imposing a fine. Extinguished in the course of proceedings is a legal entity with which the proceedings were to impose a fine for an administrative offense led, *it is not possible to fine its legal successor*, even if he was taking over all the rights and obligations at the time of his disappearance existing legal rights of his predecessor. "

[37] Judgement of the High Court in Prague of 31 January 2000, sp. No. 5 and 83/98.
[38] Judgement of the Regional Court in Brno of 29 May 2007, sp. No. 62 Ca 20/2006
[39] Judgement of the High Court in Prague of 17 February 1995, sp. No. 6 A 15/94.
[40] Judgement of the High Court in Prague of 30 April 1996, sp. 6 A No. 103/94.

The issues is covered by the subsequent decision of the High Court in Prague (1997)[41], when this came to the conclusion that "*if a person dies during the procedure to review regarding a decision of imposing a fine prosecutor* and in the probate proceedings is an obligation to pay a lawfully imposed fine of liabilities included in the heritage so that it gets paied by some of the heirs, *the proceedings continue with a legal successor, onto whom was passed a decision issued by an inheritance payment obligation arising from the decision on the fine. "*

A new perspective on this subject, however, brought the Regional Court in Brno reviewing the decision of the Office for Protection of Competition of 2003[42],During the proceedings of the gas cartel two companies that were parties to the proceedings, disappeared by merger (without winding up) within the group. Office for Protection of Competition *continued in administrative proceedings with the recipient companies*, because he decided to take the sum of material and personal folders of business through witch exercised the no longer existent company their business activity and continue to do business under the same brands. Office for Protection of Competition, considered the merger of these companies as instruments of *universal succession*, which then included the possible tort liability for an administrative offense committed on competition laws and their predecessors. In fact, it was just a change of identification number of competitors who acted against ther rules[43].

The decision of the Office for Protection of Competition parties attacked the actions of the Regional Court in Brno, which judgment of 2005[44], decisions of the Office for Protection of Competition canceled. It made the decision the division of administrative decisions to the decision in rem and in personam on the decision. The first type of decision is committed to the merits and the legal successor of the original participants, who have committed an infringement (such as the decision obliges anyone who found themselves in a real situation), *while a decision which is the subject of the proceedings is bound only to a specific person participant (typically control sanction*, some licensing procedures, the case status, etc.) according to the court by definition *exclude the transferability of private disposition.* This decision was challenged by a cassation complaint with the Supreme Administrative Court, which ruled on this in 2009[45] The Supreme Administrative Court, however, before publication thereof in other legal matters in 2007[46] reminded the preventive and repressive role of sanctions and a de facto confirmed judicial line advocated by the High court in Prague and the Regional court in Brno. According to the Supreme Administrative Court "*to pay lawfully imposed fine to the legal successor in principle does not pass*, because it is tied to a

[41] Judgement of the High Court in Prague of 21 March 1997, sp. No. A 155/9
[42] The decision of the Office for Protection of Competition With 72/01.
[43] See Neruda, R., Gachová, L. More to the process of succession defunct legal persons in competition matters. Legal Perspectives, 2007, No. 15, p. 561st
[44] Judgement of the Regional Court in Brno on 26 September 2006, sp. No. 31 Ca 84/2004
[45] The decision of the Supreme Administrative Court of 30 December 2009, sp. No. 8 Afs 56/2007.
[46] The decision of the Supreme Administrative Court of 27 July 2007, sp. As No. 2 8 / 2007

responsible person who was saved. The purpose of the administrative penalty is to penalize the perpetrators of the offense, which had been stored in the liability of legal relationship, which is purely personal and educational purposes. In a situation where there is still a body that the infringement committed can not be transferred adverse Legal consequences to the perpetrators of criminal sanctions to cause offense to someone else, respectively. not required to carry harm the one who committed offense.

In its decision of 2009 the Supreme Administrative Court concluded[47] that a test is needed to apply the possible abuse of rights - and in cases where abuse is proven right, will come into consideration transition tort liability. The Supreme Administrative Court emphasized that "it is not possible, nor fair and reasonable to allow abuse of rights without any impact to the body so acting. Legal certainty subjects of law, the court is the proper, fair and reasonable application of law. Applications must be ZOHS while in such a way as to protect the values on which this legislation is based. It is therefore necessary to follow the meaning of the legislation and the arguments made in such a way as to achieve the goal, which follows the law and for which it was adopted. The object is ZOHS effective protection of competition and competitive environment, however, this court can not be achieved by a situation in which will be allowed to accept such conditions, when the violators of competition law standards by certain special-purpose legal acts will be able to avoid sanction punish. What is needed with regard to the purpose and mission was ZOHS under certain narrowly defined conditions to capture some of the competitors in case of their extinction, and punishment of their legal successors. Transformation of a competitor from one legal form to another, especially in the economic, personnel and content in the form of continuing the same economic entity (but legally in the form of another legal entity), according to court is a legal act, the law allowed, which is not in any way to intervene against not argue with him. On the other hand, if such discussions are conducted purposeful attempt to avoid responsibility, it is an abuse of rights.

It is important to note that those decisions concerning the legal status to 31 August 2009, because from that date the Act No. 155/2009 Coll., which was effective from 1 September 2009 amended ZOHS is when it was explicitly laid down rules for the transition of responsibility in case of legal succession, which then addresses the controversy courts.Under the current wording of § 22b, paragraph 6 to 8 ZOHS, the liability of legal persons for an administrative delict becomes the legal successor of that person only if the legal successor at the latest creation of legal succession, or knew the circumstances and your circumstances have known that the legal person before the law of succession has committed acts which filled the signs of an administrative offense. If a

legal person has more successors, is responsible for the administrative offense each of

[47] See Raus, D. The question of participants in public offenses and their tort liability. In Tribute P. Hain, London: Wolters Kluwer Inc., 2010, p. 305th

them. In the area of a fine, well to the extent assumed by the legal successor of revenues, benefits and other benefits from committed an administrative offense, and that, if one goes from the legal successors of the activities for which the administrative offense committed. Destroyed if the legal person who committed the administrative offense, to which the decision, which had been under the administrative offense fined, the duty to pay the fine to the legal successor of the defunct entity. If several successors, are responsible for payment of a fine jointly and severally.

Conclusion

Discretion of administrative bodies in matters of administrative punishment (discretionary authority) must have particular regard to the principle of legal certainty to its limits, despite the existing possibilities of judicial review, without them there would be danger of arbitrariness of administrative bodies and their discretionary authority in the Administrative Punishment could become a means of expansion, rather than specifications, legal standards.

An important tool for creating limits to the administrative discretion of administrative authorities in prosecuting the administrative case law. Like the most problematic seems to be correct considering of all criteria, which "must" or "may" authorities practicing administrative punishment use, especially one of the fundamental principles, namely the prohibition of winding a fine effect, and the question of legal succession to the obligation to pay the penalty imposed.

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Local Government Granting Procedures – an Instrument of Local Cooperation with Nonpublic Units

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Abstract: The paper aim is to present an actual municipal procedures of financing local tasks undertaken by nonpublic units and to point out the main problems of applying granting law by Polish municipalities. The paper will also make short comparison with the relevant system existing in United Kingdom, where the phenomenon of "local quangos" explosion could be observed in recent years.

Keywords: local government finance, granting law, local government expenditure on grants, grants for private deliverers of local services, phenomenon of British *"guangos"*.

1. Introduction and comparative remarks

The process of introducing nonpublic units to the system of providing current local services has a zero growth in Poland not only because of social and historical backgrounds, but also because of diverse and unclear regulations on financing tasks undertaken by nonpublic units. The choice between a public or nonpublic way of performing local government duties still remains a hard one in Polish local governance and budgetary and financial regulations in this sphere don't make this choice easier. There is a great diversification of "granting" procedures, which are applied in different municipalities to finance the tasks performed by nonpublic units (e.g., private kindergartens, private schools, non-governmental organizations, sport's clubs). One should look for the reason of this diversity not only in the idea of local government independence but also in the Parliamentary law (granting law) set in this sphere, which quite often are full of gaps and unclear regulations.

As stated emphatically in Article 43 of the Polish Public Finance Act 2009[1], *"unless other acts stipulate otherwise, anyone shall have the right to perform a public task financed from public sources"*. Such wording is understandable in the light of the European principles of subsidiarity and fair competition and it has special impact in local governance. Additionally, the European Charter of Local Government, 1985 spells out two other principles of local governance: the principle of local government's full

[1] Ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych (Dz.U. No 249, item 2104 as amended) hereinafter Public Finance Act 2009

discretion to exercise their duties (Art. 4 § 2) and the principle of local government's right to dispose freely their own financial resources within the framework of their powers (Art. 9 § 1). One can observe that all the principles mentioned above are exercised in a different manner in European countries. Within the previous outputs of Polish public finance law science, we can find few issues relating to nonpublic forms of undertaking local government's tasks (other than PPP and Public Procurement) and methods of its financing. So far, there has not been any comprehensive monograph on this subject matter, which would consider all nonpublic units providing local services outside the PPP and Public Procurement formulas or one which would compare Polish system to the European ones.

With the relation to local budgetary law we can divide nonpublic units providing local services into: nonpublic units financed by the mode of granting (private kindergartens, private schools, nongovernmental organizations, sport's clubs, private owners of monuments, private performers of environmental protection tasks) and nonpublic units financed by other modes (private social care service providers, municipal companies, nonpublic health centers). The paper will deal with the first mentioned group of units. The researches on them are interesting mainly because of fact that an initiative to create such a unit (task) comes not from local government but from its inhabitants (individuals) and local authorities, according to law, have to (private kindergartens, private schools, nongovernmental organizations) or may to (sport's clubs, private owners of monuments, private performers of environmental protection tasks) cooperate with them and finance their activity within the limits of law. However we can observe a great diversification of "granting" procedures, which are applied by different municipalities to finance their tasks performed by nonpublic units and eventually this could be a reason of the minimal participation of nonpublic units in local service delivery in Poland.

We find a quite diverse relation in United Kingdom, where *payments for Services or expenditures on Agencies(Voluntary Organisations, Private Contractors, Other Establishments)* constitute 25-40% of total expenditures of local governments[2]. While British local authorities possess minimal income (grants based) autonomy, they have been granted a large expenditure and organizational freedom, which finally caused a great ambiguity and diffusion of local governments' responsibilities. In fact local government in the UK operates within a network of appointed and nominated boards (such as housing associations, registered social landlords, children's trusts, business improvement districts) and shares its responsibilities with a wide range of non-elected agencies conventionally known as *"local quangos"* – quasi-autonomous non-governmental organizations (such as health authorities, police authorities, learning and

[2] A.Ostrowska, *Local Government Expenditure Autonomy in Making Grants. Present and Future Dimension for Poland and Scotland*, In: Finanse publiczne i prawo finansowe w Europie Centralnej i Wschodniej w warunkach kryzysu finansowego, ed. E.Ruśkowski, I.Zawerucha, Temida 2, Białystok-Lwów 2010, ISBN 978-83-89620-85-9, s. 207

skill councils)[3]. One is tempted to state that a new stage has arrived in the UK – the stage for a greater involvement of private sector firms, voluntary bodies and non-elected organizations in providing public services. In the last two decades British local authorities have become "enablers and regulators rather than providers of services"[4]. This is strictly connected with relaxation of the *ultra vires* rule, which we can observe in UK recently. The Scottish Parliament, for example, has relaxed this rule by giving Scottish local authorities the *power to advance well-being*. Under the Local Government in Scotland Act of 2003, within some statutory limits, a local authority has the power to do anything which it considers is likely to promote or improve the well-being of its area and persons within it. This includes power to incur expenditure, give financial assistance, enter into agreements, cooperate with, provide staff, goods, facilities or property to any person. Is it possible to introduce the construction similar to the *power to advance well-being* in Poland? Considering its historical and constitutional backgrounds it seems to be impossible and another reasonable and modern model is needed to be applied in Poland in this sphere.

2. Local grants for tasks undertaken by nonpublic units in Poland – amounts and structure

Next to the Public-Private Partnership (PPP) and Public Procurement payments, the only permitted financial transfer from local government budget to any nonpublic/private unit in Poland is a budgetary grant made under statutory regulation. In 2009 grants made by local governments to finance local tasks performed by nonpublic units constituted about 5% of total local government expenditures, which reveals the marginal scale of nongovernmental units' participation in performance of current local tasks. Table 1 presents the structure of Polish local government's expenditure and the participation budgetary grants, which has been made from municipal budgets in 2010 year.

[3] G.Jones, *The future of local government: has it one?*, Public Management and Policy Association, London, May 2008, pp. 1-6

[4] B.Denters, L.E.Rose (ed.), *Comparing Local Governance. Trends and Developments*, Palgrave Macmillan, 2005, pp. 159-161

Table 1: The structure of local governments expenditure in Poland (2010)

Expenditure category	Gminas /Communes/	Cities with the right of the county	Poviats /Counties/	Voivodeships /Regions/	All local governments
	% of total expenditure				
CURRENT EXPENDITURE including:	74,9	77,7	78,2	61,0	75,1
employee costs	33,4	31,4	44,4	14,1	32,6
grants	5,1	8,8	5,3	22,9	7,9
debt's interests	0,9	1,4	0,8	0,9	1,0
natural persons benefits	14,8	6,6	3,1	0,5	9,3
miscellaneous exp.	20,7	35,3	24,4	22,5	33,6
CAPITAL EXPENDITURE	25,1	29,4	21,8	39,0	24,9

Source: the author's calculations on the basis of: State Budget Report 2010, Local Governments Budgets Report, Schedules and Tables, Ministry of Finance, Warsaw 2011, www.mf.gov.pl, July 31th, 2011

We may conclude from the above Table that grants constitute the greatest amount at the region level and the smallest on at the commune level, but generally they represent a minimal participation in total expenditures of Polish municipalities. While analyzing this ratio we have to notice that some part of grants from local governments budgets goes to public units (theatres, museums, public hospitals etc.), which belong to Government Sector (Public Finance Sector). Therefore actually the ratio of grants that local governments make for nonpublic units is only about 5% of their total budgetary expenditures.

The great financial and legal abilities in making grants posses Polish regional governments. This derives from the nature of their public tasks, in particular in redistributing EU sources. Grants made about 22% of total regional governments expenditures in previous year and there is much variety of them. However, this variety derives mainly from the specific character of Polish public finance sector and from the mechanism of financing particular units belonging to that sector. For example regional governments grants for theatres, museums, philharmonic hall, libraries are, in fact, the instruments of financing whole activity of these institutions and kind of mandatory local and regional spending for culture. These grants, therefore, can be treated as an General Culture Grant and should have general, universal grant's procedures and principles, based on regional culture programme. Grants for culture units do not have the proper "granting" function (aiding function) in Poland, which derives from the fact that, although these institutions are independent legal persons, they nevertheless are not

able to finance their all activity by their own incomes. The great amount of regional government's expenditure create also grants for public hospitals. local and regional government grants for hospitals have the other specific character and are an discretionary instrument of financial help to them. Dramatic financial situation of many hospitals in Poland force local and regional governments to make a grant for them, although they are not obliged to do so.

At the other levels of local government (communes, counties and cities with the right of the county) grantsfor units which do not belong to Government Sector (nonpublic units) takes priority. These are grants for non-governmental organizations, private kindergartens, private primary and secondary schools, private higher schools and universities, private welfare houses, professional sport clubs, natural persons or other entities (for environment or monuments preservation purposes). Within this group, apart from statutory provision, a *local subsidy programme* is required to be enacted by local council (to accommodate free market principles). The granting itself, in that case, is a kind of commission of local tasks the effect of which is drawing up the 'grant agreement' between a grantor (local authority) and a grantee (e.g. NGO, private welfare house). We must stress that in this area one may find a wide financial autonomy of municipalities, within which they act much a like the State conducting its policies through grants and subsidies. Local governments create here a municipal law by enacting *local subsidy programs and procedures.* Unfortunately Polish local governments seems to be not interesting in increasing grants form their budgets or perhaps legal barriers stop a development of nonpublic units as local services providers. Table 2 proves that the amount of grants made form municipal budgets in Poland is on permanent the same low level and even was decreased in 2010.

Table 1: The expenditures on grants as a part of total local governments expendituresin 2006-2010

	2006	2007	2008	2009	2010
Local Goverments Expenditure on grants	% of total expenditure				
	8,3	8,5	8,6	9,1	7,9

Source: on the basis of: State Budget Report 2006-2010, Local Governments Budgets Report, Schedules and Tables, Ministry of Finance, Warsaw 2011, www.mf.gov.pl, August 15th, 2011

The downfall of local governments expenditures on grants from 9,1% in 2009 to 7,9% in 2010 is not a positive tendency, but it is regions where we should look for the reason of it. From 2010 a new rules of redistributing EU resources has been introduced which eliminated regions as primary distributor of them and caused a great decreasing of expenditures on grants at this level of local government. Nowadays EU resources goes to beneficiaries straight from the State budget, through Bank

Gospodarstwa Krajowego[5]. Therefore the main grants which regions make from their budgets at present are: grants for regional train and bus transportation, grants for regional hospitals, grants for theatres, regional philharmonic hall, regional libraries, regional museums and cultural centers, although even their amounts were decreased. However, within the mentioned grants, only grants for Polish train companies (PKP), bus companies and hospitals with a status of limited liability company could be number among grants for nonpublic units as they do not belong to the Government Sector. Next regional grants for culture units, which belong to Government Sector, do not have the proper "granting" function (aiding function) in Poland, which derives from the fact that, although these institutions are independent legal persons, they nevertheless are not able to finance their all activity by their own incomes.

Therefore, we may state, that grants for nonpublic units[6] are budgetary expenditures mainly of governments at local level (communes and counties). Considering the local governments responsibilities, the grants from local governments budgets for nonpublic units could have:

1) obligatory character, where the law obliged the local government to make a grant (e.g. grants for NGO, grants for private kindergartens, private primary and secondary schools, grants for private welfare houses) or
2) facultative character, where the law allows a local government to make a grant (e.g. grants for hospitals' investments, grants for sport clubs, grants for environment or monuments preservation purposes, private performers of environmental protection tasks).

The grants mentioned above follow European principles of subsidiarity and fair competition the most, because a creation of municipal law is taking place here by enacting *local subsidy programs and procedures*. This area of municipal law creation brings local governments problems not only with proper application of statutory law, but also with finding effective and legal tools of reporting and controlling beneficiaries.

3. Selected problems with granting procedures application

3.1 Grants for private kindergartens and schools

As from 1999, and in its complete form from 2000, all educational tasks carried out bythe three levels of territorial self-government are financed within the framework of a general subsidy from the State Budget. In the year 2000 a uniform system of allocation of funds with the use of an algorithmic formula based on the number of

[5] The described change was introduced by a new Public Finance Act 2009

[6] The term *„grant for nonpublic units"* is only a short for a proper one – *„grant for the local government's task performed by nonpublic unit"*. According to the law, local government can not finance a nonpublic unit itself, but only a local task performed by this unit, by applying a proper granting procedure.

pupils was adopted for the whole education system. This formula is based on the real number of pupils, increased by a system of weightings (taking into account specific conditions in which a particular school functions, i.e. rural areas, small towns, as well as specific educational tasks, i.e. special education, vocational education, sports schools). In line with the School Education Act of 1991[7], schools can be of two types: public (state) schools, which offer free education within the framework of the core curricula, and nonpublic schools. The latter can be civic (social), church or private schools. The schools were called "social" or "civic" because of the vast amount of work that was invested in them by people from local communities – mostly parents and teachers. All these schools may prepare their own curricula. They are financed by fees received from parents. Funds can also come from private enterprises and foundations. Non-public schools with the rights of public schools are eligible for a grant calculated according to the number of pupils, which equals 100% of the average cost of educating those pupils in a public school[8].

The same division (municipal and private) we find within Polish kindergartens, although they are financed by local governments totally by their own recourses. However there is a legal rule that private kindergartens receive only 75% of the value of costs bear by a municipal kindergarten on one pupil. Although, according to the Article 90 par. 2b of the School Education Act 1991, this ratio can be risen up by a local council, but unfortunately it happen very rare, which seems to be understandable particularly in the places where there are any municipal kindergarten service. Consequently there are a lot of parents who send their children to the private nursery schools or private kindergartens, which are high-paid. One could judge here the case of the infringement of primary constitutional principles, e.g. the principle of the equality in the law.

The Article 90 of the School Education Act 1991, which introduces local government's obligation to make grants from their budgets for private schools and kindergartens, has its constitutional grounds. Under Artice 70 par. 3 of Constitution of Poland[9] *"Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions, shall be specified by statute"*. The above mentioned regulation was implemented by Article 90 par. 1-3g of Education System Act 1991, which set the rules and conditions of

[7] Ustawa z dnia 7 września 1991 o systemie oświaty (Dz.U. 2004, No 256, item 2572 as amended) hereinafter the School Education Act 1991

[8] *The System of Education In Poland,* Polish EURYDICE Unit, Foundation for the Development of the Education System, Warsaw 2010, p. 17

[9] The Constitution of the Republic of Poland of 2nd April, 1997 (Dz.U.No. 78, item 483)

receiving educational grants by private schools and kindergartens, while following regulation (Art. 90 par. 4) set a delegacy for local councils to proclaim the procedures of transferring these grants (granting, settling accounts with a grantor, controlling the use of grant resources). These municipal acts were a subject of many juridical and administrative decisions, which prove how imperfect is a statutory law in this area. Here are selected rules which have been pronounced by courts while examine problems which appeared in the process of creation municipal procedures on granting private schools and kindergartens:

1. The acts on procedures of granting private schools and kindergartens are the municipal law acts. Therefore local council is entitled to set regulations addressed to a not-limited and unnamed units (which eventually could be created on the territory of the particular local government) not to a individual school or kindergarten[10];
2. A local government grant for private school or kindergarten is a 'grant defined as to grantee', therefore till 2009 it was forbidden to ask a grantee to settle accounts with a grantor (show invoices, bills, payrolls) for proving the proper use of grant resources[11]. The mentioned rule was changed recently by the amendment of the School Education Act 1991 introduced on 19 of March 2009, which gave local governments wide competences to control the appropriation of using grant resources;
3. Local government can not demand from private school or kindergarten, in order to receive a grant, other documentation than only this one proving the number of pupils[12];
4. Local government can not suspend (hold up) granting under any condition, because it goes beyond its statutory delegacy[13];
5. The financial claim on local government to receive a grant in a appropriate amount can be vindicated by private school or kindergarten at civil court, because it is a case of demand for payment[14].

Municipal law on granting procedures have its great impact to the existence of private schools and kindergartens. Quite often they are the only provider of this type of service in nearest area or they offer better services than a municipal unit. They are a

[10] Wyrok NSA z dnia 11 stycznia 2002, I SA/Kr 2048/01; the Supreme Administrative Court Decision 11 Jan., 2002, I SA/Kr 2048/01

[11] Wyrok WSA w Krakowie z dnia 19 stycznia 2009, I SA/Kr 974/08; Decision of the Regional Administrative Cort in Cracow 19th Jan., 2009, I SA/Kr 974/08

[12] Wyrok WSA w Krakowie z dnia 19 lutego 2009, I SA/Kr 1106/08; Decision of the Regional Administrative Court in Cracow, 19th Feb., 2009, I SA/Kr 1106/08

[13] Wyrok WSA w Kielcach z dnia 10 marca 2009, II SA/Ke 30/09; Decision of the Regional Administrative Court in Kielce, 10th March, 2009, II SA/Ke 30/09

[14] Wyrok SN z dnia 4 września 2008, IV CSK 204/08; the Supreme Court Decision, 4th Sept., 2008, IV CSK 204/08; Postanowienie WSA we Wrocławiu z dnia 4 listopada 2009, IV SA/Wr 515/09, "Wspólnota" 2009, Nr 49; Resolution of the Regional Administrative Court in Wrocław, 4th Nov., 2009, IV SA/Wr 515/09, as published "Wspólnota" 2009, No 49

good supplement to local governments fulfillment of their responsibilities, therefore the procedures of granting pupils of private educational units should not contain unclear and uncertain regulations.

3.2. Grants for sports clubs

One must admit that municipal granting law in Poland is strongly influenced by political and economical realities and statutory regulations on financing sport clubs are a great example of this influence. It is quite easy to judge that sport law in Poland, starting from the previous Professional Sport Act 2005[15] and ending on the present Sport Act 2009[16], was amended appropriately to the national aim of organizing UEFA Euro 2012. Consequently, the limited legal abilities to support professional sport clubs (grants only on prizes for sportsmen and scholarships) that local governments had previously, was under the Professional Sport Act 2005 increased by adding the ability to make a 'general support' for sport clubs, accordingly to the *local professional sport subsidy programme*, set by a local council. There were many statues, which allowed local governments to make a grant (as an discretionary spending) for other units, but unfortunately they formulated these permissions using unclear formulas like: "financial support", "financial help". Such regulations remained "dead", concerning the local government principle of acting only by a legal permit. If the statue does not strongly indicate that this "financial support or help" can be performed by making grant from a local budget, local government would rather give up making any support or help, not to be suspected of illegal action by a supervision organ. The new Sport Act 2010 partially eliminated this doubts by setting a provision that allows local governments to make a specific grants for sport clubs acting on local territory and having non-profit nature (Article 28) and presents the list of specific purposes on which grant can be make (e.g. conducting programmes of sport's training, purchasing sport's equipment, covering the expenses of organization of sport competition). The Sport Act 2010 formulates also a delegacy for local councils to set *local sport subsidy programme* (Article 27). However the same Act describes a condition that this kind of grant should be made according to the regulations of Public Benefit and Volunteer Work Act 2003[17]. Consequently it seems to be unclear whether local governments should use Sport Act 2010 and their *local sport subsidy programme* or the regulations of the Public Benefit and Volunteer Work Act 2003 when they want to make a grant to local sport club. Polish legislator should eliminate this "double meaning" and mixing regulations and bring a priority of

[15] Ustawa z dnia 29 lipca 2005 r. o sporcie kwalifikowanym; Professional Sport Act of 29th July, 2005 (Dz.U. No 155, item 1298 as amended)
[16] Ustawa z dnia 25 czerwca 2010 r. o sporcie; Sport Act 2010 (Dz.U. No 127, item 1298 as amended)
[17] Ustawa z dnia 24 kwietnia 2003 r. o działalności pożytku publicznego i o wolontariacie (Dz.U. Nr 96, poz. 873 z późn.zm.); Act of law of April 24th 2003 on Public Benefit and Volunteer Work Act 2003 (Dz.U. No 96, item 873 as amended)

Public Benefit and Volunteer Work Act 2003 in the sphere of discretionary granting from local governments budgets.

3.3. Grants for non-governmental organizations (NGO)

There are 45,000 associations and more than 7,000 foundations registered in Poland (April 2004). Most of them work within the field of sports, tourism, recreation and hobby (38.6% of the organizations), culture and art (11.6%), education and upbringing (10.3%), social service and social aid (10%), health protection (8.2%). The total number of employees in the organizations can be estimated at almost 64,000 full-time jobs. Financial sources use by the largest percentage of the organizations are: member fees (60% of the organizations), regional sources (45%), donations from private individuals (40%) and donations from institutions and firms (39%). Public sources (local and national) constituted the largest part of the revenues of the whole sector in 2003 - 30% of the total receipts of all organizations[18].

The Public Benefit and Volunteer Work Act 2003 imposes on public administration facilities an obligation of implementation public tasks in cooperation with non-governmental organizations. The provision of greatest importance states that local authority units shall draft *annual programs of cooperationwith NGOs* and other entities engaging into public benefit activities. Moreover, public administration units should consult project of regulations, form task forces and inform each other on planned activities. Implementation of these provisions should increase the effectiveness of collaboration between NGOs and public administration units. The most important element of cooperation between public administration units and NGOs consists in commissioning public tasks to organizations by virtue of open bid competition. The Act of law defines obligatory elements of the offer to be announced by administrative unit, competition procedure and obligatory elements of the agreement to be reached with a non-governmental organization. Public administration units were granted with the appropriate controlling powers towards institutions implementing commissioned public tasks[19].

The recent amendment of The Public Benefit and Volunteer Work Act 2003, which came into force on 12th March, 2010, brought new instruments of local governments cooperation with NGO. Next to *annual programs of cooperationwith NGOs* (which is obligatory) local governments may draft *long-termprograms of cooperationwith NGOs*, which will allow them to plan long-term policy in this sphere. Moreover, the definition of non-governmental organization was broadened. According to the present regulations, the term "NGO" applies not only to foundations and associations, traditionally representing the third sector, but also to all corporate (e.g.

[18] *Situation of the non-governmental sector in Poland in 2004,* conducted by Klon/Jawor Association, 2004, Department of Public Benefit, www.pozytek.gov.pl, 11th Sept., 2011

[19] M.Rymsza, P.Frączak, R.Skrzypiec, Z.Wejman, *Standardy współpracy administracji publicznej z sektorem pozarządowym,* Instytut Spraw Publicznych, Warszawa 2006

joint-stock companies, limited liability companies, sport clubs) and non-corporate entities not forming part of the public finances sector, not operating for profit, and formed against separate legal provisions. Provisions of the Act do not apply to: political parties, trade unions or employers' organizations. The same concerns foundations formed by political parties, State Treasury or local authority associations, except for foundations engaging in academic research or scientific work. The mentioned above amendment of the Public Benefit and Volunteer Work Act 2003 introduced also a quite new instrument of cooperation – a "civil initiative", which gives inhabitants the right to initiate particular task to be conducted and co-financed by local authority. Again the law set a rule of drafting by local council a *local procedure on "civil initiative"*. Unfortunately new regulations of the Public Benefit and Volunteer Work Act 2003 do not answer the question: Can local authority make a financial grant to "civil initiative"? It would seem to be quite unreasonable if we will forbid local authority financial participation in "civil initiative" by making a grant on it. Next new tool, which was introduced by a separate amendment of Article 221 of the Public Finance Act 2009, is the right to finance by local government the NGO's investment expenses connected with their public benefit tasks.

Conclusion

The paper allowed it's reader to estimate if Polish local government finance regulations demonstrate the public authority's openness and acceptance of nongovernmental/private bodies as public services providers. One must admit that in some local services the nonpublic way of performance is much better than the public (e.g. personal services for the elderly and handicapped, foster families, family orphanages, utilities and sanitation) while in others is a good, necessary supplement to the system of public units (e.g. pre-school, educational, culture, sport and leisure, environmental protection and health care services). Additional aims of this paper were: to enable readers to understand the mechanisms of financing local services performed in a nongovernmental way and maybe find a description of road to reasonable enlargement of nonpublic units' participation in local governance.

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Financial Crisis and Financial Independence of Local Self-government Units

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Abstract: this article addresses Polish legislative regulations which set forth the rules of incurring financial liabilities by local self-government units. The article discusses the regulations indicating the allocation of funds acquired by means of government borrowing; limiting the volume of borrowing requirements; controlling the structure of debenture instruments used, and introducing debt limits. Legislative changes are also presented, which have recently been introduced, mostly as a consequence of the difficulties the fiscal authorities are facing in the time of the financial crisis.

Keywords: public debt, debt of local self-government units, budget deficit.

1. Introduction

The financial independence of local self-government units is guaranteed by both the Constitution of Poland and the European Charter of Local Self-Government, which was ratified by Poland in 1994. The independence is manifested, among other things, in the access of local communities to the domestic capital market. It means that local self-government units have the possibility of using refundable budget funds which come from drawn loans and credits, as well as securities issued, i.e. the instruments defined as government borrowing. However, local communities are not allowed complete freedom of action; they are obliged to act as provided for in the law[1]. Given the far-reaching results of borrowing by local self-government units, the legislators have precisely defined the rules of financing their expenditures and spending with funds from that source. In this way, the risk of local self-governments incurring excessive debt has been curbed as, otherwise, it could lead to their insolvency. Moreover, it needs to be borne in mind that local self-government units' deficit and debt have an impact on the situation in the whole public finance sector. In the worst-case scenario, the poor standing of local self-government units may lead to the country's insolvency. As they are confronted with the debt crisis looming over several European countries, the legislators' particular concern about the financial standing of local self-government units is understandable. Therefore, the analysis of the legal solutions which regulate incurring debts by the units, given the fact that they have recently undergone significant modifications, is justified.

[1] Panfil P., *Wykorzystanie przychodów z pożyczki publicznej*, www.samorząd.lex.pl.

2. Allocating funds from government borrowing

In Article 89(1) of the Act of 27 August 2009 on public finance law (Dz. U. z 2009 r., nr 157, poz. 1240 z późn. zm.; hereinafter referred to as "the p.f.l."), the legislators set out the aims which may be financed by local self-government units with receipts from government borrowing. The means acquired in this way are allocated for:

1) covering the temporary deficit occurring in the course of the year,
2) financing the planned deficit,
3) repaying prior financial liabilities due to securities issue, and incurred loans and credits,
4) advanced financing for activities which are financed with UE funds.

The list above is complete[2], which has practical implications. In general, the receipts acquired by means of government borrowing must not be used to finance aims which are not listed in Article 89(1) of the p.f.l. Obviously, the restriction in question is not absolutely binding. However, if a local self-government unit wanted to use receipts from government borrowing in order to finance aims other than those set out by the legislators in Article 89(1) of the p.f.l., it would require a legal basis in the form of a regulation in statutory rank.

The temporary deficit referred to in Article 89(1)(1) of the p.l.f. should be equivalent to temporary loss of liquidity by a local self-government unit. It is, therefore, a short-term phenomenon which functions irrespective of annual settlement periods[3]. It can occur in local self-government units which are in good financial condition. The short-term nature of the temporary deficit has an effect on the maturity date of the instruments which are used to finance the deficit. Pursuant to Article 89(2) of the p.f.l., the liabilities due to that shall be repaid in the course of the year in which they are incurred.

The most important part of the distribution of the receipts acquired from government borrowing, which is mentioned in Article 82(1) of the p.f.l., is financing the planned deficit, i.e. the negative difference between the planned revenue and the expenditure in the budget of local self-government units. Pursuant to Article 212(1)(3) of the p.f.l., the quantity is annually determined in the budgetary act. Moreover, it is a limit whose non-compliance is equivalent to the breach of the public finance discipline. In order for the planned deficit to be ever increased, it is always necessary to change the budgetary act, which can be done solely on the initiative of the executive organ of local self-government units.

Taking into account the regulations in question, it turns out that the laws limiting the budget deficit are very important. First and foremost, it should be noted that

[2] *Nowa ustawa o finansach publicznych wraz z ustawą wprowadzającą. Komentarz praktyczny*, Ruśkowski E., Salachna J. (Eds.), Gdańsk 2010, p. 299.
[3] Panfil P., *Saldo budżetowe* (in:) *Leksykon prawa finansowego. 100 podstawowych pojęć*, Drwiłło A., Maśniak D. (Eds.), Warszawa 2009, p. 396.

Article 242 of the p.f.l. introduces the so-called fiscal golden rule. It is based on the concept of the division of the budget into the material part and the current part. The former includes material revenue and expenditure of local self-government units. The notions are precisely defined in Article 235(3) and Article 236(4) of the p.f.l. The material revenue includes: subsidies and funds towards investments, revenue from property sale and transformation of the right of perpetual usufruct into the right of ownership. The material expenditure is, on the other hand, the expenditure towards investments and investment-related purchases, contributions to companies and commercial partnerships, as well as purchasing and taking up stocks and shares. The legislators do not introduce any limits as to the volume and the nature of the balance of the material part of the budget. In contrast, the current part comprises the current revenue and expenditure, i.e. those that cannot be included in the material revenue and expenditure. The current part of the budget should be generally balanced or show a surplus. It is unacceptable to finance the current expenditure with the receipts acquired from government borrowing. The limitation is binding for both adopting the budget and its execution. The only exception to the rule is a situation in which the current expenditure is a result of implementing projects partly financed with EU funds or non-refundable aid from EFTA member states.

The limitations which result from the recovery procedures provided for in Article 86 of the p.f.l. have a different purport. Their main purpose is to protect the Polish economy against the consequences of the breach of the constitutional debt limit, according to which public debt must not exceed 60% of GDP. The recovery procedures are *defacto* a set of quantitative and qualitative fiscal principles which put restrictions on the freedom of financial management on the level of both the state and local self-government units[4].

The first recovery procedure is applied when public debt exceeds the level of 55% GDP. In such cases, the expenditure of local self-government units' budget set out in the budgetary act for the following year may be higher than the revenue of that budget, including the budget surplus from the previous years and the available funds, only by an amount resulting from implementing projects financed with EU funds and by non-refundable aid from EFTA member states. The solution is similar to the fiscal principle set out in Article 242 of the p.f.l., but its subjective scope is broader. It considers the whole budget of local self-government units, not only their current part.

The second recovery procedure is applied when public debt reaches the level of 60% GDP. In such cases, the expenditure of local self-government units' budget set out in the budgetary act for the following year must not be higher than the revenue of that budget. It means that it is necessary to balance the budget or show a surplus, which obviously limits the necessity to use government borrowing.

[4] Panfil P., *Prawne i finansowe uwarunkowania długu Skarbu Państwa*, Warszawa 2011, p. 236.

The analysis of the nature of the recovery procedures shows that they are based on the "collective responsibility" principle[5]. A high level of public debt, mostly generated by the State Treasury, has an effect on the financial management by local self-government units, as well as limiting, among other things, their investment capabilities. The solution is in a way justified by the fact that the state budget deficit is a symptom of the imbalance in the whole public finance sector.

The funds from government borrowing are also used to finance expenses connected with repaying previously incurred liabilities, i.e. debt refinancing. It means that the "old" debt is replaced with a "new" one. Debt refinancing, therefore, allows to postpone making the decision to repay the debt definitively, which would mean the necessity to allow for non-refundable funds in the budget towards that end. Moreover, owing to such operations, local self-government units can manage their debt, shape its structure and control the related costs and risk.

Pursuant to Article 212(1)(5) of the p.f.l., a budgetary act determines the total amount of the planned spending in local self-government units' budgets. Just like in the case of expenditure, in this regard its provisions are directive. It is evident in the wording of Article 52(1) of the p.f.l., which states that expenditure and total spending comprised in local self-government units' budget constitute a limit which must no be exceeded. It should be noted, however, that, at the stage of elaborating and adopting the budget, organs of local self-government units have little say in what the assumed volume of spending will be. The spending is mostly fixed and it results from liabilities incurred in the past.

The volume of spending connected with repaying previously incurred liabilities is limited by Article 169(1) of the act of 30 June 2005 on public finances[6] (Dz. U. z 2005 r., nr 249, poz. 2104 z późn. zm.; hereinafter referred to as: "p.f.l. of 2005"). Pursuant to that provision, the sum total of:

1) repayments of liabilities following government borrowingin order to finance the budget deficit and refinance debt,
2) interests and discount on those liabilities, as well as the liabilities incurred in order to finance temporary deficit,
3) possible repayments of amounts resulting from sureties and warranties granted by local self-government units,

in a given budgetary year, must not exceed 15% of the revenue of a local self-government unit planned for a given budgetary year. The principle is further tightened if public debt exceeds the level of 55% GDP. In such cases, the sum total of the above must not exceed 12% of the planned revenue, unless all those encumbrances are a result of liabilities incurred prior to the date of making the relation publicly known. However,

[5] Gilowska Z., *Rozczarowanie ustawami*, „Rzeczpospolita" 10.08.1998.
[6] The law is legally binding until the end of 2013 when the fiscal principle set out in Article 243 of the p.f.l. enters into effect.

the restrictions do not apply to liabilities incurred in relation with an agreement concluded with an entity with EU funds at their disposal, non-refundable aid from EFTA member states, as well as sureties and warranties granted to a local self-government legal entity which executes tasks of the local self-government unit using such funds.

The aim of the regulation presented is to limit the payments resulting from the existing debt of local self-government units. It is also an indirect method for the legislators to influence the volume and the structure of the debt, in particular, through stringent measures concerning the accumulation of its maturity dates.

Local self-government units may also allocate funds from a government borrowing to advance financing activities which are to be paid with EU funds. It is a new solution, effective from 1 January 2010. Its main aim is to increase the uptake of EU funds.

3. Structure of debt instruments

The legislators have introduced certain restrictions concerning the structure of the debt instruments used by local self-government units. In particular, pursuant to Article 92(1) of the p.f.l., such units may only incur financial liabilities if their debt servicing costs are borne at least once a year, where:

1) discount on securities must not exceed 5% of the nominal value, and
2) interest capitalisation is not allowed.

The aforementioned restrictions do not apply to government borrowings used in order to finance the temporary deficit in the budget of local self-government units.

The solution in Article 92(1) of the p.f.l. makes it impossible for local self-government units to transfer the debt servicing costs into the burden of the debt. The possibility of postponing the necessity to bear the costs have also been significantly limited. Therefore, each liability incurred by local self-government units influences their current financial standing.

Pursuant to Article 93(1) of the p.f.l., local self-government units must not take loans or credits, issue securities and grant sureties and warranties whose nominal value due to be paid on the maturity date, expressed in PLN, was not established on the day of the transaction. The provision introduces a ban on government borrowing denominated in foreign currencies. The legislators' motive in doing so was the attempt to limit the risk of hike in the debt of local self-government units as a result of the depreciation of PLN. In case of liabilities whose amounts are unknown on the day of repayment, it is also impossible to estimate the impact they will have on the financial standing of the local self-government unit. Both the current debt servicing costs and the level of future spending connected with its repayment depend on the amount. A risk factor occurs in the actions of local self-government units, which is difficult to manage without appropriate personnel and technical resources.

The ban on incurring liabilities denominated in foreign currencies is not absolutely binding. Its stringent measures were to some extent lightened in the regulation of the Council of Ministers of 17 December 2010 issued on the basis of statutory delegation. It concerns cases in which the restrictions on incurring certain financial liabilities by entities in the public finances sector, excluding the State Treasury, do not apply. The regulation enables local self-government units to, among other things, take loans and credits, denominated in foreign currencies, from the international financial institutions that have Poland as their member, or with which Poland concluded a cooperation agreement, as well as from governments and/or governmental institutions of foreign countries, by virtue of agreements concluded by the Council of Ministers. On the other hand, issuing securities denominated in foreign currencies is possible, e.g. in situations when the securities are bonds with their maturity period longer than a year. However, prior to that, the issuing entity must be assigned a credit worthiness rating on the level of investment grade by a rating agency recognized in the capital market where the securities are to be issued. In most cases, the possibility of incurring liabilities denominated in foreign currencies also depends on the allocation of receipts acquired in that way.

4. Limitations concerning the volume of debt

Article 216(5) of the Polish Constitution introduces a ban on taking loans or granting warranties and financial sureties as a result of which public debt exceeds 3/5 of the yearly GDP value. The notion of "public debt" is not defined in the Constitution of Poland. Its subjective scope can, however, be defined on the basis of Article 73(1) of the p.f.l. Pursuant to that provision, public debt is calculated as a nominal value of the liabilities of the public finances sector, upon eliminating mutual liabilities between various entities of the sector.

The Minister of Finance is entrusted with the supervision over the public finance sector regarding observance of the constitutional debt limit. However, the organ has no instruments at its disposal to manage actively the debt in its entirety. In this regard, the competences of the Minister of Finance are restricted to the State Treasury. Therefore, it was necessary to structure the legal order so that it could prevent individual entities of the public finances sector, including local self-government units, from incurring excessive debt.

Pursuant to Article 170 of the p.f.l. of 2005, the sum total of the debt of a local self-government unit at the end of a budgetary year must not exceed 60% of the total revenue acquired by the unit in that budgetary year. On the other hand, in the course of the budgetary year, the debt amount at the end of the individual quarters of the year must not exceed 60% of the planned revenue of the unit. The aforementioned restrictions do not apply to liabilities incurred in connection with implementing EU-financed schemes, or schemes financed by EFTA member states.

Since 1 January 2011, the restrictions concerning debts of local self-government units have been notably stricter as the new regulation of the Minister of Finance of 23 December 2010 came into effect on the detailed manner of the classification of debt titles counted as public debt, including the State Treasury debt. The regulation broadened the subjective scope of the "credit and loan" notion beyond the scope following the provisions of the banking and the civil law. Currently, the category comprises both credits and loans in their traditional sense and:

1) sale agreements in which the price is payable in instalments,
2) leasing agreements concluded with a manufacturer or a financing entity in which the risks and the benefits resulting from the ownership title are transferred onto the lessee,
3) public-private partnership agreements which have an impact on the debt level,
4) securities with a limited tradability,
5) innominate contracts with a payment period longer than a year which regard financing services, deliveries and construction works, and which produce economic effects similar to those following loan or credit agreements.

The change in the classification of debt titles led to a hike in the debt of local self-government units. Some of them exceeded the debt limit arising from Article 170 of the p.f.l. of 2005. Therefore, the change have significantly limited the possibility of incurring liabilities by local self-government units, and, in consequence, their ability to undertake investment projects. Moreover, local authorities were "surprised" by the new regulations, which, by the way, do not seem to comply with the provisions of the Polish Constitution.

Pursuant to Article 216(5) of the Polish Constitution, the method for calculating the value of yearly GDP and public debt is to be provided for in an act. Hence, the two issues fall into the scope of statutory matters. The basic principles governing the calculation of the debt value are set out in Articles 72 and 73 of the p.f.l. Pursuant to the former, debt titles include, among other things, incurred credits and loans. At the same time, the legislators entitled the Minister of Finance to determine, by means of a regulation, the detailed method of classifying debt titles counted as public debt. In this way, the organ has influence over how the debt is calculated, and, therefore, on the final form of the constitutional debt limit. Elaborating the provisions of the regulation in question, the Minister of Finance should have exercised great caution. In changing the scope of the "public debt" notion, he/she exceeds his/her authority, and encroaches on the territory of the legislative organs.

6. Summary

Polish regulations limit the possibility of incurring debts by local self-government units in a number of ways. First, they indicate the acceptable allocation of refundable budget funds, and limit the volume of self-governments' borrowing needs. Particularly important is the golden fiscal rule introduced by the new p.f.l. in accordance to which no government borrowing is possible in order to finance current expenditure and limit the acceptable level of debt servicing costs. The legislators also define certain requirements concerning the debt titles used by local self-government units. For example, in principle, they are not allowed to incur liabilities denominated in foreign currencies. The acceptable debt limit for local self-government units is also important. It should be noted that the debt is a part of public debt, which, in the time of the financial crisis in Europe, makes the European Commission, rating agencies and investors pay closer attention to it. Owing to the changes in the classification of debt titles, at the beginning of 2011, the regulations concerning the acceptable debt limit for local self-government units became notably stricter. However, the manner in which the solutions were introduced, as well as their form, raise serious reservations. Not only do they limit the financial autonomy of local self-government units, but they seem to fail to comply with the provisions of the Constitution of Poland.

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Tax Revenues of Municipalities Budgets

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Tax revenues are considered to be basic and general kind of financial resources from income basis point of view. On average they participate by one half on total municipalities´ revenues. Two taxes are the most important for municipalities´ budgets- individual income tax, which represents more than half of total tax revenues in municipalities´ budgets and legal person income tax- which constitutes one quarter of total tax revenues and real estate tax, whose yield covers 10 % of total revenue.

Tax yields, which are revenues of municipalities´ budgets according to thetax rating,differ in territorial cross-section. The amount of the particular tax yield is influenced by different factors that can not usually be influenced directly by municipality itself. Tax yield can be usually affected only indirectly, for example by creating the conditions for individual business, for example long term lease or land purchase to entrepreneur after building the enterprise building can influence future yield of property tax as well as income tax (either personal or legal person income taxes).

Act on budget determination of tax yields or budget rules (in some countries budget or financial law) determines so called tax rating, which means they determine kinds of taxes collected according to nationwide valid tax laws. Those are called vested tax. It is possible to determine the share on nationwide collected tax by tax rating. This share will be revenue of municipality´s budget or budgets or higher level of self-governing territorial units. Those are called "shared taxes". Municipalities also use some local taxes – in the Czech Republic those are called "local charges."

The competence of municipality to assess local taxes is different in developed countries. Set of local taxes is usually enacted, from witch municipalities can choose, which taxes will be imposed on their civilians or companies. However, using the system of smaller amount of local taxes (but the yielding ones, so that the collection and administration of the tax is as easy and as cheap as possible), is better than using the system of many local taxes, which absorb the substantial part of the tax revenue.[1]

Collection and administration of the tax is not uniform in all the countries. In some countries municipality authorities are responsible for tax collection and calculation, in others there are tax offices. Nationwide valid law on system of local taxes usually defines subject to tax, tax base, range of tax rates, in some cases also the rules for tax exemption[2].

[1] Compare with Peková, J. Finance územní samosprávy, územní aspekty veřejných financí. Praha: Victoria publishing, 1995.
[2] In Pařízková, I. Finance územní samosprávy. Brno: Masarykova univerzita, 2008, p. 81.

For example in Spain since 1988, there has been introduced new scheme of local tax collection, whose aim was to rationalize and simplify the operation of local authorities in tax area. Two kinds of local taxes have been introduced: compulsory taxes and voluntary taxes. The division of those taxes is derived from the fact whether the municipality is or is not obliged to set and collect such taxes. Compulsory taxes include real estate tax, corporation tax and tax on motor vehicles.

Real estate tax falls annually on real estate or title owners and it is calculated according to cadastral value of the land set by municipalities (it needn´t exceed the commercial value) and according to the fact whether the property is situated in town or in countryside. All business activities run on the municipality's territory is assessed annually and their rate depends for example on: kind of activity, place of plant, number of employees etc. It is possible to compare partly such a tax with profit tax in our system of taxation. Tax on motor vehicles is also paid annually and it varies according to the engine power and size of municipality. On contrary, the voluntary taxes, which could be imposed exist two: tax on building activity and tax on increase in value of urban land. Real value of any work of building activity, which needs the permission before the start, is charged in case of tax on building activity. Tax on increase in value of urban land is applied any time during the land transfer, if the increase in value of the land was detected. Such a tax is creditable as tax credit to personal income tax[3].

Officially, we do not use system of local taxes in the Czech Republic, however, as I mentioned above, most of local charges have character of tax. This is a result of large set of charges used in the Czechoslovak Republic after 1918, which was narrowed after 1948. That is why we can include so called local charges into those taxes in the Czech Republic[4].

Municipality´s budget revenue should involve taxes, whose tax base is stable. This influences stable tax yield. At the same time, taxes that can not be evaded and tax evasion is hardly expected should be involved. Tax, notably the subject to tax, the tax base as well as the tax rate should be clear and obvious so as the taxpayer could easily find out his tax obligation and could compare it to the taxation benefit.

It is necessary to respect canons of taxation i.e. tax equity and tax payment ability, taxation benefit, tax efficiency as well as tax collection and administration modesty. It is mainly the canon of taxation benefit that stands out on the municipality level. Tax payers may quite easily evaluate taxation benefit in form of public goods[5].

Traditionally, some forms of property taxes create municipalities´ or some higher levels of self-governing territorial units´ budgets. Those taxes are very stable but not much yielding. Partial property taxes are used (tax on land, other local rates or taxes of other assets). There is also universal type of property tax. The most yielding are

[3] In Pařízková, I. Finance územní samosprávy. Brno: Masarykova univerzita, 2008, p. 81.
[4] More in Bakeš, M. et al. Finanční právo. 3. aktualizované vydání. Praha: C.H.Beck, 2003, p. 165.
[5] Compare with Pařízková, I. Finanční právo Finance územní samosprávy. Brno: Masarykova univerzita, 2005, s. 35.

income taxes, mainly individual income tax (revenue tax, in the Czech Republic individual income tax) or from companies (in the Czech Republic legal person income tax).

If the income tax is used as municipalities´ or higher territorial self- governing unit budgets´ revenue, it is usually in form of shared tax i.e. portioning of the income tax. Predetermined fixed percentage of whole tax yield goes to municipality´s budget[6].

1. Property taxes

Income taxes are classed into direct tax group, i.e. it is not possible to transfer tax liability to other subject and at the same time such taxes affect the taxed income at the moment of its origin. On the other hand, the indirect taxes are connected with income while it is used. Sometimes types of taxes, where tax payer and taxable person is the same individual are called direct taxes.

Property taxes asses the fortune which poses fixed state in certain time, respectively in certain moment. The problem of income taxes´ usage is that they do not respect income situation of the tax-payer. The amount of tax does not depend on amount of income from witch the tax-payer (generally, the owner, the property holder etc.) pays the income tax. Therefore the canon of ability to pay the tax is not fully respected. The bigger extent of property, generally profits to bigger usage of the owner and affects positively the ability to pay the tax overall[7].

Reduced capacity to pay this tax is respected in some countries for ex. by the tax allowance, tax postponement etc. If the ability is reduced (for example in case of disabled people, retired people, large families, tax payers with low income etc.), such tax allowances are used, which results from the law or from the authority of the self-governing territorial unit to grant them. The municipalities are not usually authorised to grant exceptions of taxation and tax allowances, because they influence the tax yield (reduce it) and thus self-sufficiency of municipality´s budgets.

Income taxes charge:

1. Particular kind of property or thing in relation to its size,
2. or the summary of all property – fortune, which is owned by one subject- tax payer namely:
    - property in the ownership,
    - property acquired by gift or inheritance or corrupt property transfer[8]

[6] Act No. 249/2000 Sb., o rozpočtovém určení výnosu některých daní.
[7] Compare with Peková, J. Finance územní samosprávy, územní aspekty veřejných financí. Praha: Victoria publishing, 1995.
[8] Compare with Pařízková, I. Finanční právo Finance územní samosprávy. Brno: Masarykova univerzita, 2005, p. 36.

Subject to taxation of property in the ownership is generally immovable property, i.e. land or other immovable property i.e. building, in some countries tangible property and tangible business assets, for example machines[9].

Tax yield of income tax influences the tax base and tax rate or provided allowances and tax exceptions.

The tax base influences mainly the way of evaluation and exceptions of tax base. In developed countries the value of property is used to calculate the tax base. Differences are in ways of evaluation of the property and in ways of regular tax base review, mainly in immovable[10].

The property of the state or municipality, land which is built- up by roads, rail or other transport or communication systems are usually free of tax. Tax allowances of property taxation, mainly the immovable property, that serve to social, educational, religious, sport or other similar purposes are excepted of taxation, but in some countries it depends if it regard to the private or public sector[11].

In the Czech Republic such a type of property tax is the real estate tax which is fully tied to the land of competent municipality to which budget the whole yield goes to. The tax of such real estate, buildings and land, which are located in its territory, while the tax rate is not derived from the market price of particular real estate but on a basis of the ratio, set by the law. Immovable property in ownership or in permanent use (i.e. buildings and lands) is taxed annually by such a tax. Nationwide valid law on real estate tax regulates such a tax. The municipalities, to which the whole tax yield is ensued, have very small competence and therefore they can influence the yield of such tax very slightly[12].

There is significant yield increase in this property tax comparable to the past. Subject to tax was substantially extended namely in buildings and lands. All buildings and lands are taxed except for cases of removal of subject on tax or the cases of real estate tax allowances.

This means also the substantial extension of real estate tax payers range. Tax rates grew, mainly at some types of buildings and by this, the tax yield also grew however, it constitutes only small share in municipalities´ revenues.

The share of real estate tax on total revenues of local budgets is only around 4% and on municipalities´ budgets revenues, to where the tax flows, it is around 7%. Real estate tax, even it is table municipalities´ budget, it is low yielding income.

[9] See Bakeš, M. et al. Finanční právo. 3.přepracované vydání. Praha: H.C.Beck, 2003, p. 166.
[10] Pařízková, I. Finance územní samosprávy. Brno: Masarykova univerzita, 2008, p. 85.
[11] Act No. 338/1992 Sb., o dani z nemovitostí, ve znění pozdějších předpis, Act No. 357/1992 Sb., o dani dědické, darovací a z převodu nemovitostí.
[12] Pařízková, I. Finance územní samosprávy. Brno: Masarykova univerzita, 2008, p. 85.

What are the differences in real estate tax yield within the Czech municipalities influenced by?

1. Unequally distributed base on tax, which is derived from land area and from different ways of evaluation of different land types, in case of buildings their built area. Therefore the tax yield is influenced by structure of land (i.e. agricultural land, forest areas), number of buildings and their built area.
2. Different basic tax rates on particular types of land and buildings that are differentiated according to the purpose of immovable usage. The basic real estate tax rates can not be influenced by municipality only supplementary tax can be affected.
3. The buildings and land coefficients. By imposition of supplementary tax – coefficient can the municipality significantly decrease the taxation on some kinds of buildings, mainly for business. If it wants to create favourable conditions for enterprise, it will consider usage of supplementary rate[13].
4. An extensive real estate tax allowance, while it is possible to expect that claim for tax allowance will not be distributed equally.
5. The conversion of this tax yield per capita is influenced by population density[14].

Construction of such tax does not come up to common practise in developed states because in limited way it infers the tax base from the value at some kinds of lands[15].

Property taxes also charge property rights transfer. Those are single, occasional, random taxes and therefore less stable from the view of tax yield. Partial property taxes or universal type of property tax is used. In the Czech Republic gift tax, succession duty and real estate transfer tax belong to this group.

Their unstable yielding character complicates budget dispatching to some extent. That is why such kinds of property taxes are usually revenue of state budget. In some countries the budgets of self-governing territorial units of higher levels participate on their tax yield.

2. Income taxes

Income taxes are classed into the direct tax category. In terms of tax subject we can structure those taxes to individual income tax and legal person income tax.

In the Czech Republic the significant part of income tax yields flows to municipality´s budget. Incomes of capital character, i.e. dividends, interests etc. are subjects of tax after many years. Monetary and non-monetary incomes are the subject of income tax. The subjects of individual income tax are:

Dependent activity tax and functional treats revenues,

[13] See Pařízková, I. Finance územní samosprávy. Brno: Masarykova univerzita, 2008, p. 86.
[14] Peková, J. Hospodaření obcí a rozpočet. Praha: Codex Bohemia, 1997, p. 153.
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business and self – employment revenues,
capital revenues,
lease revenues,
other revenues[16].

If the legal income tax subject determination is concerned, yields from all activities and from dispose of whole property are understood. By income it is meant monetary as well as non-monetary income or income reached by exchange.

Amount of tax as well as tax burden intensity depend on the amount of tax payer´s income, i.e. amount of base on tax- the difference between incomes and expenses in calendar period or business year from which tax is calculated and on the tax rate[17]. Tax base is affected by deductible items and extra charges or tax allowances or discounts.

Tax yield of business income tax, lease and from the group of other expenses flow into the municipality´s budget according to permanent address of individual income tax payer, it is not like that in case of dependent activity income tax[18].

Tax yield of individual income tax is divided between municipality, region and state budget at the moment. Division of tax yield to municipalities in a district according to number of inhabitants takes into account canon of utility, because it serves to finance public needs, mainly of municipality inhabitants. It is necessary to realise that it is mainly economically active inhabitants in productive age who are individual income tax payers in theory.

The place of tax collection – in our conditions it a place of tax-payer´s (employer´s) cash- affects the individual income tax yield. That is why inter district shift of part of individual income tax yield occurred because of significant number of commuters. It is not possible to say that the income tax yield is always used to finance public goods, which is used by tax-payer in a municipality where he lives.

In terms of individual income tax construction municipalities can no influence the tax yield. From long-term point of view they can influence indirectly such a yield by creating conditions for business and employment growth respective by decreasing unemployment in their district[19].

The change of tax rating should lead to the fact, that municipalities would think about how to create conditions for business and how to attract private capital to their region and by that influence the tax yield from long-term point of view[20].

[16] Compare with Pařízková, I. Finance územní samosprávy. Brno: Masarykova univerzita, 2008, p. 87.
[17] Compare with Pařízková, I. Finanční právo Finance územní samosprávy. Brno: Masarykova univerzita, 2005, p. 38.
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The Autonomy of Local Governments and the New Constitution

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1. The constitutional status of the Local Governments in the Constitution

Regulations of the Basic Law concerning local governments may be conceivable and interpreted only in comparison with the regulations of the Constitution. For this reason, firstly, I review the nub and the specialties of these matters[1].

Local governments are of great significance in the Constitution. An entire chapter, Chapter IX provides their relevant detailed regulation, more detailed than on the other significant area of public administration (the so-called "state" administration – or governmental agencies). According to the provisions, local governments are *decentralized government entities,* named in the Constitution, established by a separate Act of Parliament (a two-thirds majority, under the Basic Law: cardinal statute). As compared to the central bodies, they possess *autonomy defined in the Constitution and protected by the law.* The constituents address the local public affairs based on their *collective right to local self-governance.* Local affairs relate to the supply of local residents to the public services, to exercise self-governance-type public power as well as to the creation of the organizational, personal and financial conditions related to all this[2].

The essential element of the local government system is the actual enforcement of *local government rights* defined by the Constitution: to elect a board of members which is capable to practice these rights effectively and its operation is based on these acts. According to the Constitutional Court: "the Act shall provide for all types of local governments the practice of the basic rights laid in Article 44/A paragraph (1) in the

[1]A detailed description of the present local government system (including the statute-level regulation as well) can be found in: DEZSŐ, MARTA – SOMODY, BERNADETTE – VINCE, ATTILA: *Constitutonal Law in Hungary*, Kluwer Law International, 2010. p. 223-240.

[2] See: Article 42 of the Constitution: "The community of voters of the municipalities, cities, the capital and its districts, as well as the counties shall have the right to local self-governance. Local self-governance shall be the independent, democratic management of local affairs affecting the community of voters and the exercise of local public authority in the interests of the population.“

Constitution, namely: eligible voters exercise the right to local government through the representative body that they elect and by way of local referendum"[3].

According to the conception of the Constitutional Court the mentioned *collective constitutional right* is a right of fundamental importance to which communities of voters are entitled to, meaning as well the constitutional *source* of the local government rights[4].

While the subjects of the collective constitutional right of local self-governance are the communities of voters (the local "population" in question), the subjects of the local government rights are the elected local boards (i.e. local councils). According to Article 43 paragraph (1) of the Constitution these local government rights shall be equal, but their duties may differ. The rights and duties of local governments shall be determined by statute. It is important to stress that it is the Constitution itself that ensures judicial guarantee for the board of representatives. "The lawful exercise of the powers of local government is afforded the legal protection of the courts and any local government may appeal to the Constitutional Court for the protection of its rights"[5]. The Constitutional Court agreed: the operating principle of the local government is the protection by the judiciary[6]. Judicial proceedings *mean constitutional guarantee*; Article 43 paragraph (2) of the Constitution and the right to access to courts in Article 57 paragraph (1) are interrelated. Article 43 paragraph (2) deals with the judicial protection regarding the exercise of the responsibilities and powers of local governments, as a particular issue under Article 57. Hence, in case a public administration activity becomes a local government task which is based on statute, throughout the organization of the completion of the task, the decisions made by local governments (board of representatives and its bodies), the possible disclaimers, the signed contracts, and other used legal instruments count as practice of the scope of duties of local governments related to the required function. Provision of Article 43 paragraph (2) covers this[7].

The local government rights (not identical with the collective constitutional right to local self-governance) are listed in the Constitution as independent powers of the local *board of representatives*[8] are referred in two sections as *fundamental rights of local self-governments*[9]. The Constitutional Court states that the rights regulated in Article 44/A of the Constitution ensures such powers and responsibilities of the local board of representatives which constitute the basis of the constitutional guarantee to ensure autonomy within the local governments' activities. The fundamental rights

[3] Decision 56/1996 CC
[4] Decision 18/1993 CC and 22/1993 CC
[5] Constitution Article 43 paragraph (2)
[6] See Decision 3/2003 CC
[7] Decision 42/2008 CC in relation of the refund of the sewerage–support on the territory of Local Governments
[8] Constitution Article 44/A paragraph (1)
[9] Constitution Article 43 paragraph (1), Article 44/C

provide constitutional guarantee for the local governments primarily against the governmental and the central administration interference. The fundamental rights regulated in the Constitution restrict the legislator; it cannot establish restrictions to such an extent that would infringe the basic content of a certain local governmental fundamental right, or to result in its actual withdrawal. These groups of scopes of duties are intended to guarantee the autonomy of a public body of the type amongst the state organs exercising public power. This way, the Constitution does not regard the local government rights enjoying fundamental rights protection – compared with fundamental rights regulated in Chapter XII – that ensures the constitutional guarantee of the autonomy of the individuals. Therefore, it is not a constitutional requirement towards the restrictions on the local government rights to be introduced necessarily and proportionally in order to enforce a constitutional right or achieve a constitutional target[10]. In other words, the constitutional test of "necessity and proportionality" does not refer to these local government rights, even if they are expressly addressed as "fundamental".

According to the regulations of the Constitution in Article 44/A the (Central) Government or agencies of the central administration cannot intervene either with normative or individual decisions into the exercise of autonomy regarding the self-governance management or regulatory issues to which local governments are entitled to[11].

Additionally, the Constitution regulates itself in the most of the questions mentioned in the European Charter of Local Self-Government. Whereas the Charter provides for an option between the Constitution and a statute (e.g. in Article 4: "The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute"), the Hungarian law "chose" the constitutional level of regulation[12].

2. General Approach – Basic Law as the framework of the local self-government system

Literally, the new regulation of the local governments in the Basic Law is not entirely new. Many of the rules are the same or almost the same as before. However, the leading *philosophy* (the conception) behind is *fundamentally different*, thus the new Basic Law establishes the basis and the frame of another sort of local self-government system.

These become visible especially in those rulings that are *missing* compared to the Constitution. The Constitution built the regulation of the local self-government

[10] Decision 56/1996 CC
[11] Decision 77/1995 CC
[12] Further examples: Article 2, the legal foundation of self-governments; Article 8, administrative supervision.

system on the collective constitutional right to self-governance, in which not only the subject and the content of the right was fixed, but the levels of the self-government (municipality, city, county, capital and its districts) as well. As mentioned before, the board of representatives had so-called local government rights (also called "fundamental") to implement this collective right. And – although the protection of these (fundamental) local governmental rights by the Constitutional Court was often not strong enough – only two-thirds majority statutes could restrict these rights. The legitimate exercise of the self-governmental powers prescribed by law was protected by the court and the limitation of this was proved to be unconstitutional (see Decision 42/2008 CC, mentioned before).

These rules have not been incorporated into the new regulation. The Basic Law focuses on the management of the local public affairs and on the exercise of local public powers, instead of the regulation of the legal protection against the Government and the central public administration (moreover in some cases against the Parliament), while the separation of the local self-governmental and the state administration still predominates. For example, although the Government is the supreme body of the whole public administration (it also includes the local self-governments), it can "only" establish public administrative bodies according to statutes[13]. The elected mayor and the president of the county board of representatives – beyond their self-governmental duties – may exceptionally discharge public administrative duties and powers, but for fulfilling this there must be a statute or a Government decree based on statute. Therefore, the Government in its substantive competence is not allowed (alone) to assign public powers (and duties) to the elected leaders of the local government. By this sort of assignment of administrative powers the Basic Law shows the strong and prevailing separation of the local self-governments from the Government. With this solution the Basic Law made obvious, that – based on the separation of the local self-governments from the Government – a mandate of the Basic Law is essential to assign public administrative power on the mayor whose autonomy from the Government and from the public administration is protected by the Basic Law itself[14].

The Basic Law states explicitly that local governments and the state organs will mutually cooperate in the interest of achieving community objectives[15]. All of these do not mean that the powers of local self-governments are depleted by any means of law, but – in my opinion – it strengthens the operation-oriented nature of the new constitutional regulation. Although they are not codified as rights (even less as fundamental ones), the essential fields of self-governmental autonomy can be found in

[13] Article 15 paragraph (2)

[14] Namely: „The separation of the local self-governments from the public administration is reflected by the constitutional regulation of the mayor's legal status.

[15]This sort ofmutual cooperation is naturally not a new invention, because at the very beginning of the operation of the Constitutional Court had emphasised, that the constitutional bodies must cooperate with each other without specific regulation regarding to this.

Article 36 paragraph (1) item d) to l). In strong connection with these, the third sentence of Article 34 paragraph (1) states: "For discharging its mandatory duties and authority, the local government may have the right to appropriate budgetary and other material support." Since the main components of the autonomy are determined by Basic Law, those cannot be revoked even by a statute, although the autonomy has not got any separate legal protection, at least determined by the Basic Law itself[16].

It is a fact, that the new Basic Law does not determine the territorial levels on which self-governments should operate. The *territorial subdivision* of the state is stated in Article F among the General Provisions instead of self-governmental regulations (unlike in the Constitution). Article F paragraph (1)-(2) declare that the capital of the country is Budapest and that the territory of Hungary shall be divided into counties, cities and municipalities and districts may be formed in cities[17]. Consequently forming districts in the capital is not a constitutional obligation anymore, and so is the establishment of the local governments of capital districts.

It also refers to the change in the principles of the system's operation, that the Basic Law mentions "legal supervision" instead of "legal control" in connection with the local governments. Supervision means a more regular and stronger intervention from the Government, than the control[18], while the Parliament invariably bears the power of dissolution. According to Article 1 paragraph (2) item g) of the Parliament may dissolve representative bodies functioning in breach of the Basic Law, which is repeated partly in Article 35 paragraph (5). Based on this – according to the Constitution[19] – the Parliament dissolves representative bodies functioning in breach of the Basic Law proposed by the Government, but the Government may submit its proposal only after requesting the opinion of the Constitutional Court. Based on the same regulation, the practice of the Constitutional Court regarding dissolution of representative bodies is still normative[20].

To adjudge generally the situation of local governments in the Basic Law (their status in public law) one has to consider the rules written in Article T as well. Based on this, the decree of local government is a legal act (a "law") in which a generally binding

[16] Article 11 of the European Charter of Local Self-Government (about the legal protection of local self-government) guarantees that "local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation." According to the Charter, the recourse to a judicial remedy, the details of the judicial protection – in the absence of constitutional provisions – shall be enacted into the new cardinal statute on local self-governments.

[17] This is partly the same as in Article 41 of the Constitution. Fundamental difference is the ignoring of the capital district local self-governments.

[18] Article 8 of the Charter also provides for "Administrative supervision" of local authorities' activities, while the Constitution (mentioning "control") prevented the Parliament to enact a statute on "supervision" over local governments.

[19] Article 19 paragraph (3) item 1) of the Constitution

[20] According to the Decision 1220/H/1992 CC, it gives a principal opinion about the dissolution, if the situation written in the proposal can lead to an unconstitutional operation and it doesn't review the statement of the Government about the facts.

rule of conduct may be determined. The local governments are organisations which have law-making (regulative) competence based on Basic Law[21], although a cardinal statute may determine the rule of promulgation of local government decrees[22] differently, namely that these decrees do not have to be published in the (national) Official Journal.

Since the local governments have exercised public power in their independent administrative competence[23] while managing public affairs[24], one has to definitely consider them as public "*authorities*". Therefore, they have to administer public affairs within their jurisdiction impartially, fairly and within a reasonable time during their operation and according to the legal regulations they must justify their decisions. Additionally, the local governments are liable for any unlawful damages suffered by any person caused by them (as authorities) performing their public duties[25]. Exercising local public power the essential function is any person's fundamental right to present individually or jointly with others, written petitions, complaints or suggestions to them, similarly to any public authority[26].

3. The legal status and autonomy of local governments (powers, responsibilities, authority)

The Basic Law does not define the different types of local governments; it only names one particular type, the *county*. [Article 33 paragraph (2) explicitly names the County Representative Body mentioning no other types of local government authorities]. As the above mentioned Article F (on the territorial subdivisions) is not directly linked with the rules laid down in Article 31 (definition of local governments), the cardinal statute on the fundamental rules pertaining to local governments (Act on Local Self-Governments) – see Article 31 paragraph (3) – will have to determine the *different levels* and even the *different fields* of operation of local governments. In other words, according to the Basic Law, it is not obligatory to maintain a local government with full scope of powers in every single municipality, but it is not prohibited to do so either. Correspondingly, it is not mandatory by the Basic Law to establish capital districts with full scope of local governmental powers (unlike under the Constitution). Considering that the establishment and functioning of local governments is not based on the fundamental collective right of self-governance, granted to a community of voters living in a particular geographical area, this right is not violated when there is no operating representative body in a given municipality. The lack of an operating

[21] See: Article 32 paragraph (1) item 2) and paragraph (2)
[22] Article T paragraph (1) item p)
[23] Article 32 paragraph (1) item b) and c)
[24] Article 31 paragraph (1)
[25] Namely: Article XXIV paragraph (1) and (2) are valid on them.
[26] Article XXV

representative body – caused by any reason – does not violate this right, but may violate the rules of the Basic Law defining public powers.

According to the Basic Law, the essence of local self-governments is to manage public affairs and to exercise public authority (they have to function in order to fulfil this), since this is the reason why local governments shall exist[27].The local referendum is not the (seldom) alternative method of exercising the collective right to local self-governance anymore, but a method of deciding each case within the competence of the local government, as it is possible to hold a local referendum on such cases – as set forth in law[28]. The Basic Law does not even remotely define the exact meaning of managing local public affairs. Practically, local public affairs mean the mandatory duties and powers (authorities) of local governments[29]. The Basic Law does not regulate these public powers – or public affairs – in an entirely systematic method, in other words, the closely interconnected regulations do not appear in the same parts of the Basic Law.

Considering local public affairs, it is most important to emphasise the role of statutes. Local governments shall manage local public affairs within the frameworks defined in statutes[30]. At first glance, this might look limiting, but this exact rule removes the local governments from the public administration controlled by the Government, as not "legal norms" in general but only the statutes may limit or determine the management of local public affairs. This "statute level" protection is even more emphasised by the following rules: local governments may issue local government decrees to regulates issues of local society not regulated by statute (original legislation), and on the basis of a mandate stipulated by statute[31] (delegated legislation); only a statute may set forth mandatory duties (powers) and authority for the local government[32].

These rules and limits on local public affairs set forth in statutes will only be considered constitutional as long as they do not cause the full revocation of autonomy in a given topic. The *maintenance* of the local governments' *substantive* autonomy is a fundamental condition for the existence of autonomous organisations.

According to the Basic Law, there are two means of administering local public affairs. The local governments issue decrees (generally binding decisions) and make resolutions (particular decisions)[33]. The local body performs "independent

[27] Article 31 paragraph (1)
[28] Article 31 paragraph (2)
[29] See Article 32 paragraph (1) item l) and the phrasing of Article 34 paragraph (1)
[30] Article 32 paragraph (1)
[31] Article 32 paragraph (2)
[32] Article 34 paragraph (1)
[33] Article 32 paragraph (1) item a) and b)

administration", whichever method should the local government choose[34], to be considered the general essence of local governance. The meaning of the autonomy is that the local government makes its decisions (decrees or resolutions) independently, without previous or posterior assent of any other organisation, and that it cannot be instructed while reaching this decision. As the Basic Law itself regulates this autonomy, it can only be limited – at any level – by the Basic Law. The rule setting forth that statute may require the approval of the Government for a local government to take out a loan – the size of which defined by law – or to undertake any other obligation could be considered as an example for limiting the autonomous administration[35]. Another example for limiting the autonomous (or independent) administration is the above mentioned obligation for cooperation (the local government and the state organs will mutually cooperate in the interest of achieving community or public objectives)[36] and the rule setting forth that a statute may order that mandatory local government duties be performed in a partnership[37] – thus limiting the right to free association.

The Basic Law defines numerous groups of matters as well, as subjects of "managing the local public matters", i.e. defining the most important public matters themselves. Accordingly, during the fulfillment of its tasks, the local government either issues decrees or makes resolutions (maybe both), but in either case does it independently. These subjects fill the independency of local government with content.

The fundamental element of the autonomy of the local governments is the right to regulate its functioning and *organisational structure* (autonomy of organisation)[38]. At first glance the Basic Law allows more independence in this than the Constitution, because it provides less local government bodies (representative body, mayor, county chair, committee, office – not to mention the deputy chair and the notary). However, this autonomy will be limited further on not only through the cardinal statute, but could be restricted by other (normal) statutes as well. The right to regulate the organs and its inner structure would be exercised within these frames and in harmony with the decisions taken so far by the Constitutional Court[39].

It is deemed as a fundamental condition of the self- governance (*conditio sine qua non*) to determinate the types and rates of *local taxes*, more precisely the autonomous right of taxation[40]. This regulation essentially divides the right of taxation between the Parliament and the local government[41], giving authorisation to ensure to resources to the necessary extent for covering expenses related to their duties and to

[34] Article 32 paragraph (1) item c) The Constitution regulated the right of „independent regulation and administration" at the first place among the rights of local governments – Article 44/A paragraph (1) item a)
[35] Article 34 paragraph (5)
[36] First sentence of Article 34 paragraph (1)
[37] Article 34 paragraph (2)
[38] Article 32 paragraph (1) item d), Constitution: Article 44/A paragraph (1) item e)
[39] Decision 1285/D/1993 CC; Decision 23/2001 CC
[40] Article 32 paragraph (1) item h), Constitution: Article 44/A paragraph (1) item d)
[41] Decision 67/1991 CC

their scope of authority. It is important to emphasise that it is only the determination of the framework which falls in the competency of the Parliament, as "decision is made within a legal framework" about this as well. The right of taxation, the specification of the regulations of obligatory tax payments, the introduction of each tax, the determination of scale of exemptions within the frame, remains within the scope of autonomy of the representative body[42].

The power (and therefore the right) of taxation could not lead to full *economic autonomy*, even if the local government had had the right to act independently with the property and the financial resources. The Basic Law considers this autonomous economic management as a local public matter and ensures it by multiple connecting regulations. It states that the local government (or by Article 33 paragraph (1) the representative body) with respect to local government assets exercise *proprietary*rights[43]. At first sight the sentence that might seem meaningless proves to be significant: while property of the local government is part of the public property and in one serves the performance of tasks[44], the practice of the right of the owner does not depend on another body, it is not the Government or any of its office which decides about it, but the elected representative body.

The property and its subjects (assets) mean only the *conditions* of management (the statics), the management itself forms the dynamics. The Basic Law ensures the autonomy of the management – within the framework – by ensuring the local government to set its own budget[45]. The peculiar local budget is only an apparent barrier above the management, as its enactment also falls into the autonomy. As the management-based budget does not necessarily mean the growth of property as well, the Basic Law determines separately that the local government (the representative body) might carry on entrepreneur activities, on the condition that it may not endanger the completion of its mandatory obligations and only those properties and incomes might be used for this (enterprise) that are delegated to this[46]. The already referred rule to take out a loan and to undertake an obligation is also a restriction of autonomy in management by the Basic Law.

The economic autonomy of the local government is not on its own behalf, the local government is not a corporation and *not a profit-oriented* organisation. The economic autonomy should serve performance of duties of the local government. As only legislation may set duties or scope of authority for them, it is essential that their fulfillment should be granted by the legislator. This is based on the rule of the Basic Law similar to the provision of the Constitution, according to which the local

[42] Decision 155/2008 CC
[43] Article 32 paragraph (1) item e) – Constitution: Article 44/A paragraph (1) item b)
[44] Article 32 paragraph (6)
[45] Article 32 paragraph (1) item f)
[46] Article 32 paragraph (1) item g) – Constitution: Article 44/A paragraph (1) item b)

government is entitled to budgetary or other asset support which commensurate with their obligatory duties and scope of authority[47].

The Basic Law does not identify separately the local governments as the community of voters. One of the significant basic elements of the local governance is that the bodies of local governments are established through elections. The Basic Law states that the members of the local representative bodies and the mayors are elected by the citizens on the basis of universal and equal suffrage, with direct and secret ballot, at elections articulating the free will of the people in a manner defined by cardinal (qualified majority) statute and for five years[48]. The body that is elected to a determined area needs a symbol which expresses the political and historical unity. The Basic Law, by keeping the existing rules, provides that the local government (representative body) may create symbols and emblems relating to the local government, and may establish local honors and titles[49].

Cooperation between bodies of public administration is regulated by legislation and usually they are not the ones who could decide about the forms of cooperation and the bodies with whom to cooperate.

The elected local government bodies however *represent a political community*. The strength of this community and the success of the local government may depend on how they are able to display their interest. The Basic Law creates an opportunity for this, stating that the local government *may freely associate* with other local representative bodies, may create local government associations for the representation of their interests, may co-operate with the local governments of other countries and may be a member of international organisations of local governments[50]. As representative of the local community of voters, the local government may be the subject of specific right to petition, while practicing public power that the people may lodge complaint to. According to the Basic Law it may request information from authorities with jurisdiction, initiate a decision, articulate an opinion[51].

4. The delegated legislation and omission

Beyond the right of taxation, the second fundamental condition (*conditio sine qua non*) of autonomous self-governance is the creation of the generally binding local rules of conduct. Compared to the rule of the Constitution[52] the Basic Law defines the

[47] Article 34 paragraph (1) item h) – Constitution: Article 44/A paragraph (1) item c)
[48] Article 35 paragraph (1) and (2). In accordance with the provisions of the Charter: The right to self-government "shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute." Article 3 paragraph (2)
[49] Article 32 paragraph (1) item i) – Constitution: Article 44/A paragraph (1) item f)
[50] Article 32 paragraph (1) item k) – Constitution: Article 44/A paragraph (1) item h)
[51] Article 32 paragraph (1) item i) – Constitution: Article 44/A paragraph (1) item g)
[52] Article 32 paragraph (1) item i) – Constitution: Article 44/A paragraph (1) item g)

right to issue local decrees more precisely: it states that the Local Government within its competence may create two types of decrees. The decree might be issued based on an original mandate granted by statute in order to regulate relations of the local society (or community). Such decrees, which relate directly to issue local decrees concerning local public affairs, have their origins in the Basic Law. Decrees however may be issued by authorisation of statute, by derivative nature[53].

The decrees of the local governments implicitly may not be in contradiction with other laws[54], nevertheless clarifying their relation to Government decrees is more important. The practice of the Constitutional Court so far has been considered to be the normative one, by which the executive or public administrative powers of the Government shall not lead to intervention through decrees into the autonomy of local governments exercising its administrative power ensured by the Basic Law[55]. The Government within its competence may create a decree[56] in matters not regulated by statute, or by authorisation given by statute, this may not lead to define duties and powers of local government[57], because, according to the Basic Law this is within the competence of the legislation.

Local governments form integral part of the state organisation, an integral part of the public administration yet do not belong to the government bodies and agencies that are controlled and directed by the Government. The Basic Law defines the Government as a general body of the Executive, whose powers and authorities covers all, that are not delegated by the Basic Law or legislation into the duties and powers of another body. The Government is the supreme organ[58] of public administration, which ensures the legal (administrative) supervision of the local governments through the government agencies of the capital and the counties[59]. This supervision implicitly extends to the creation of decrees; therefore its fundamental rules are incorporated in the Basic Law. The Constitution does not determine this, but new regulations (in the Basic Law) states that decrees of local governments has to be sent to the government agencies of the capital or the counties forthwith after publication. In case the capital and the county government agency find the decree or any of its provisions offending, it may initiate the supervision of the decree at the Court[60].

The Basic Law introduces changes not exclusively into the supervision of the legal provisions of local government decrees, but it also provides for the omissions of the local governments as well. In their original legislative authority local governments

[53] Constitution: Article 44/A paragraph (2)
[54] Article 32 paragraph (3)
[55] Decision 1/2001 CC
[56] Article 15 paragraph (3)
[57] Decision 17/2006 CC
[58] Article 15 paragraph (1) and (2)
[59] Article 34 paragraph (4)
[60] Article 25 paragraph (2) item c) declares that local decrees interfering with other legal acts should not be reviewed by the Constitutional Court, but the ordinary courts. The Basic Law does not designate the court that exercises this scope of authority.

issue decrees based on their own decision by considering local needs and conditions. In relation to this, by definition omission is excluded. However, the vast majority of the local decrees are of executive nature, based on legal authorisation. In such cases the representative body has not only the right, but the obligation as well to issue the decree in the specific question. According to the precedent of the Constitutional Court the right to issue a decree becomes an obligation explicitly by legal requirement[61]. Non-compliance of this might violate the interest of local citizens but violates the public interest as well. To determine the omission of the obligation of legislation can be initiated by the Government agency at the court. The court sets a deadline for supplementation in the verdict that states the omission. In case the local governments do not fulfill the obligation for legislation the government agency might initiate authorisation for the issue of the decree itself, from the court. In case the court brings such a verdict, based on the resolution the decree of the local government will be issued on behalf of the local government by the head of the government agency[62].

5. Internal organization and subjects

The new regulation determines the *subject of self-governance* only *indirectly*. Since it does not regulate voters' right to self-governance, it would have been appropriate to determine it at the provisions for the elected body of representatives. This lagged behind and the Basic Law states only, that "Local government duties and powers will be exercised by the representative body"[63]. Therefore the body is not entitled to the powers, it "only" "exercises" it. All these would not change the given situation, namely that the elected body plays a key role in the system of the Hungarian self-governance system, which is headed by a directly elected mayor (except counties). The president of the county representative body is elected from among the members for the period of its mandate. The Basic Law mentions the county representative body and the local representative body separately among these regulations which may be disturbing, because the county representative body is also a "local" (not central) representative body[64].

The Basic Law ignores to declare (and therefore create) other organs of the self-governments, it states only, that the representative body may, in accordance with the provisions of a cardinal statute, elect a *committee* and establish an *office*. It is obvious from the text, that establishing an office and a committee is not an obligation for all local governments. The Basic Law does not determine the additional organs regulated in the Constitution[65], such as vice-mayor, notary and the public servants of the office.

[61] e.g. Decision 37/2004 CC
[62] Article 32 paragraph (5)
[63] Article 33 paragraph (1)
[64] Article 33 paragraph (1) and (2)
[65] Article 44/B paragraph (1)

On the one hand, this does not mean that these bodies cannot be established by cardinal statute, but on the other hand it means that their establishment would not be mandatory for the legislation. Therefore, the Basic Law gives the Parliament a broader scope of authority to create local public organs. An example of this may be the mandatory partnership (association), which is missing from the Constitution, being the main problem of it. Mandatory local government duties (responsibilities) may be performed in a partnership for providing mandatory tasks[66].

6. The elections and the political term of self-governments

One of the differences in the Basic Law compared to the Constitution is that it does not define the *date of*the local government *elections*[67]; the other one is, that it defines the electoral and political term of the elected local government in five years[68]. Due to this, the parliamentary elections and local elections will gradually shift throughout the years. As I have referred to it earlier, chairs of the county representative body receive their mandate in an indirect way, the members of the local representative bodies and the mayors are elected by the citizens on the basis of universal and equal suffrage, with secret ballot in elections which ensure articulating the free will of the people in a procedure which is defined in the cardinal statute[69].

As the local governments practice public power, the determination of the beginning and the ending date of the mandate of the representative-body have constitutional relevance.

The mandate of the representative body lasts until the day of the general elections of the local government representatives and the mayor. In case of cancelled elections due to the lack of nominees, the mandate of the representative body extends until the day of the by-elections. The mandate of the mayor lasts until the election of the new mayor[70]. The mandate may be terminated not only by time, but in extreme cases by the representative body too, as it may declare its dissolution, but the exact condition of this will be defined in the cardinal statute[71]. As mentioned earlier, similarly to present regulations, the Parliament may exceptionally dissolve the body that has been deemed to function unconstitutionally, upon the Government's initiation. Both cases of dissolution end the mandate of the mayor as well[72].

[66] Article 34 paragraph (2)
[67] According to Article 44 paragraph (2) of the Constitution local government elections are to be held in October of the following fourth year of the previous general elections.
[68] Article 35 paragraph (1)
[69] Article 35 paragraph (1)
[70] Article 35 paragraph (3) – Constitution: Article 44 paragraph (3)
[71] Article 35 paragraph (4) – Constitution: Article 44 paragraph (4)
[72] Article 35 paragraph (6) – Constitution: Article 44 paragraph (6)

The Consequences of Public Finance Globalization

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Abstract: The advancement of technology and communication has facilitated exchange of information and international contacts, thus laying foundations for the phenomenon called globalization that appeared in the mid-1970s. Globalization impacts are the main subject of the discussion presented below, which concentrates on one area influenced by globalization – the system of public finance. The article evaluates the consequences of globalization and attempts to identify its effects and constraints. In the concluding part of the article, the public finance areas where globalization should take place and those to be protected from it are presented.

Keywords: public administration, autonomies.

1. Introduction.

Economic processes and systems evolve, taking different forms. This process is driven by a search for solutions that are better or more effective in ensuring society's well-being. Following the development of technology and communications that facilitates information exchange and reduces international barriers, the term "globalization" was coined in the mid-1970s. Its definitions in the literature are multiple, but its essence is well understood.

The above introduction provides a starting point for the discussion presented below, where the special characteristics of globalization and its definitional differences are considered. In this context one area open to globalization impacts will be examined – the public finance system. Its globalization produces specific consequences, both negative and positive. Before they can be evaluated, the public finance areas that may undergo globalization will be indicated. The major effects and constraints in this process will also be discussed. This research approach actually aims to help find out if globalization is not likely to reverse its course, turning into alter-globalization processes.

2. The historical and institutional determinants of globalization.

The rapid development and progress of civilisation that took place in the last twenty five years of the 20th c. has resulted in many technological achievements, creating also a rather natural chance for global integration. This chance appeared with new, faster means of transport becoming available, and with solutions allowing contacts to be established and information to be obtained. As well as revealing that particular countries operated in different environments, these new circumstances stimulated also

the need to reduce the inter-country differences. The tendency that followed was called "globalization". What the term actually means has not been precisely defined, so it seems practical to present briefly how it is understood in the literature. The definitions one can find in the English literature describe globalization as inter-country linkages and influences that are ultimately expected to form a uniform global system, where the national economies cooperate to a degree that makes them mutually dependent[1].

Another definition views globalization as the emergence of a global economy or a global market for capital, labour force, goods and services[2].

There is also an enumerative approach, listing the characteristics of globalisation. These are:

a) decreasing distances between various entities, such as business organizations, households and individual territorial units;
b) social and economic integration;
c) interdependent states[3].

Without analysing these definitions in detail, it can be generally concluded that globalisation takes time and that it aims to unify national systems, particularly countries' economies, by eliminating barriers obstructing social development. It must be borne in mind, though, that globalization does not have one universal form, and so it affects or can be implemented only in specific areas. According to the literature[4], these are finances, capital, markets, technology, scientific research, models of consumption and culture. The last two areas are the most controversial and a separate discussion would be needed to understand why it is so. In this article the first of the areas will be explored.

In the literature, globalization is described by contrasting it with other economic and social phenomena, such as fragmentation, regionalization, and localness; it is also stressed that globalization facilitates integration by reducing disintegration[5]. This comparative approach is used to show what globalization is not about.

That globalization exists and even accelerates is out of the question. Its processes have brought about changes in several dimensions, leading to:

- the establishment of various international institutions;
- the expansion of international financial markets;
- the emergence of transnational corporations;
- the new ownership structure of investments;
- labour force movements;
- a different role of the State.

[1] See S. Flejterski, P.T. Wahl, Ekonomia. Synteza globalna, Difin, Warszawa 2003, p. 18.
[2] See K. Gałuszka, Wpływ procesów globalizacji gospodarki na finanse samorządu terytorialnego, [in:] Finanse publiczne wobec procesów globalizacji, Gdańska Szkoła Bankowa, Gdańsk 2003, p. 106.
[3] See W. Gumuła, Uniwersalia i anomalie w procesach globalizacji XX wieku, Biuletyn PTE no. 3 (47) April 2010 p. 12.
[4] See S. Flejterski, P.T. Wahl, op. cit. p. 18.
[5] Ibidem p. 23.

International institutions have been created and the scopes of their influence have been extended following the growing demand for their special services**.** Their group includes financial institutions, e.g. the International Reconstruction and Development Bank (IRDB) or the International Monetary Fund, as well as trade regulators, such as the World Trade Organization (WTO). Other specialised institutions with economic profile are the Food and Agriculture Organization (FAO) and the International Fund for Agricultural Development.

Different goals are pursued by the International Labour Organization (ILO), which coordinates and creates solutions for the international labour market. Institutions such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) are dedicated to culture and science. Even this brief review shows that international institutions deal with a broad spectrum of issues, which facilitates the taking of joint actions worldwide.

Further, independent banks and stock exchanges guarantee that capital will flow freely without encountering any formal barriers, which is conducive to creating an international financial market.

A special trend within globalization involves the establishment of international corporations, which are sometimes called transnationals. One of the measures applied to assess the effectiveness of the process is value added that the foreign-owned enterprises contribute to the country's GDP. The rate takes different values, but in many countries its value has been at least several per cent for a long time. Its trend is rising, which is closely related to the growing volume of Foreign Direct Investments. In 1973-1998 alone, FDI increased 25 times[6]. This process has contributed to labour force movements and to the expansion of open labour markets.

Because of the goals this discussion is to attain, of crucial importance are the multifaceted changes to the State's role that globalization brings about. Their main sources are international military agreements (NATO), monetary agreements (the Monetary Union), or socio-political agreements. A relevant illustration of the latter is the European Union that imposes specific legal solutions and financial obligations resulting from the creation and distribution of the EU budget. It is doubtless that the transformation of the State as we know it is underway, but will this process limit all its functions? This subject is too vast to discuss in this article, so only one theme, closely connected with the functioning of the State, will be analysed here, i.e. public finance.

[6] Ibidem, p. 28.

3. The dimensions of public finance globalization

When globalisation is understood as a process which is to ensure that particularly countries attain relatively homogenous levels of development, then public finance becomes the first area to be affected by this process.

There are several reasons why it is so:

1. The public finance system is part of the political system in the country.
2. The public finance system is determined by the model of the State.
3. The public finance system has instruments that the State uses to implement its financial policy;
4. The public finance system controls public funds;
5. The government decides how much public revenues will be collected.
6. The government indicates what public funds will be spent on.
7. The public finance system may be either open or closed, thus showing the degree to which it is willing to accept unification and then globalization.

Because of the strong relationship between the State and public finance, globalization transforming the shape of the State must consequently have an effect on public finance too.

This makes us ask the question whether the atrophy of the State as we know it affects also public finance. Naturally, the term "atrophy" should not be understood as the gradual disappearance of the State, rather as its transformation that ultimately leads to the conclusion that its finance system has been changed. For this change to take place, what the State does must be characterised by effectiveness, responsibility, subsidiarity and self-sufficiency[7]. It is necessary that the four requirements be met concurrently, as otherwise the State will not be able to secure the living standard and equal access to public goods that may be achievable under the existing circumstances, place and time. This goal is pursued using the instruments that have been made available to the financial system. In this context, the question about the degree to which the system is or can be globalized must be asked.

For the answer to be given, issues common to several areas need to be analysed. The first area involves the degree of government decentralisation and the selection of tasks and powers that should be transferred to the local and regional structures of government. The second area covers the role of the public revenue index and its structure, as well as the construction of particular instruments, mainly taxes.

The third area is the system for planning and controlling public funds, the main issue here being the implementation of the performance budget.

[7] K. Szczerski, Model państwa a skok cywilizacyjny w: Polonia quo radis? Red. A. Kukliński, K. Pawłowski, J. Woźniak. Biblioteka Małopolskiego Obserwatorium Polityki Rozwoju, Kraków 2010, p. 164.

The fourth area is the structure of public expenditures, which should be subordinated to the financial policy objectives and the stages of its implementation; consistency with a strategic approach to social and economic development is required.

The fifth area covers the development of a system for managing government funds, which either stresses their balance or accepts deficit.

The sixth area is the policy of making the public economy either dependent or independent of foreign funds.

In particular areas globalisation may take a different course and lead to different results.

Both theory and practice agree that decentralised government offers many benefits, such as more effective allocation of public funds owing to better knowledge of what is needed and increased activity of the citizens, expressed through social initiatives. This approach is capable of lowering the costs of services being delivered, etc.[8] From the perspective of this article, it is most important that decentralisation is particularly open to globalisation, because of the ubiquitous tendency to restrict the powers of the centralised States and because effective management of public funds must be ensured. It is true that „In the globalising economy the territorial self-government (regional, local) has an important role to play"[9]. But it must also be asked, whether globalisation does not contribute to limited financial autonomy of the units of territorial self-government.

The next issue concerns revenues in the State. It is rational to ask whether their structure and form should be unified or not. Arguments either supporting or rejecting structural uniformity can be presented. For instance, when the labour markets are open, a uniform income tax system is much simpler to operate and special inter-country agreements are not needed. However, for a tax system to be acceptable it must be fair, i.e. consistent with the social and economic needs in the country. Other affirmative arguments can be raised in relation to the valued-added tax (VAT), because of the steadily expanding trade in goods. Unified VAT may facilitate the conclusion of financial transactions, but it must be remembered that especially its reduced rates must support the socio-demographic policy pursued by particular States, so their unification might be inappropriate.

Another area that needs to be considered when globalization processes are being evaluated is the already mentioned system for planning and controlling public funds, which are mainly cumulated within the budget management system. The principles underlying performance budgets (mainly performance indicators) are very much worthy of unification, whereas the fulfilment of particular tasks which is stretched in time should be protected from globalization, because the tasks serve

[8] See M. Kosek-Wojnar, K. Surówka, Finanse samorządu terytorialnego Wyd. Akademia Ekonomiczna w Krakowie, Kraków 2002, p. 19.
[9] K. Gałuszka, op. cit., p. 111.

national policies that are shaped by country-specific historical circumstances, etc. The performance budget imposes a special structure of public expenditures, because the governments must coordinate their plans with the global development programmes. In 2008 the Club of Rome started to work on a programme called the New Path for Work Development, where the countries' progressing interdependence is strongly stressed. Because of the process, it is important that the priority objectives that countries cooperatively choose for action are consistent with their national interests. Further, the Amsterdam Declaration 2009 makes it clear that economic growth is not based on growing consumption, but on the creation of well-being understood as satisfaction of life[10]. Financial policies should pursue this goal, paying special attention to the directions and structure of public expenditures. Another area is the State's model concept of its financial result, stressing either financial balance or accepting deficit and consequently the burden of public debt. It seems that the question about whether the solutions in this area should be unified in the course of globalization should be answered negatively. There are many reasons for this answer. While borrowing funds to finance current needs and expenditures is blameworthy, debt arising due to the development-boosting projects, e.g. new investments, seems to serve a right purpose. It must be asked, however, why in some countries, such as Chile, public economies are balanced and run at surplus, while others (i.e. Greece) suffer from extreme shortages of funds. Answering this question is outside the scope of this article, as this required special research.

When the government budget is in deficit, the decision about how it will be financed gains importance. The domestic sources of funding (issues of securities, e.g. government bonds) and external sources of funding (the use of foreign funds) must be chosen. Having unified solutions in this area would be risky, as they would naturally disregard the country-specific circumstances.

The last area is tightly connected with the one discussed above. It actually boils down to the question whether the use of foreign funds makes a country dependent on others or perhaps expresses the world solidarity. If external funds are treated as a temporary solution, then the borrowing country does not run the risk of becoming dependent.

4. The effects and constraints of public finance globalization

It has already been mentioned that globalization is multifaceted and produces a whole range of effects. Its constraints are equally diverse. It will be practical to start analysing the more general issues first and then to proceed to specific problems within public finance.

[10] See Z. Sadowski, Nowa ścieżka rozwoju świata. Program Klubu Rzymskiego, Biuletyn PTE no. 3, 2010 p. 14.

The general evaluation of globalization provided in the literature is very controversial and stirs extreme reactions, from apologetic to condemning all its aspects. There are apparently several reasons why formulating general statements about globalization that lead to final judgements is not rational. Firstly, the phenomenon appeared as late as the end of the 20th c. and is still in progress; secondly, in-depth analyses presenting its real rather than alleged outcomes have not be performed yet; thirdly, its evaluations should be therefore relative and stress changes rather than states. Some more appropriate ways of evaluating globalization are presented below. For instance, instead of stating that globalization strengthens the institution of the State, the evolution of its roles and functions should be indicated.

There is an opinion that globalization builds civil society. Rather than that, it would be more appropriate to say that globalization makes its creation easier. The negative opinions also need to be toned down. For instance, the statement about globalization killing cultural diversity may be replaced with one indicating that globalization brings cultures closer together, without posing any risks to the development of their unique traits.

The belief that globalization undermines people's sense of belonging to the same community is also ungrounded. Globalization rather enables comparisons, thus helping communities improve and supporting new initiatives. The question about whether globalization reduces or perhaps helps remove the differences in the standards of living in the world does not have an answer. There is an error inherent in the way it has been formulated. Globalization is not a panacea capable of spanning the gap between the rich countries and the poor countries, as the gap exists for many reasons. It would be overly optimistic to assume that the 30 countries recognised as the richest countries in the world may sufficiently influence the situation of the minimum 100 poor countries, lifting them from poverty.

K. Wojtyna is of the opinion that the empirical investigations (especially the macroeconomic ones) do not provide solid evidence that the emerging economies may reap net benefits from becoming „financially open". Neither directly, by achieving higher levels of well-being or higher rates of growth, nor indirectly, owing to forced institutional reforms or changes in economic policy, etc."[11]

Another important conclusion is that „…there is no formal empirical evidence … that financial globalization in itself and by itself should be blamed for the string of crises … in the last thirty years."[12]

The literature also indicates that because of globalization the importer countries turn into exporters, mainly of savings.

All the opinions lead to the conclusion that globalization is far from being a straightforward process.

[11] Kryzys finansowy …op. cit. p. 22.
[12] Ibidem, p. 22.

The above context definitely justifies asking the question about globalisation impacts on the public finance system. The relationships observed here are doubtless very strong, mainly because of the tight connection between globalization and the State.

Therefore, the public finance areas where globalization has or may have the strongest impact will be identified. As indicated, there are several of them.

The first area is the tax system. Its unification, even if partial, simplifies the settling of international transactions, mainly those involving goods and services.

The second area strongly influenced by globalization is that of budget deficit and public debt. Having to finance their budget deficits, countries become dependent on the international lending institutions.

The third area covers development and the pursuit of relevant international agreements and arrangements. The decisions here may not be taken hastily, as they are directly connected with the country's financial policy.

The fourth area stems from the third, as it concerns public expenditures. Attempts at unifying the structures of public expenditures are extremely dangerous, because joint implementation of international programmes and environmental protection programmes co-funded from the EU budget comes with certain obligations, which call for corrections to public expenditures in the country.

The fifth area covered by globalization is planning and controlling the government budget. Even partial unification in this area may help choose the most effective modes of action.

The above arguments can be summed up by indicating the areas where globalization is present, as well as those where it is possible and advisable. These are presented in the conclusions below.

5. Conclusions

Globalization in the sphere of public finance should be controlled, because public finance systems fulfil special functions and tasks that are strongly determined by the unique history of particular nations. For this reason, the public finance areas where globalization is practical, where it can be partially useful, and where it should be avoided must be defined.

It is doubtless that globalization can help plan and control the government budget. Its main benefit is the possibility of using methods proven elsewhere, if a country finds them practical. This approach ensures comparability of particular systems' effectiveness.

Globalization may also be partially introduced into the tax system, specifically into its VAT section, and into the State's strategic financial policy.

The way the budget deficit and public debt are financed may also be globalized; this mainly concerns the structure and amounts of funding obtained from the external sources.

However, it seems inappropriate that the general solutions that governments develop under their budget balancing policy or deficit policy be open to globalization.

Finally, globalization of public expenditure policy should be avoided, because the expenditures show strict correspondence with the character of the State and the level of its social and economic development.

All opinions and views presented in this article are author's own and are open to debate.

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Selected General and Financial Perspectives of Decentralisation in Slovakia

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Abstract: The paper studies the topic of decentralisation from two different perspectives. On one hand the author provides a brief introduction into the theory of decentralisation and provides the reasons for which states decide to decentralise their powers. On the other hand, the author provides the reader with basic facts as to the fiscal decentralisation in Slovakia. To this end, the paper focuses on the communities only (not on the regions) and it studies primarily the basic relations that exist between the central state budget and the budgets of the communities. The author names the payments communities get from the central budget and analyses some of these payments in detail. The article also suggests the types of local taxes and fees and other sources of income of the communities. In the final part of the paper, the author defines the criteria that are taken into consideration when distributing the personal income tax collected by the central authorities, to the communities. At the same time, limited space is devoted to the statistical fact that the total amount of personal income tax in Slovakia has a decreasing tendency and to other issues relating to this matter.

Keywords: decentralisation, personal income tax, distribution of revenue, communities, central budget, delegated powers, original powers, tax, fee, local government.

1. Introduction

Decentralisation is a term used in many branches of science, including law and economics. It is not surprising to learn that the term decentralisation finds its real application and meaning when combining its legal perspectives with the financial ones.

In the following paper, we will provide the reader with basic information on fiscal decentralisation in Slovakia, its history and current status in the context of the communities[1] (*"obce"*).

It is more than clear that in the administrative sense, decentralisation refers to the transfer of competences/powers and duties from one entity to another. In the legal sense, decentralisation usually refers to the distribution of public powers and their execution among a number of institutions and entities. In the financial or economic sense, it usually refers to the possibility of gaining financial means necessary for the

[1]When using the term *communities* in this paper, the author uses it in the context of villages, towns and cities, i.e. in the meaning of local territorial units of self-government other than regions.

operation of the specific body without being connected to any other institution of the State (or to having at least a degree of financial independence from the central budget). Understanding this, one common feature of the term *decentralisation* can be identified already - namely the fact that in the process of decentralisation one entity gives up on some of its rights and competences in order for another (public) "player" to receive them. In other words the competence does not disappear but it is simply moved between the parties. From this point of view, the one who receives these powers has two sets of competences: the ones received (usually from the central government) – i.e. the *delegated powers* - but at the same time, local sub-central governments have also some powers which are their very own by the nature of such competences. These competences are usually referred to as *original powers*. In any case, the redistribution of powers within the public administration sphere leads (logically) also to the redistribution of public finances used to cover the public services. One of the basic rules behind decentralisation (especially from the point of economics and finance) is that there should be a level of subsidiarity between the central government and the sub-central governments by accepting the fact that some competences of public administration shall be primarily assigned to the "jurisdiction" that is closest to the citizen, i.e. the local governments (communities or regions). To this end, one can presume that most public services could be provided by the communities without any major problems or obstacles. However, in practical terms, decentralisation may lead to a set of negative outcomes as well. Most importantly, in many cases the sub-central governments are vested with competences (powers and duties) but without any or with no adequate means to fulfil them. For this reason, seeking for the best model of financing of local governments is not a new issue at all. In this paper, however, we do not attempt to find such a model but to focus on some elements of the existing model in Slovakia.

Why to decentralise (from the political and legal perspective)?

Decentralisation is carried out for a number of reasons. In most cases it has a *bone fide* base and it is actually a form of agreement between the one who transfers the competences and the one who gains them. Nevertheless, it is not rare to learn that decentralisation is also carried out as a unilateral act – moving the powers and competences without a general and public dialogue, without discussing (in detail) the issue with the ones concerned. Just like the process of decentralisation, also the motives behind it may be various:

A) One of the motives of decentralisation **could be the stabilisation of the political situation in the country** thus strengthening the country as a whole. Examples of such decentralisation are seen in the UK, Italy but also in Spain where decentralisation was adopted as one of the most efficient means of the democratisation processes. It is totally acceptable for unitary states (and in some cases also for federal

states as well) to transfer the powers to local territorial units in order to strengthen their own positions. Doing so, the territorial units receive competences which relaxes their anger or frustration and that usually leads to the relaxation of the whole political scene.

B) In some other cases, **(international) treaties may require signatory states to implement some levels of local and regional governments** and to provide them with a set of economic autonomy as well. When looking at the very gist of the term self-government, one understands that it refers to the governance of the very own issues of a certain society on a certain territory. Such self-government is full and absolute only in those cases, in which the communities have their own financial means for governing their own issues (independent of any other source). Logically, in a number of countries (especially in Eastern and Central Europe) such fully-independent operation of self-government is limited (if not excluded entirely). A factor determining this is that in many Central and Eastern European countries territorial self-government units are still a rather new issue and are still in the process of formation. A clear example of this is Slovakia.

C) When looking at the **key motive of economic nature**, in many cases, central governments tend to implement the formation of sub-central governments in order to cut the costs of the central government. It is (sometimes wrongly) believed, that in cases when the competences of the central government are vested in the sub-central governments, the expenditures of the central government will drop. This notion is true (to a certain degree) but not in the absolute sense. Decentralisation usually does not lead to the narrowing of central public bodies, number of civil servants etc. These items of cost just move to the entity where the new competence is transferred. One of the key issues to remember is that with the decentralisation of competences, the powers and duties do not disappear, they just simply move. And if these are executed in the same form and extent, normally there is no extensive area for major savings of public finances.

D) Another reason why some countries tend to introduce different models of decentralisation is that they believe that ones the powers are transferred to the local level; they will be managed and executed more efficiently since they will be closer to the receivers of public services. This argument is usually well accepted and not disputed. However, it is fully applicable only in those cases in which the sub-central governments are also provided with sufficient funding for providing these public services. It is more than clear that financing these services exclusively from the very own means of the sub-central governments is almost impossible. This ground of decentralisation is logically tightly connected to the issue of local preferences and the fact that local people have greater knowledge of their own needs.

E) **Regional diversity** may be another reason for decentralisation. In countries with a diverse population (from the perspective of ethnicity, language etc.), but with

sections of the population being concentrated in certain areas, decentralisation is not a rare phenomenon.

Although self-government and sub-central governments have proved to be useful and needed instruments in public administration and public services, within unitary states, there will always be a need for a central "control", "review" or "check" of the whole system. States, from this perspective, shall be the guarantee that all public services in the country – whoever provides them on behalf of the central government – will be provided in a timely and efficient manner. This is also the reason, why the vast majority of central European states have opted for a hybrid model, in which two territorial self-governments exist but with the central government being involved in the administrative issues – at least to a certain degree. Nevertheless, this is not typical for central Europe only, but also for a number of countries in the Western part of the European continent. Education – for example – is shared between the central government – the regions – and the local autonomies in the Slovak republic. Local autonomies have the competence to create and run elementary schools, regions have the competence to create and run secondary schools but the central government (represented by the Ministry of Education, Science, Research and Sport of the Slovak republic is still involved e.g. in the curriculum formation etc.). So while on one hand, decentralisation makes it possible for the relevant parties to provide "tailor-made" public services, the central government is there to overview them, to (co-)finance them and most importantly – to guarantee that the services provided by all sub-central governments meet at least the minimum standards (usually by establishing norms, official standards, directives etc.).

Another example is the case of healthcare in Slovakia. In Slovakia (just like in many other countries, e.g. in Austria etc.), there is a clear line of shared competences between the local autonomies and the central governments. The central authorities in Slovakia are still the only institutions having the power to create and to run certain types of healthcare institutions. If hospitals and clinics of certain types are created by regional governments, they do administer them etc., but the central government still overviews them through a set of bodies and institutions (e.g. in Slovakia the national Healthcare Surveillance Authority at the Ministry of Health of the Slovak Republic is the one tasked with controlling the quality of healthcare provided by hospitals created also by sub-central governments and dealing with the complaints of patients in relation to such hospitals). The power of this national body is not limited in any way by the fact that regional governments have the duty to employ a doctor of medicine in the position of a "*regional doctor*" (*"lekár samosprávneho kraja"*) who is also responsible for some tasks within the healthcare system provided by the doctors on the territory of the particular region.

The last example we could name in order to illustrate the distribution of competences and duties between the central governments and the sub-central

governments is the example of roads. With the adoption of some new laws, roads in Slovakia are now categorised into certain groups and the categorisation of the road determines the entity being tasked with the administration of the road (including repairs etc.).

As suggested in the previous parts of this paper, one of the most negative perspectives of transferring public services on the sub-central governments is the fact that by doing so, their financing is not solved at all. On the contrary, poor regions and local councils, although having the competences, the powers and duties, they do not have enough own funding to provide good quality services. On the other hand, economically productive sub-central governments and territorial units have a good chance to provide high quality services and by looking into the needs of the inhabitants of the region, it is very likely their services would be better than the services of the central government (e.g. specialist hospitals for miners in mining areas etc.). If the economic power of the regions is approximately the same, problems may occur if their population differs greatly. Again, regions with high population will be "richer", while regions with lower population will more likely have less funding and will not be able to provide services of the same quality. If that is the case, it is likely that the inhabitants of the latter region will leave, will move to a region with better public services thus lowering the population of the "poor" region even more thus the region get less money from the central government (see below). Technically the same general rules apply to communities as well.

Selected Financial Perspectives of Decentralisation in Slovakia

According to Article 64 of the Constitution of the Slovak Republic, in Slovakia there are two units of territorial self-government. One being the communities (villages and towns/cities – *"obce")* and the other one referred to as *higher territorial self-governing units* (regions – *"vyššie územné celky"*)[2]. It is important to note that there is no hierarchy between the communities and the regions. Within the decentralisation process, the lawmaker has decided to transfer some competences on the communities while some other competences to the regions. An example of this can be seen above (e.g. elementary schools are managed by the communities and secondary schools are managed by the regions). At the same time it must be added, that the communities and also the regions are tightly connected to the public budget of the central government.

Slovakia is not a country with a very long-lasting history of self-government. Actually, the rebirth of territorial self-government in Slovakia dates back only to the 1990s with the first Act on communities being adapted as Act no. 369/1990 Coll., i.e. still within the common State of the Czechs and Slovaks (since Slovakia as an independent country came into existence only on January 1, 1993). On the other hand,

[2] This paper focuses on the matters of decentralisation in relation to the communities (*„obce"*).

the regions were created by the Act on *higher territorial self-governing units* - Act no. 302/2001 Coll. However, in the very same year, i.e. in 2001, the Parliament adapted a new piece of legislation by which some of the powers and competences of the central government were transferred onto the communities and the regions. This - of course meant – in line with the facts described above, that the central government needed to introduce a system of financing the services provided by the communities and regions but giving them a degree of financial autonomy at the same time.

With no reference to the past, in the current paper we will only deal with some basic questions: what is the relation between the communities and the central government from the point of financing public activities? How efficient is the current model of financing? What are the "original" incomes of the territories and is there any space for improving the system?

In 2004, the National Council of the Slovak Republic (the Parliament) adapted the Act on budgetary rules of public administration – Act no. 523/2004 Coll. which replaced the old Act of the same nature which dated back to 1992. With a very tight link to this Act, the Parliament also brought into existence two more pieces of law, namely Act no. 582/2004 Coll. on local taxes and fees and Act no. 583/2004 Coll. on the budgetary rules of self-government.

These Acts represent the key elements of the legal framework regulating the financing of sub-central governments and the execution of their powers and competences. The first thing we need to look at is the bipolar position of communities and regions in Slovakia. Both of them have original powers and competences, i.e. powers that are directly vested in them by the law and relate to their nature of self-government, nevertheless, bearing in mind Act no. 416/2001 Coll. they also have derivative or delegated powers. These powers are those which were transferred on them by the State, i.e. by the central government. To this end, logically, the central government will also provide them with sufficient funding (*grants – "dotácie")*. The binding rule on this is set forth in § 8 lit. e) of Act no. 523/2004 Coll. which stipulates that: *The state budget is used to cover the costs of communities and higher self-governing units within the execution of the delegated powers*. This rule, however, is rather general and in order to be able to reach a more precise idea of the system, one needs to inspect § 3 of Act no. 583/2004 Coll. According to this Act, the financial relations between the communities and the regions on one hand, and the central state budget on the other, can be seen in three different perspectives. In line with this provision of the law, self-governing units are entitled to:

a) a share (portion) of taxes collected and administered by the state,
b) grants to cover the cost of delegated competences (within decentralisation)
c) other grants in line with the Act on public budget for the particular year (if that Act provides for such grants).

As to the type of income of the communities, one needs to go into details in order to be able to group them. In general, one can refer to two major categories:

a) taxes and fees – which are taxes collected by the central government and transferred to the communities (a share/portion of taxes) but it also refers to local taxes and fees
b) other income not having a tax or fee nature – income of the communities originating e.g. in the selling of their property, renting of their property, other for-profit activities of communities and its companies, gifts of property etc.

Logically, there would be many other methods of grouping incomes (e.g. according to the criterion whether the community is entitled to that income or not, another criterion could be the fact whether the income is voluntary or obligatory – from the perspective of the one who provides the payment etc.), however, for the time being and in relation to the nature of this paper, there is no need to go into further details at this point.

Nevertheless, in order to be more specific, in the following part of this paper we will name the types of income communities may have according to the law:

a) local taxes and fees
b) other income not having the nature of taxes and fees
c) income connected to the financial means of the community
d) income in the form of sanctions for the breach of financial disciplines of the community
e) gifts and other income of similar nature
f) a share (portion) of taxes collected and administered by the state
g) grants to cover the cost of delegated competences (within decentralisation)
h) other grants in line with the Act on public budget for the particular year (if that Act provides for such grants)
i) specific grants originating in special treaties/agreements between the communities, or the community and the self-governing territorial unit
j) grants from EU funds
k) other income if so stipulated by the law

Although local taxes and fees do not have a dominant position in the income sphere of communities, some space needs to be devoted to them as well since they represent an important "independent" source of income of the communities. The lawmaker gave the communities the power to collect the following taxes and fees – of course – all of them being in one way or another connected to the territory which collects and administers the tax/fee.

According to § 2 of Act no. 582/2004 Coll. communities have the power to collect the following taxes and fees:

a) real estate tax,
b) pet tax (dog tax),

c) tax for the use of public area,
d) accommodation tax,
e) vending machine tax,
f) game (entertainment/play) machine tax (not gambling machines),
g) tax for permitting entry to and parking a vehicle in the historical centre of the community (village/town/city),
h) nuclear instalment tax,
i) fee for household litter and minor construction litter.

As to the above taxes and fees, although communities are empowered to collect and administer them, they are not obliged to do so. Understanding this, one needs to add that the most "profitable" income of the above is usually the real estate tax.

Nevertheless, the main question remains as follows: if communities have the possibility of collecting 8 types of taxes, 2 types of fees and they also have their own income relating primarily to their own property etc., how much money is still needed from the central state budget to guarantee the minimum public services and their standard quality? The answer is quite simple. Out of 100% of the annual income tax of natural persons collected by the State, 70,3 % goes to the communities, while 23,5% goes to the regions and only 6,2% remains in the central state budget. In addition to that, regions (i.e. not the communities) get 100% of the motor vehicle tax collected by the State. According to Act no. 564/2004, § 4 section 1, the government sets the rules according to which the taxes are shared among the communities by its Regulation[3]. As suggested above, communities also receive other payments from the central state budget. These include different subsidies or grants supporting their operation and the execution of their tasks. In general and in a rather simplified manner, the following notion can be expressed: communities receive subsidies and grants from the central state budget in order to cover their costs relating to the execution of administrative tasks transferred upon them by the State, and they also receive a fixed payment from the budget expressed through a percentage of the total personal income tax. The chart below illustrates the percentage of **total** transfers from the central state budget to the communities for the period of 2005 to 2012. In the most general sense, the table describes how much money of the central state budget goes back to the communities ("*obce"*).

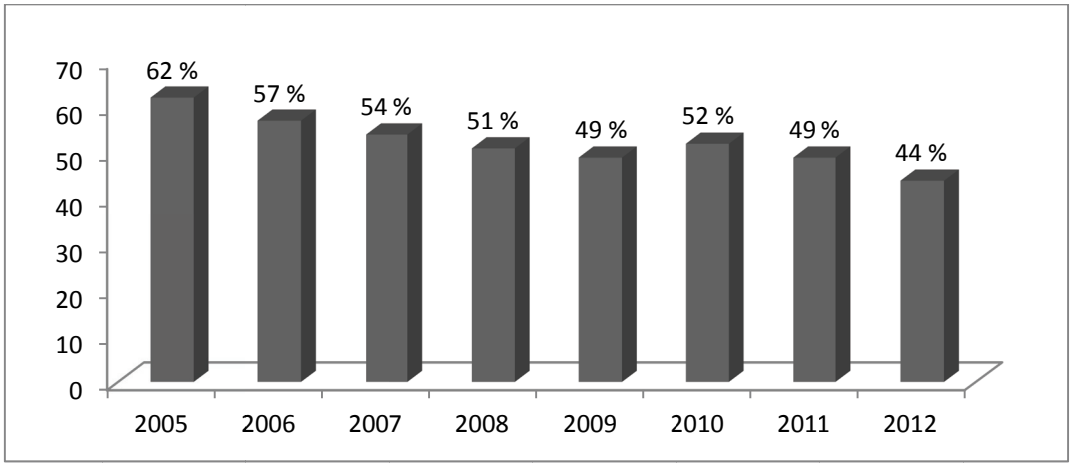
[3] More on these rules will be discussed later.

Table 1.[4]

Year	Total income – central state budget	Total – transfer to communities[5]	%
2005	8.538.338.678 €	532.926.077 €	62 %
2006	9.052.547.068 €	511.588.561 €	57%
2007	10.305.766.182 €	559.655.281 €	54 %
2008	11.559.839.507 €	593.341.665 €	51 %
2009	13.221.992.753 €	646.248.920 €	49 %
2010	12.530.993.951 €	645.666.693 €	52 %
Year	Total income – central state budget	Total – transfer to communities[6]	%
2011	13.147.833.812 €	649.663.254 €	49 %
2012	15.270.326.156 €	674.719.247 €	44 %

In the chart below, the values were transformed into columns in order to illustrate the fact that the percentage of the amounts being transferred back to the communities is decreasing year by year (with the slight exception of 2010 and 2011).

Chart 1.



The above text, table and chart explain the basic tendency that can be identified, i.e. that communities get smaller amounts of money from the central state budget year by year. To us, however, it is more important to see, how much money communities get

[4] The values originate in the official documents of the Government or in the relevant Acts of Parliament and are to be considered as estimates set forth by the law (the reality may differ from the anticipated values set forth by the law). The values for the period of 2005 – 2008 were recalculated into Euros (instead of Slovak korunas – the official currency of the country at the time). As to the year 2012, the value refers to a presumption by the Government as presented on the website of the Ministry of Finance of the Slovak Republic.

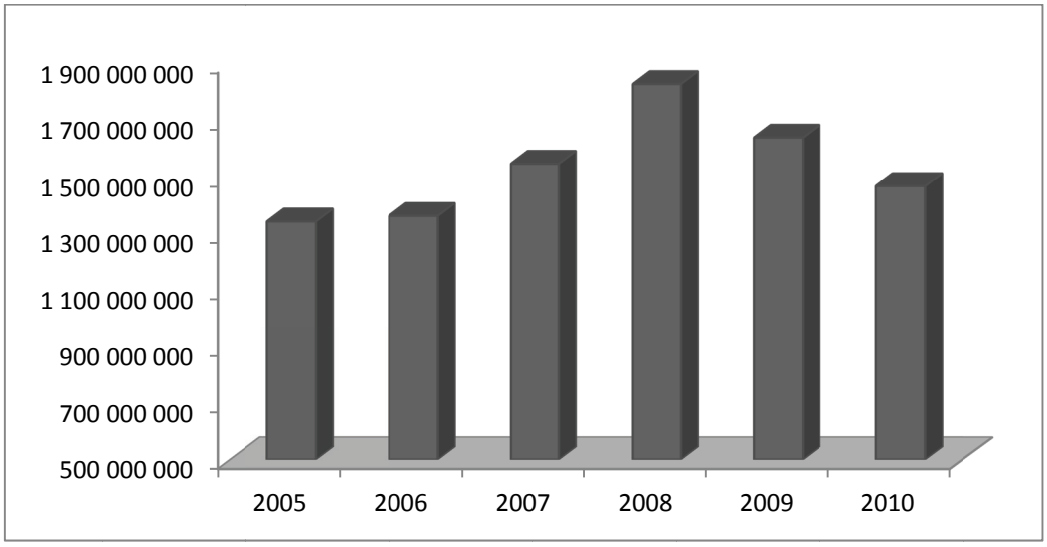
[5] When referring to „communities", the author of this paper refers to „obce" (towns and villages), i.e. these values do not include the regions.

[6] When referring to „communities", the author of this paper refers to „obce" (towns and villages), i.e. these values do not include the regions.

from the central government as a share in personal income tax. By now it must be clear to the reader of this paper, that 70,3 % of the personal income tax collected by the State is transferred to the communities by redistributing this amount according to specific rules (see below). In other words, the relevant Act does not guarantee any minimum fixed amount (in absolute numbers) to be redistributed amongst the towns and villages, it only defines the percentage of the personal income tax to be transferred onto the communities. In case less personal income tax is collected by the tax authorities, logically, communities get less money from the central state budget. On the other hand, if the economy is extremely efficient, communities get more than expected.

The following chart illustrates the total values of personal income tax collected by tax authorities in Slovakia in the periods of 2005 till 2010.

Chart 2.[7]



Logically, if the total amount of collected personal income taxes drops, the amount of money that is redistributed among the communities (the 70,3 % of the total amount) will decrease as well. Table 2. (below) provides a general summary of distribution of the personal income tax collected by the State among the following entities: the communities, the regions and the central State budget.

[7] Source: Tax Directorate of the Slovak Republic (website). The values are in Euros. The values for the period of 2005 – 2008 were recalculated into Euros (instead of Slovak korunas – the official currency of the country at the time).

Table 2.[8]

	TOTAL PERSONAL INCOME TAX	COMMUNITIES	REGIONS	CENTRAL STATE BUDGET
YEAR	(100%)	(70,3 %)	(23,5 %)	(6,2 %)
2005	1.342.030.140 €	943.447.188 €	315.377.083 €	83.205.869 €
2006	1.361.976.424 €	957.469.426 €	320.064.460 €	84.442.538 €
2007	1.546.536.037 €	1.087.214.834 €	363.435.969 €	95.885.234 €
2008	1.827.104.363 €	1.284.454.367 €	429.369.525 €	113.280.471 €
2009	1.639.076.453 €	1.152.270.746 €	385.182.966 €	101.622.740 €
2010	1.467.425.007 €	1.031.599.780 €	344.844.877 €	90.980.350 €

Before concluding this short paper, some space needs to be devoted to the very idea of financing communities in Slovakia. From the text above, it is clear that communities have two main sources of revenue – the central state budget and their own income. Only a very small percentage of the communities budgets are actually formed from their own means (approx. 10% +/-) which logically takes us to the conclusion, that although communities are independent from the state (from the point of law and politics), they do depend on the State from the point of finance.

Communities have some options how to become more independent also financially. Most importantly, they could apply their competences to raise revenue by imposing local taxes and fees as set forth by law. Only very few communities decide to take this route (in the extreme sense) mainly due to the fact that it may have many back-drops. Communities need to publish the draft of the bylaw by which they wish to regulate the taxes and fees on their territories well in advance before the Municipal Council adapts them. If the residents are aware of this, pressure groups may come into existence to lower local taxes and fees (or to abolish them entirely). At the same time, the decision-makers will not be supporting the idea of too many local taxes and fees also due to their political interests which may prevail in many cases. However, some of these taxes and fees have also an objectively negative touch to them as well – mainly in the form of "over-taxed" communities losing their "attractiveness" (e.g. extremely high local taxes/fees could lead to the exodus of residents or on the other hand, there would be no new-comers coming to the community. This – at the end of the day – will lower the number of residents of the community thus will lower the amount the community gets from the central state budget – see below). By understanding the sensitivity of the issue, one is forced to learn that local taxes and fees are not the way to make communities richer.

[8] Source: Tax Directorate of the Slovak Republic (website). The values are in Euros. The values for the period of 2005 – 2008 were recalculated into Euros (instead of Slovak korunas – the official currency of the country at the time). The values are approximates and were provided by arithmetical operations.

By now, however, we also know that the personal income tax has a "falling" tendency which means that if the process goes on like this, smaller amounts of money will be collected by the central tax authorities thus the amount distributed among the communities will be also lower, without changing the extent of public services communities provide. There is no need to go into scientific researches to find out the cause of such lowering of tax income (we presume it is primarily the world credit crunch – the world crisis). One of the possibilities to avoid such negative situations in the future is to split the "percentage" among various types of taxes. Instead of providing 70,3 % of the personal income tax to the communities, the lawmaker could change this into providing a smaller share of some other types of taxes to the communities as well (e.g. 20% of the value added tax, 30% of the corporations income tax and 20,3% of the personal income tax). In this case the risk of losing massive amounts of money would be distributed on more types of taxes.

In reference to the text above, let us conclude this paper by looking into a rather specific thing. By now it is clear to the reader of this paper that communities in Slovakia get 70,3 % of the total personal income tax collected by the State. We have also mentioned that this amount is distributed among the communities[9] according to some specific rules. Currently these rules are defined by the Government Regulation No. 668/2004 Coll. and they are as follows:

a) **23% -** depends on the number of people permanently residing on the territory of the community as of 1 January of the previous year, out of which 44% is recalculated by a coefficient relating to the level of the centre of the community above sea level

   This principle is sometimes referred to as the principle of *equality* (equality in the sense that this share of the amount depends on the number of residents of the community). The positive feature of this criterion is that it provides the communities with stability and – most importantly – predictability of finances. As to the sea level factor, the representatives of the Association of the Towns and Communities of Slovakia (*Združenie miest a obcí Slovenska*) have suggested to introduce this criterion in order to stress that communities situated higher above sea level have higher costs relating to heating when providing public services (mainly education – i.e. in schools). However, it must be added that according to some experts, this criterion is not quite objective since the length of the heating season depends on many other geographical and climatological factors.

b) **32%** - depends on the number of people permanently residing in the community as of 1 January of the previous year recalculated by a coefficient relating to the size of the territory of the community

[9] Currently, there are approx. 2.900 communities – including towns/cities („obce") in the Slovak republic.

One of the reasons to introduce this criterion was the fact that many individuals do not use public services (only) in the area where they have permanent residence but also in other communities ("free-movers", "commuters"). This is typical mainly for smaller villages from which e.g. pupils often travel to the nearest town to school (despite of the fact that there is a school in their community as well) etc. Larger towns usually tend to attract more people also those not directly residing on their territory thus there is a need to reflect this in the distribution of revenue.

c) **40% -** depends on the number of pupils of elementary schools and art schools as of 15 September of the previous year recalculated by a coefficient relating to the type of school

   Due to the fact that elementary schools are currently created and managed by the communities, the State in line with its basic duties and interests provides the communities with funding as to this end as well. For this reason, 40% of the share of income that communities get depends on the number of pupils in elementary schools and schools of arts (as mentioned above). It is interesting to note that the amount is directed to the community where the relevant school is and not to the community where the child attending the school has permanent residence. The logic behind this issue is that there are free-movers who tend to go to school at a place other than their place of residence.

d) **5% -** depends on the number of residents who reached the age of 62 as of January, 1 of the previous year

   The last criterion that is considered when distributing the revenue to the communities is the number of seniors over the age of 62 having permanent residence on the territory of the community. This share is provided in reference to the social services communities need to provide in line with the law. At the same time, it must be added that this principle is based on the concept of *equality*. All communities get the same amount not depending on any other factor that could influence the costs of the services (e.g. sea level) but based simply on the absolute numbers of seniors as identified above.

Although these criteria may seem "entertaining" at some point, there are logical rules behind them. Nevertheless, one must understand that all those determinants are relative and it is almost impossible to reach an absolutely fair distribution of the relevant tax income among the communities.

Summary

In the presented paper, we have attempted to describe the basic elements of (fiscal) decentralisation in Slovakia in relation to communities. The main idea of the article was to introduce the fact that much of communities´ revenues is still dependant on the central state budget and that communities – inter alia – receive 70,3 % of the

personal income tax collected by the State. This amount is distributed amongst the towns and villages according to a clear set of rules. In general, however, the amount the State collects in the form of these taxes is decreasing annually thus causing major financial problem to the communities. Since less revenue is raised by the central authorities, less money is channelled back to the communities. To this end, one of the solutions could be to split up the relevant percentage on a number of taxes, i.e. not to link it only onto the personal income tax. At the same time, the author also describes the criteria that are taken into consideration when distributing the amount amongst the communities by stressing some illogical perspectives that may exist in this sense. Such illogical and sometimes unfounded approaches may lead to unwanted discrepancies within the distribution of revenues.

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Local Charges on Gambling Machines

Michal Radvan, JUDr. Ing. Ph.D.

Abstract: The gradual replacement of the traditional gambling machines (game slots) – that are always subject to local charges – with what is known as other technical game facilities has led to the decrease of revenue from local charges on gambling machines. This situation is happening in the absence of any statutory definition of "other technical game facilities". The following text briefly introduces the history of legal regulation of charges on gambling machines and other technical game facilities. The main aim of the article is to define the concept of "other technical game facility" and to either confirm or disprove the hypothesis that the "other technical game facility" also includes interactive video-lottery terminals, which thus have to be charged according to municipal ordinances on charges on gambling machines and other technical game facilities. The article also describes other structural components of the charge and discusses the most problematic aspects of this issue. Finally, the text outlines the best solution that the municipalities can adopt in order to guarantee their economic autonomy.

Keywords: charge, local charge, charge on gambling machines, gambling machine, other technical game facility.

1. Introduction

Every municipality in the Czech Republic may levy local charges (local fees, local taxes)[1]. However, the authority to levy the charges must be established by law. Not all municipalities levy all the local charges possible – town councils may, on the one hand, decide whether the municipalities will levy a given local charge and, on the other, they are free to determine the amount of this charge. In fact, the income from local charges is very important for municipalities since the payment of local charges is the same obligation as the payment of all other taxes and charges. Apart from the fiscal function, local charges also have the regulative and protective functions.

Not surprisingly, the legal regulation of local charges is very important. The Charter of Fundamental Rights and Freedoms (Act No. 2/1993 Sb., as amended) states in Article 11(5) that taxes and charges may be imposed only through statutes. The relevant law in this case is the Act No. 565/1990 Sb., The Local Charges Act, as subsequently amended. In Section 14, the act provides for the power of municipalities

[1] See also Mrkývka, Petr (2003): Některé úvahy o materiálním základu veřejné správy. Časopis pro právní vědu a praxi, No. 2/2003.

to assess local charges by means of issuing their ordinances (bylaws). Such ordinances must specify the conditions for levying, the charge rate, the charge maturity and possible exemptions, if any. The ordinances may not exceed the limits defined by the Local Charges Act (such as, for example, the absolute charge rate and the types of charges permitted)[2].

Presently, the municipalities in the Czech Republic have the opportunity to levy only the following local charges (the list is complete, i.e. municipalities are not allowed to levy any other charges):

1. Dog charge;
2. Charge for spa and recreation stay;
3. Charge for using public places;
4. Charge on entrance;
5. Charge for housing capacity;
6. Charge on operated gambling machines and other technical game facilities released by the Ministry of Finance according to other legal regulations;
7. Charge on communal waste;
8. Charge for permission to enter selected places by motor vehicle;
9. Charge on appreciation of building land.

One of the most important sources for municipal budgets in the Czech Republic (if the municipalities' own tax incomes are only taken into account) is constituted by the charge on gambling machines. The following table indicates the revenues in the last three years:

Year	Revenue (CZK[3])
2008	1 164 290 000
2009	1 054 836 000
2010	927 298 000

Table 1:*Revenue from the charge on gambling machines and other technical game facilities*[4]

It is obvious that the revenue decreases. Why should that be the case? The reason appears to be mainly in the missing legal definition of "other technical game facilities" that are gradually replacing the traditional gambling machines (game slots)

[2] See Radvan, Michal (2008): In: Radvan, Michal et al., Finanční právo a finanční správa - Berní právo. Masarykova univerzita et Doplněk, Brno. Radvan, Michal (2007): Zdanění majetku v Evropě. C. H. Beck, Praha. Radvan, Michal (2005): Poplatkové právo v ČR, In: Current Questions of the Efficiency of Public Finance, Financial Law and Tax Law in the countries of Central and Eastern Europe (Aktuálne otázky efektívnosti verejných financií, finančného práva a daňového práva v štátoch strednej a východnej Európy). Univerzita Pavla Jozefa Šafárika v Košiciach, Košice, 41 + CD.

[3] 1 EUR = 25 CZK.

[4] An email by Holmes, A., the chief of Property taxes department, Ministry of Finance, 14.7.2011 (unpublished).

that are subject to the charge without exception.The following text briefly introduces the history of legal regulation of charges on gambling machines and other technical game facilities. The main aim of the article is to define the concept of "other technical game facility" and to either confirm or disprove the hypothesis that the "other technical game facility" also includes interactive video-lottery terminals, which thus have to be charged according to municipal ordinances on charges on gambling machines and other technical game facilities. The article also describes other structural components of the charge and discusses the most problematic aspects of this issue. Finally, the text outlines the best solution that the municipalities can adopt in order to guarantee their economic autonomy.To achieve these objectives, the methods used in scientific research - analysis, comparison and deduction - will be used.

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2. Brief history of charging gambling machines

The charge on operated gambling machines was added to the list of local charges by the Act No. 305/1997 Sb., effective from January 1, 1998. Gambling machines were defined in the Lottery Act[5] as mechanical gambling machines or similar facilities released by the Ministry of Finance (till August 1998) or as compact, functionally indivisible and program-controlled technical facilities with remote control only for one player (from September 1998). However, there is another definition in the Lottery Act, defining gambling machines as electronically or electro-mechanically controlled gambling machines or similar facilities. Having two definitions in a single act (even if one of them is a legislative shortcut) is not the best solution, but it is, in fact, possible to combine these two definitions in order to define the gambling machine as an electronically or electro-mechanically controlled, compact, functionally indivisible and program-controlled technical facility with remote control only for one player or some other similar facility.

The charge was even named "charge on operated gambling machines" (i.e. winning game slots), while the object of taxation was defined just as "every released game slot". This meant that legally the objects of taxation were game slots:

1. Released (by municipal offices, regional offices or the Ministry of Finance);
2. Both winning and non-winning;
3. Both operated and not operated.

In fact, the charges were collected only for released, winning and operated gambling machines (game slots). That was, in my opinion, correct because the

[5] Act No. 202/1990 Sb., on lotteries and similar games, as amended.

regulative and protective functions of the charges must always be remembered, i.e., not only their fiscal effects.

Since the beginning of the century, classic game slots are gradually being replaced by interactive video-lottery terminals. There has been a lot of discussion whether the object of taxation referred to in the relevant act as "every released game slot" (see above) also includes such terminals. In my opinion, the definition does cover such terminals. However, the Senator Jaroslav Kubera, a member of Senate of the Czech Republic, decided to make the legal regulation more precise. Without any consultation with the Ministry of Finance, he submitted an amendment during the legislative process in the Senate[6]. What is even more, the act that was currently under debate did not concern local charges at all – it was the Act on Support for Sports. These kinds of amendments are called as "wild riders"; in this case, the amendment constituted an extensive overstepping of the object of the draft. This practice is inadmissible[7]. By contrast, amendments known as "legislative riders", where the intention of the draft is not overstepped, are accepted. Senator Kubera argued that his amendment was such a legislative rider, as sports are partially financed from the revenue generated from lotteries and bets[8].

The amendment No. 183/2010 Sb. to the Act on Support for Sports changed the name of the charge to "the charge on operated gambling machines and other technical game facilities released by the Ministry of Finance according to other legal regulation" and amended the object of taxation into "a released game slot or other technical game facility released by the Ministry of Finance". This regulation came into force on June 16, 2010 and is still valid.

3. Other Technical Game Facility

As the term "game slot" was not changed by the amendment, it is necessary to answer the question what "other technical game facility" is. It is an uncontested fact that the facility may become subject to the charge if it fulfils three conditions. The facility must be:

1. a game facility;
2. a technical facility;
3. some other facility than a game slot.

According to the definitions in the Lottery Act mentioned above and with the knowledge that lotteries can be run using mechanical, electro-mechanical, electronic or similar facilities[9], it may be stated that technical game facilities constitute a much larger

[6] Familiarly referred to as Lex Kubera.
[7] See Finding of the Constitutional Court Pl. US 77/06.
[8] For details see Boháč, Radim (2010): Živelná normotvorba v oblasti finančního práva na příkladu místního "loterijního" poplatku, In: Dny práva - 2010 - Days of Law. Masaryk University, Brno (http://www.law.muni.cz/content/cs/proceedings/ - 25.7.2011),598.
[9] See § 1/1 Lottery Act.

set than game slots. In practice it is much more problematic to interpret this term, especially with regard to interactive video-lottery terminals. It is not obvious whether the "other technical game facility" is just the central unit (server) connected with all the end-user terminals (i.e., single machines where people bet) or both central unit and every end-user terminal.

The Czech Ministry of Finance asked the Electrotechnical Testing Institute to interpret the term "other technical game facility" for the purpose of charging. As the Institute is not competent to interpret any term from the area of taxation, it prepared a technical definition under which the "other technical game facility" is a functionally indivisible facility realizing a game (games); that means, it offers a voluntary deposit (bet) of the participant and applies a random game process according to the game plan with the possibility of a non-guaranteed win and the possibility of the payment of the win and the deposit, the total amount of which is higher than the amount of stakes for played games[10].

The interpretation was used by the Ministry of Finance in its methodological communication concerning the local charge on operated gambling machines and other technical game facilities. In this communication, the Ministry of Finance states that technical facilities with terminals used for the operation of betting games are technical game facilities in both forms, i.e. as the central units with local control units as well as the individual end-user terminals (interactive video-lottery terminals). One of the arguments is that it is necessary to receive permission not only for the central unit but also for every end-user terminal[11].

In June 2011 the Ministry of Finance somewhat modified its methodological communication. At present, the communication states that other technical game facility is a technical game facility different from a game slot, defined in Section 17(1) of the Lottery Act, which is functionally indivisible and is used to realize lotteries or similar games in the sense of Section 1(1) of the Lottery Act from the beginning of the process to its end. A technical game facility is not constituted by merely a sub-component of a functional unit that does not allow the game from the beginning to the end. Consequently, a single central lottery system (server) cannot be charged, and the same holds for a single interactive video-lottery terminal, as they separately do not allow the game. It is only the interactive video-lottery terminals connected to a central lottery unit that are able to realize the game from the beginning to the end and are, consequently, subject to the charge[12].

In my opinion this communication is quite acceptable and correct, respecting legal regulation. There is just one last question: why this methodological

[10] Electrotechnical Testing Institute, Interpretation of the term "other technical game facility" for the purpose of charging from June 7, 2010 (www.mfcr.cz - 25.7.2011).
[11] Ministry of Finance, Methodological communication to the local charge on operated gambling machines and other technical game facilities from August 6, 2010 (www.mfcr.cz - 25.7.2011).
[12] Internal material from the Ministry of Finance (unpublished).

communication was sent only to the municipal offices and not published at the Ministry's web page?

The argumentation of the Ministry was supported by the finding of the Constitutional Court. In a recent case, the Constitutional Court addressed the issue of whether municipalities are authorized to determine the places where interactive video-lottery terminals can be run. The court thus had to deal with the question of interactive video-lottery terminals and ruled that interactive video-lottery terminals are different from game slots defined in Section 17(1) of the Lottery Act. At the same time, however, they belong to the group of betting games run on electronically or electro-mechanically controlled gambling machines or similar facilities. The court pointed out that there is no essential difference between the game slot and the interactive video-lottery terminal. What difference there is due to an internal arrangement of the device: the video-lottery terminal is closed and does not form a single functional unit, being part of a larger electronic system. This fact should be clearly taken into account during the process of arranging for the permissions of video-lottery terminals. It is desirable to make a decision about the whole system by one relevant local authority rather than an indeterminate number of administrative bodies, depending on the location of the individual components of this system in each municipality. On the other hand, these characteristics of interactive video-lottery terminals cannot constitute an obstacle for municipalities when determining, in their generally binding ordinances, the places within their territories where the individual components of such a system may be operated[13].

4. Object of charge on operated gambling machines and other technical game facilities

After the definition of the basic terms, it is possible to proceed with the object of charging. The contradiction between the name of the charge and the definition of its object has already been mentioned. According to the name of the charge, the object of charging should be:

1. Operated gambling machines (i.e. winning game slots); Radim Boháč believes that operated gambling machines should be released by the Ministry of Finance because the full name of the charge is "Charge on operated gambling machines and other technical game facilities released by the Ministry of Finance according to other legal regulation"[14]. In my opinion the words "released by the Ministry of Finance according to other legal regulation" belong only to the other technical game facilities. Failing

[13] See Finding of the Constitutional Court Pl. US 29/10.
[14] Boháč, Radim (2010): Živelná normotvorba v oblasti finančního práva na příkladu místního "loterijního" poplatku, In: Dny práva - 2010 - Days of Law. Masaryk University, Brno (http://www.law.muni.cz/content/cs/proceedings/ - 25.7.2011),597.

that it would mean that classic gambling machines released by municipalities would not be charged;

2. Operatedother technical game facilities released by the Ministry of Finance according to other legal regulations.

This interpretation is unacceptable because the object of taxation is defined in a different way. According to the verbal expression, the object of charging should be:

1. Released game slots
   a. released by municipal offices, regional offices or the Ministry of Finance;
   b. winning or non-winning;
   c. operated or not operated;
2. Other technical game facilities
   a. released by the Ministry of Finance;
   b. winning or non-winning;
   c. operated or not operated.

In my opinion we have to respect the tradition and legal practice that has been forming here for more than twelve years. In case of game slots it means that the object of taxation are only operated gambling machines (i.e. only winning game slots) released by municipal offices, regional offices or the Ministry of Finance. Not operated and non-winning game slots do not constitute any social or moral threat and there is no need for the charge with its either regulative or protective function. On the other hand, unreleased gambling machines can cause problems, but they cannot be charged; the penalty for the running of an unreleased gambling machine usually equals the amount of unpaid charge.

The same practice (because of identical reasons) should be applied to other technical game facilities, so that chargeable technical game facilities are operated other winning technical game facilities released by the Ministry of Finance. The opinion of the Ministry of Finance is somewhat different; experts working at the ministry[15] also consider the non-operated other technical game facilities as an object of charging. Radim Boháč extends the group further by adding the non-winning other technical game facilities[16]. In my opinion, this approach is not fair since it does not respect one of the oldest and most important legal principles: the principle of equity; even the Constitutional Court in the above-mentioned finding said that there is no essential difference between the game slot and the interactive video-lottery terminal.

This proves the hypothesis that the interactive video-lottery terminal does, in fact, constitute the "other technical game facility" and has to be charged according to

[15] Opinions of Zdeňka Jirásková, Alena Šneberková (unpublished).
[16] Boháč, Radim (2010): Živelná normotvorba v oblasti finančního práva na příkladu místního "loterijního" poplatku, In: Dny práva - 2010 - Days of Law. Masaryk University, Brno (http://www.law.muni.cz/content/cs/proceedings/ - 25.7.2011), 598.

municipal ordinances on the chargeon gambling machines and other technical game facilities.

5. Other structural components of the charge on operated gambling machines and other technical game facilities

Probably the most difficult issue connected with the charge on operated gambling machines and other technical game facilities was solved in the previous chapter. In fact, there are not many other problematic aspects because the relevant wording in the Local Charges Act is rather short and the concrete construction of most of the structural components depends on the municipality and its municipal binding ordinances.

The payer of the charge is the operator of the gambling machine or other technical game facility; i.e. a legal person with its registered office in the Czech Republic who has received a permission to run the facility.

The tax (charge) rate is constructed in a very special way because there the act provides for not only the maximum rate (5 000 CZK) but also the minimum rate of 1 000 CZK[17], both applicable for a period of three months. The charge on operated gambling machines and other technical game facilities is the only one with such a specific construction of the rate and in fact it makes no sense to set a minimum rate in the act: it depends only on the municipality if it wants to collect the charge and if it provides any exemptions. Moreover, the act sets that the municipality need not provide any exemption. It is a pointless regulation because the municipality is bound by the act when drafting its municipal ordinance; in the absence of any provisions concerning exemptions in the act, it is only up to the municipality to decide whether and how many exemptions will be provided.

The taxable period is also specified in very concrete terms: it is a period of three months. At this moment it is necessary to point out that if a facility is not operated for a certain time during this period – e.g. because of repairs or the limited opening hours of the establishment where the facility is placed – it is still subject to taxation and the rate is not affected by such external constraints.

As regards the administration of the rate, the municipalities face the most complicated moment with respect to the changes of the rate in combination with the taxable period. This is because every facility has a different taxable period. Thus, for instance, if there is a change in the amount of the rate (say, from 1st January), it means that the taxable period is over only for those facilities whose taxable period started three months before, i.e. on 1st October. In all other cases, the new rate applies to a part of the

[17] With the exception of 1998, when the maximum rate ranged from 5 000 to 20 000 CZK.

taxable period and the charge needs to be assessed as a part of the basic charge depending on the remaining part of taxable period.

In their municipal binding ordinances, municipalities can regulate all other details of the structural components of the rate, although they must always respect the current legal regulation, including the reporting requirements. In the notification the taxpayer must identify itself (i.e., as a legal person) and provide bank account numbers and other necessary details so that the charge duty can be duly assessed.

The tax administrator is the relevant municipal office (not the municipality itself). The municipality receives the whole charge revenue. Moreover, the municipality receives half of the administrative charge for issuing the permission to run a gambling machine[18]. By contrast, the main problem with interactive video-lottery terminals is that they must have a permission issued by the Ministry of Finance, in which case the administrative charge goes to the state budget and not the municipal one. Moreover, while in case of gambling machines, municipalities even receive a part of the proceeds from the machine, there is no similar rule for the proceeds from interactive video-lottery terminals.

6. Legal Regulation of Gambling Machines de Lege Ferenda

As mentioned several times above and confirmed by the Constitutional Court, there is no essential difference between gambling machines and interactive video-lottery terminals. The current wording of the Local Charges Act, even thought imperfect, may – with perfect interpretation – do justice to this rule, namely that gambling machines and interactive video-lottery terminals are charged in the same way. This confirms the hypothesis that interactive video-lottery terminals constitute the "other technical game facility" and thus have to be charged according to municipal ordinances on the charge on gambling machines and other technical game facilities.

The Lottery Act should respect this rule, too. Legislators should draft an amendment that removes the discrepancies between the legal regulation of gambling machines and that of interactive video-lottery terminals. The best solution would be to let the municipalities decide themselves whether and where to accept game facilities (if any), issue permissions for such game facilities, and receive (part of) the administrative charge for the permissions and part of the proceeds. The municipalities should, of course, retain the power to issue their municipal binding ordinances on the charge on gambling machines. All this would lead to the main goal, i.e. the economic autonomy of the municipality.

At this point, the article could be concluded. However, there are two recent drafts of amendments of the Local Charges Act currently in the legislative process that deserve to be commented on in this context.

[18] 10 000 - 30 000 CZK; depending on the length of the permit.

The first is the act amending the Lottery Act[19]. It deals with gambling machines and offers, most importantly, a new explicit definition of interactive video-lottery terminals (though the sense of the concept remains the same). The problem is that the amendment retains the two separate regimes: one for gambling machines (i.e., there is no change in comparison with the currently valid legal regulation) and the other for video-lottery terminals. In both cases the municipalities will have the right to issue their municipal binding ordinances that determine the places where game facilities may or may not be run. A municipality can even absolutely forbid any game facilities within its territory. The main problem is that the amendment does not remove the difference in issuing permissions: while interactive video-lottery terminals must have their permissions issued by the Ministry of Finance, gambling machines are permitted by the municipalities. This means that the administrative charge for interactive video-lottery terminals goes to the state budget, not to the municipal budgets. The amendment includes a new construction of the administrative charge for the permission to run interactive video-lottery terminals: the charge is set to be 10% of the difference between the amounts wagered and the winnings paid out to players, with the minimum annual charge of 1 500 CZK and the maximum charge of 10 000 000 CZK. In case of interactive video-lottery terminals, their operators will have the duty to send at least 5% of their proceeds to the municipality, while no such duty is specified in case of gambling machines. This piece of information, though somewhat beyond the topic of this article, needs to be mentioned in connection with the issue of the economic autonomy of municipalities.

In addition, the Chamber of Deputies of the Parliament added to this act amending the Lottery Act an amendment of the Local Charges Act setting the new title of the charge (charge for operated gambling machines, end-user interactive video-lottery terminals and game sites of local gaming systems), as well as a new object of the charge. This object is constructed poorly as the act sets that "the object of charge for operated gambling machine is every released game slot defined in Section 2(e) of the Lottery Act, every end-user interactive video-lottery terminal defined in Section 2(l) of the Lottery Act, and every game site of local gaming systems defined in Section 2(l) of the Lottery Act". This means that not only does the name of the charge not correspond with the object of charging, but the object also does not correspond with the text of the Lottery Act. Because of these problems, the Senate of the Parliament sent the amendment back to the Chamber of Deputies. When (and if[20]) the final wording of the amendment is accepted and published, I am ready to analyze the text. In addition, in my opinion it is not very appropriate to newly define the object of taxation so that it is clear

[19] Chamber of Deputies of the Parliament, Amendment of the Lottery Act (http://www.psp.cz/sqw/historie.sqw?o=6&T=138 - 28.7.2011).

[20] The deputy Jan Farský changed the draft prepared by the Ministry of Finance to such an extent that is it not acceptable for the Ministry and the Government any longer. The parliamentary majority will thus probably vote against the proposal (internal information from the Ministry of Finance).

that interactive video-lottery terminals are to be charged. This is because there are currently many disputes before courts and such an amendment would bring a very good argument to the operators of interactive video-lottery terminals, namely that the current legal regulation of local charges on gambling machines does not apply to these terminals, i.e. that these terminals are not subject to taxation and, consequently, there is no duty to pay the charge. And this can be dangerous for municipal budgets because there is a risk that municipalities may have to return the charges already paid to them and resign to the revenue from charges assessed and yet unpaid.

No matter what the final text will be, this amendment (or, more specifically, the part dealing with local charges) is likely to be in effect for a rather short period of time. It will come into force upon its publication (probably at the end of September 2011). At the same time, however, there is a new proposal of the Ministry of Finance entering the legislative process, intended to come into force on January 1, 2013, though a part of it (namely the part dealing with our topic) is meant to come into force as early as January 1, 2012. The draft proposal of this act, referred to as JIM (the act on a single collection place)[21]. abolishes the local charge on gambling machines entirely and introduces a levy on lotteries and other similar games. The levy base is created as a combination of four partial bases:

1. from lotteries;
2. from sports books and betting games in casinos;
3. from released devices and facilities;
4. from other lotteries or other similar games.

The partial levy base from released devices and facilities is the difference between the amounts wagered and the winnings paid out to players from gambling machines, interactive video-lottery terminals and other technical game facilities. The levy rate is 20 %, with the minimum amount of 20 000 CZK for each facility per year. The operator of the facility will have the duty to file the levy return and send it to the financial office - a levy administrator – by the end of February of the following year. The whole revenue from the levy on released devices and facilities goes to the municipality and, in addition, the municipality receives 10 % from other partial bases of the levy.

It seems as a good idea, especially for the municipalities as they will have no duties (and costs) in the administration process. On the other hand, the proposal is a resignation on the fiscal autonomy of municipalities because they will be able to influence neither the rate and exemptions nor the actual collection of the levy.

[21] The Ministry of Finance, Proposal of Act amending acts associated with the establishment of one collection place and on other amendments of tax and insurance acts (unpublished).

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14. Act No. 565/1990 Sb., Local Charges Act, as amended.
15. Act No. 2/1993 Sb., The Charter of Fundamental Rights and Freedoms, as amended.

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Самостоятельность польских гмин в области финансирования заданий

(Autonomy of Polish Communes (Gminas) within the Sphere of Financing Tasks)

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Аннотация: В Польше, как на практике, так и в доктрине преобладает убеждение, что единицы территориального самоуправления (в том числе гмины) могут принимать только действия, закреплённые в конкретных положениях закона. Такое мнение правильно по отношению к введению единицами территориального самоуправления некоторых обязанностей / приказов. Однако это неадекватно к остальным действиям. Основы такого утверждения исходят из конституционной презумпции компетенции самоуправляющихся общин в реализации местных / региональных заданий, а также заданий, приписанных отдельным единицам местного самоуправления. Среди самоуправляющихся общин специальное и основное место занимает гмина, поэтому самые важные рассуждения настоящей статьи посвящаются именно этим единицам.

Ключевые слова: самостоятельность территориального (местного) самоуправления, финансирование заданий, финансовая самостоятельность гмин.

Abstract: In Poland, in practice as well as in doctrine, there is a prevailing view the local government units (including *gminas*) can only take actions under a specific provision of the act. It is justified indeed in reference to introducing certain obligations/orders by local governments. But it is not adequate to other activities. The ground for such claim is based on the constitutional presumption of competence of self-government communities to carry out local/regional tasks as well as statutory specified scope of competence and tasks assigned to individual local government units. Among self-government communities the special and fundamental position is occupied by the commune, for this reason main reflections of the article is devoted to those units.

Keywords: local government autonomy, financing tasks; financial autonomy of communes.

1. Вступительные замечания – Исследуемая проблема и тезис

Свобода решений единиц территориального самоуправления (далее сокращ. етс) является темой редко обсуждаемой в Польше не только на фоне финансового права[1]. Очень подробно рассматриваются только проблемы, связанные с даннического господством (даннического правотворчеством). Они чаще всего рассматриваются без учёта всех проблем системы фингансового права местных общин[2]. Удивительно отсутствие более подробных исследований на тему свободы (свамостоятельности) решений етс в области реализованных ими заданий (и их финансирования), тем более, что в области местных и региональных финансов много места уделяется проблеме самостоятельности. Её неотъемлемым элементом является свобода / самостоятельность решений. Самостоятельность как в аксиологическом, так и в правовом понимании составляет суть территориального самоуправления как отдельного публично-правового субъекта[3]. Для финансов и финансового права характерно то, что самостоятельность понимается в принципе (и за исключением проблем даннического правотворчества) – в ресурсном понятии. Это означает, что анализируется она сквозь призму адекватности величины финансовых средств (или их источников) по отношению к намеченным заданиям или обязательным платежам[4] (расходам). Инцидентно «появляются» проблемы финансовой свободы решений в других областях функционирования публичных субъектов, в том числе самоуправляющихся общин[5].

Сама по себе финансовая самостоятельность самоуправляющихся общин является ценностью не подвергаемой сомнению (по объективным причинам) доктрины и судебной практики. Однако толкование положений определяющих

[1] В аспекте администативного права на это обращает внимание М. Кулеша в своей публикации *Об этом, сколько децентрализации в централизации, а также об особенных привычках учёных администативистов,* «Территориальное самоуправление» 2009, № 12.*(O tym, ile jest decentralizacji w centralizacji, a także o osobliwych nawykach uczonych administratywistów*, „Samorząd Terytorialny" 2009, nr 12).

[2] В рамках местного права дани.

[3] Причём «эта самостоятельность не может быть полностью или частично решающей о её сути отмененной, что, конечно, не исключает возможности её законного ограничения» - решение Конституционного трибунала от 4 мая 1998 г., К 38/97, РКТ, Сборник законов 1998, № 3 поз.31.

[4] Таких, как напр., обязательные платы етс в госбюджет на часть уравновешивающую / региональную субвенции для етс.

[5] В этом месте стоит упомянуть прежде всего о взглядах Т. Дэмбовской – Романовской на тему публичных расходов, а также способов ограничения политической свободы в этой области, представленных, напр., в: *Публичные расходы, их правовые формы, а также принципы реализации в секторе публичных финансов* в: Е. Руськовски (ред,), *Система финансового права,* т.II, Варшава 2010. (*Wydatki publiczne, ich formy prawne oraz zasady realizacji w sektorze finansów publicznych* w: E. Ruśkowski (red.), *System prawa finansowego*, t. II, Warszawa 2010).

самостоятельность, а также их применение в процессе вынесения решений етс оставляет желать многое. Это касается в особенности интерпретации правила, что в публичном праве не существует принцип, что не запрещено, то разрешено. Оттуда возникло мнение, согласно которому етс могут принимать только такие действия, о которых говорится в положениях закона (конкретном положении закона), т.е. такие, у которых конкретные правовые основания (см. п. 2 настоящей разработки). Такое утверждение является правильным, но только по отношению к введению етс некоторых обязанностей / приказов (например, определения сумм налоговых нагрузок). Это неадекватно к остальным действиям, тем более, что:

- прежде всего обязывает конституционная презумпция компетенции самоуправляющихся общин в реализации местных / региональных заданий (среди которых гмина[6] занимает специальное и основное место);
- существует определённый законом объём компетенции, а также заданий приписанных отдельным етс[7].

Таким образом, мнение, что в сфере реализации приписанных законом заданий, етс издавая решения (определённые акты управления) должны добавочно (т.е. кроме общей компетенции к разрешению в области приписанных заданий), распоряжаться конкретной правовой основой их издания, является ошибочным. Кроме того, убеждение на тему необходимости существования рядом общей компетенции – также конкретного положения о принятии каждого финансового решения етс вызывает:

- нарушение конституционно гарантированной самостоятельности етс (в особенности гмин);
- вопрос – имеем ли мы реальное дело с децентрализацией государственного господства в рассматриваемом объёме. На фоне актуального положения можем прийти к выводу, что *defacto* существование самоуправляющихся общин в сфере реализации заданий вписывается в модель деконцентрации публичных заданий (но не в идею децентрализации).

В контексте представленной проблемы вполне обоснованной является предпосылка о необходимости изменения взглядов в области самостоятельности решений етс. В виду основного характера местных общин – это касается в особенности польских гмин. С целью проверки был принят тезис, что самобытной основой финансовых решений етс (гмин) является конституционное, а также законное (в законе о гминном самоуправлении) определение объёма их

[6] Статья 163 и 164 абзац 3 Конституции Р(еспублики) П(ольши) от 2 апреля 1997 г. (Ж(урнал) З(аконов) № 78, поз. 483 с исправлением.: ЖЗ № 28, поз. 319), далее как Конституция РП.

[7] См. Статья 6 и 7 закона от 8 марта 1990 г. о гминном самоуправлении (ЖЗ 2001 г. № 142, поз. 1591 с позднейшими изменениями) далее згс; статья 4 закона от 5 июня 1998 г. о повятовом самоуправлении (ЖЗ 2001 г. № 142, поз. 1592 с позднейшими изменениями) далее зпс; - ст. 11 и 14 закона от 5 июня 1998 г. о самоуправлении воеводства (ЖЗ 2001 г., № 142,поз. 1590 с позднейшими изменениями) далее зсв.

деятельности. Причём этот тезис обеспечен добавочными условиями (предпосылками), такими как:

- етс, в том числе гмины, должны соблюдать установленные законом приказы и запреты в исполнении и финансировании принадлежащих им публичных заданий;
- объём свободы решения / управления зависит от того, является ли данное решение актом местного права или актом внутреннего права.

Наши дальнейшие рассуждения будут сосредоточены на объёме самостоятельности гмин в области вынесения решений, связанных с реализацией их заданий (в том числе собственных). Прежде всего потому, что гминные самоуправления составляют основное ядро организации местных общин. Положения закона предоставляют именно им особенный статус в исполнении местных заданий.

2. Прежние взгляды на тему объёма действий области вынесения решений органами территориального самоуправления

Из обзора судебной практики административных судов, а также надзорной практики региональных счётных палат (RIO) вытекает, что в общем порядке учитывается правило, согласно которому вынесенное гминой решение (а также етс остальных уровней) по делу реализации данного вида задания и его финансирования требует законной основы (конкретного положения) для его вынесения[8]. Таким образом, недостаточными основами издания данного акта местного управления (в области исполнения и финансирования заданий) признаются урегулирования, находящиеся в статьях 6 и 7 закона о гминном самоуправлении. В этом месте стоит вспомнить, что статья 6 закона о гминном самоуправлении является в некотором смысле повторением конституционного урегулирования. В ней говорится о том, что в сфере действий гмины находятся все публичные дела местного значения, если нет в законах оговорки о других субъектах.

Прежде чем приступить к следующим анализам и выводам, следует указать, что главным практическим «исполнителем» в сфере вынесения решений етс в сегодняшнем понимании является мнение административных судов. Посредственно можем указывать на доминирующее в этой сфере взгляды доктрины (чаще всего их отсутствие). Конечно, это вовсе не означает освобождения от ответственности за такое состояние органов надзора и контроля

[8] См. Также на эту тему, например В, Виталец, Правовые границы расходов территориального самоуправления в свете практики региональных счётных палат, «FinanseKomunalne» 2010, № 6. (W. Witalec, Granice prawne wydatków samorządu terytorialnego w świetle orzecznictwa regionalnych izb obrachunkowych, „Finanse Komunalne” 2010, nr 6).

за финансовой деятельностью етс, т. е. региональных счётных палат (RIO). Однако акты надзора RIO подлежат контролю административных судов. Оттуда мнение административных судов имеет решающее влияние на результаты применения действующих положений в процессе осуществления надзорной функции счётными палатами.

Ранее представленное состояние практики связано также с закреплёнными и преобладающими взглядами доктрины как на фоне административного права, так и финансового. Другие и немногочисленные взгляды[9] на данную тему не являются, к сожалению, до сих пор представительными для польской науки, а также не учитываются в достаточной степени при рассмотрении случаев на практике.

Стоит попытаться определить причины, которые вызвали неправильное утверждение, что каждое решение етс (гмины), касающееся реализации и финансирования заданий требует, кроме общей законной компетенции, также существования конкретного (выразительного, подробного) уполномочия в действующих положениях закона (положения материального права). Теоретически можем за М. Кулеша принять, что существующий консерватизм подхода к свободе вынесения решений етс вытекает из культурного контекста (происходящего из минувшего строя), в том числе из опасений перед «извращениями администрации». Причём он связан с традиционным / классическим пониманием как функции административного права, так и его толкования[10]. На практике оспаривние источников законности вынесения решения етс в случае отсутствия конкретного положения в сфере исполнения заданий (и или формы их финансирования), несмотря на существующие общие компетенции (статья 6 и 7 закона о гминном самоуправлении), можем находить в переносе на фон становления нормативных актов органами исполнительной власти (исполняемой етс) административно-правового принципа компетентности. Этот принцип находит применение к актам применения права (индивидуальным актам)[11]. Согласно ему органы публичной администрации действуют на основе положений права[12,13]. Переносу административно-правогого

[9] Взгляды представленные, главным образом, М. Кулеша (административное право) и Т. Дэмбовской-Романовской (финансовое право).

[10] М. Кулеша, *О том, сколько...,* ук. соч. с. 8-9. (M. Kulesza, *O tym, ile…*, op. cit., s. 8-9.).

[11] Называется он принципом законности – см., например М. Вежбовски (ред.), Административное производство – общее, налоговое, принудительное и перед административными судами, Варшава 2004, с. 17-18. (M. Wierzbowski (red.), Postępowanie administracyjne – ogólne, podatkowe, egzekucyjne i przed sądami administracyjnymi, Warszawa 2004, s. 17-18.).

[12] Статья 6 закона от 14 июня 1960 г. – Кодекс административного производства (ЖЗ 2000 г. № 98, поз. 1071 с позднейшими изменениями. (Kodeks postępowania administracyjnego (Dz.U. z 2000 r. Nr 98, poz. 1071 z późn. zm.).

[13] В этом месте стоит упомянуть (об этом пойдёт речь в п. 3 настоящей статьи), что принцип административно-правовой компетентности / законности действий органов имеет более узкий объём, чем выраженный в статье 7 Конституции РП принцип легализма действий органов публичной власти, т.е. также етс.

принципа компетентности в сферу правотворческой / законодательной активности етс благоприятствует чаще всего неправильное толкование другого принципа. Им является часто закоренелое правило, согласно которому «в публичном праве обязывает принцип, что разрешается то, на что разрешает закон»[14]. Как видим, на это правило по-разному и в разных контекстах ссылаются органы, например: административный орган не действует по принципу «что не запершено, то разрешено», но по железному в административном праве правилу «разрешается только то, что вытекает из положений закона»[15], или «действие на основе права и в пределах права – это действие, которое находит подтверждение в содержании положений закона»[16]. Отсюда близко к признанию требования не только «объёма собственных компетенций и требуемой процедуры, но также соответствия содержания акта с диспозицией соответствующего положения материального права»[17]. В этом месте следует сказать, что ранее указанное общее законное разрешение на принятие действий имеет (должно иметь) разные формы – в зависимости от того, какой сферы функционирования органов власти или публичной администрации касается (о чём пойдёт речь в п.3 настоящей разработки) – однако в этой сфере не найдём в судебной и другой практиках специального различия и обоснования.

Доминирующее мнение, что реализация и финансирование данного задания самоуправляющейся общиной, в особенности гминой, требует правового основания в форме конкретного положения права (материального) является, в общем говоря, результатом отсутствия достаточного раздумья, прежде всего над разграничением компетенций / правомочий етс (как органов власти). В особенности это касается становления актов (местного права и внутреннего права), а также различения вышеназванных компетенций от «приписанного» объёма заданий (в том числе собственных).

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[14] Итак, напр., Приговор Конституционного трибунала (КТ) от 24 ноября 1998 г. К 22/98, Определения КТ (OTKZU) Сбор законов 1998, № 7 , поз. 115.

[15] Приговор Воеводского административного суда в Белостоке от 10 июля 2007 г., IS.A./Bk 361/07, OwSS 2007, Nr 4, poz. 100.

[16] Приговор Начального административного суда от 13 октября 2009 г. , IIOSK 1080/09, http://orzeczenia.nsa.gov.pl; См. Также Приговор Воеводского административнго суда в Гожуве Велькопольском от 18 марта 2008 г, IS.A./Go 108/08, LEX № 46505, в котором указано на отсутствие законного основания для издания советом повята акта местного права в сфере предоставления дотации из государственного фонда защиты окружающей среды и водного пространства (PFOŚiGW).

[17] Тезис определения, приведённого Т. Дэмбовской-Романовской, *Публичные расходы, их формы...,* ук. соч., с. 114. Такое же утверждение в.: М. Карпюк (ред.), *Нормативные и административные акты*, Варшава 2009, с. 125-126. (T. Dębowska-Romanowska, *Wydatki publiczne, ich formy* ..., op. cit., s. 114. Takie też twierdzenie w: M. Karpiuk (red.), *Akty normatywne i administracyjne*, Warszawa 2009, s. 125-126).

3. Рамки вынесения решений гминных самоуправлений – анализ правовой модели

Настоящие рассуждения стоит начать с образования конституционного принципа легализма, согласно которому органы публичной власти действуют на основе и в пределах права (статья 7 Конституции РП)[18]. Принцип легализма заключает в себе существование некоторых общих правил, часть из которых стоит в этом месте представить, а именно:

1) Принятие определённых действий органами публичной власти должно иметь соответствующее (чёткое) уполномочие (компетенцию, основу) в действующем праве; Одновременно это означает запрет презумпции компетенции в случае отсутствия урегулирований, а также невозможность выведения её из другого вида правовой основы действия[19].
2) Толкование положений компетентности должно быть чётким, что означает также исключение проведения толкования закона, заключающегося на догадываемом ограничении действующих положений, (...) даже в ситуации, когда такое «толкование» совершается согласно с правильным намерением»[20]; Особенное значение здесь имеет толкование статьи 7 абзац 2 закона о гминном самоуправлении и определение его в свете обязательных и факультативных собственных заданий етс[21];
3) Действие органа должно проходить по установленным процедурам[22]; Это имеет особенное значение в ходе правотворческой деятельности (обеспечивает, между прочим, демократизм производства)[23];

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[18] Он касается как правотворческой деятельности Ср. Приговор КТ от 18 июля 2006 г., U 5/04, ОКТ СЗ 2006, № 7А, поз. 80), так и актов применения права; При этом подчёркивается то, что он находит своё частичное отображение в формулированном в науке административного права принципе компетентности – В. Соколевич *Комментарий к статье 7 Конституции* в: Л. Гарлицки (ред,), *Конституция Республики Польши. Комментарий,* т.У, Варшава 2007, с. 8. Более подробно на эту тему: В. Якимович, *Толкование в административном праве*, Варшава 2006, с. 67 и след. (W. Sokolewicz, *Komentarz do art. 7 Konstytucji* w: L. Garlicki (red.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V, Warszawa 2007, s. 8. Szerzej na ten temat: W. Jakimowicz, *Wykładnia w prawie administracyjnym*, Warszawa 2006, s. 67 i nast.).

[19] Так, между прочим, в Постановлении КТ от 10 мая 1994 г., W 7/94, ОКТ 1994, ч. I поз. 23; приговорах КТ от 14 июня 2000, P 3/00, ОКТ СЗ 2000, № 5, поз. 138, а также от 27 мая 2002, K 20/01, ОКТ СЗ 2002, № 3А, поз. 34.

[20] Приговор ТК от 15 апреля 2003г., SK 4/02, ОТК 2003, № 4А, поз.31.

[21] См. Напр., М. Пачоха, Глосса к приговору Воеводского административного суда в Жешуве от 19 июня 2006 г. (шифр дела .....400/06), Коммунальные финансы» 2007, № 1-2, с. 116-122, а также А. Острвска, Проблемы с предоставлением дотации для квалифицированного спорта из бюджета территориального самоуправления, «Коммунальные финансы» 2008, № 7-8, с. 87-93. (M. Paczocha, Glosa do wyroku WSA w Rzeszowie z 19 czerwca 2006 r. (sygn. akt ISA/Rz 400/06), „Finanse Komunalne" 2007, nr 1-2, ss.116-122 oraz A. Ostrowska, Problemy z dotowaniem sportu kwalifikowanego z budżetu samorządu terytorialnego, „Finanse Komunalne" 2008, Nr 7-8, s. 87-93).

[22] В. Соколевич, *Комментарий к статье 7 ...,* ук. соч., с. 11 и (описанная там практика), а также П. Винчорек, *Комментарий к Конституции Республики* Польши *от 2 апреля 1997 г.,* Варшава 2000. С.

4) Необходимость действий «в пределах права» обязывает органы публичной власти к соблюдению закона, что означает, что они вынуждены соблюдать как введённые законом запреты, так и применять установленные приказы, распоряжения[24].

Прежде чем вышеназванные определения будут отнесены к издаваемым гминой решениям, стоит указать, что важное значение имеет то, с каким видом акта по делу реализации и финансирования гминных заданий мы имеем дело. Надо различить компетенции и пределы урегулирований, касающиеся актов местного права и актов внутреннего права[25].

Итак, в статье 94 Конституции РП закреплено, что на основе и в пределах уполномочий находящихся в законе о етс, устанавливают акты местного права. Стоит в этом месте подчеркнуть контекстное значение этого урегулирования. Здесь дело в разницах, происходящих в конструкции оснований для издания отдельных видов исполнительных актов. Это особенно видно по отношению к урегулированиям в области распоряжений[26]. Акты местного права издаются «на основе и в пределах уполномочий закреплённых в законе». В свою очередь, распоряжения издаются «на основании подробных полномочий, находящихся в законе и с целью его исполнения - плономочие должно определять орган, компетентный издать распоряжение и объём дел переданных для урегулирования, а также указания по содержанию акта» (статья 92 абзац 1 Конституции РП). Сравнение приведённых правил уже в самом начале приводит к определению, что основа (законная) издания акта местного права в принципе имеет более общий характер (не определяется подробно, как в случае распоряжений). Конечно, нельзя забывать, что по отношению к актам (местного права) создающим обязанности субъектов (напр. финансового характера) имеем дело также с добавочными конституционными «обострениями».

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19. (W. Sokolewicz, *Komentarz do art. 7...*, cyt. wyd., s. 11 (i powołane tam orzecznictwo) oraz P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa 2000, s. 19).

[23] Ср. , напр., Приговоры ТК : от 23 марта 2006 г., К 4/06 ОТК СЗ 2006, № 3А, поз. 32; от 20 июня 2006 г., К 40/05, ОТК СЗ, № 7А, поз.82.

[24] В. Соколевич, *Комментарий к статье 7 ...,* ук. соч., с. 10. (W. Sokolewicz, *Komentarz do art. 7...*, cyt. wyd., s. 10). В этом контексте обращает внимание мнение, выраженное Верховным судом в области приоритета применения норм. Из него вытекает, что в ситуации стечения нескольких урегулирований, имеющих применение в такой же ситуации (правовой и фактической), соблюдение закона состоит в том, что орган публичной власти даёт первенство более сильному праву (в рассматриваемом судом случае это было право собственности, несмотря на невозможность соблюдения других правил – приговор Верховного суда от 30 ноября 2006 г., ICSK 272/06, Lex № 233055.

[25] Так: З. Чешейко-Сохацки, Л. Гарлицки, Я. Тжциньски, *Комментарий к закону о Конституционном трибунале,* Варшава 1999, с. 143 и след. (Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, s. 143 i nast.). См. Также приговор ТК от 24 июня 1998 г., К 3/98, ОТК СЗ 1998, № 4, поз. 52.

[26] Последние не издаются органами етс, тем не менее следует о них упомянуть по поводу необходимости проведения системного толкования описываемых правил.

Возвращаясь к сущности вопроса, надо сказать о других аргументах более общего подхода к теме полномочий етс в области вынесения решений. Итак, основной закон вводит презумпцию компетенции етс в области реализации публичных заданий (в рамках закона), если нет оговорки о других публичных властях[27]. Причём, эта компетенция является более широкой по отношению к гминным самоуправлениям (ст. 164, абзац 2 Конституции РП). Реализация заданий происходит, что существенно, от собственного имени и на собственную ответственность (ст. 16 абзац 2 Конституции РП)[28]. В этом контексте не менее важным является то, что публичные задания, служащие удовлетворению нужд самоуправляющейся общины, исполняются етс в качестве собственных заданий (ст. 166 абзац 1).

В свете вышесказанного можем признать, что гимны как основные етс в рамках предоставленной им публино-правовой субъективности отвечают за соответствующее удовлетворение ими нужд общины. В рамках такой «директивы» имеют право и обязаны принимать определённые действия, конечно, с учётом законных ограниичений (в том числе запретов, порядка и формы вынесения решений). Положения ст. 6 и7 абзац 1 закона о гминном самоуправлении соотносятся с приведёнными конституционными урегулированиями. Законный объём действий гмины охватывает все публичные дела местного значения, без оговорки о других субъектах (ст. 6 абзац 1 закона о гминном самоуправляении). В рамках этого объёма особенное место занимает удовлетворение нужд общины, осуществляемых в качестве собственных заданий (ст. 7 закона о гминном самоуправлении). Причём в ст. 6 абзац 2 того же закона закреплено, что решения по публичным делам местного значения принадлежат гмине, по причине отсутствия законных постановлений. На основании представленных урегулирований можем определить объём свободы вынесения решений в области заданий, осуществляемых гминой. Учитывая, что мы имеем дело с актом местного права, в контексте ранее представленных правил, вытекающих из принципа легализма, можем утверждать, что:

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[27] Это вытекает из урегулирований находящихся в статье 163 в связи со ст. 16 абзац 2 Конститкции РП. Презумпция компетенции касается только части публичных заданий. Не может касаться, между прочим, правосудия или становления общепринятых действующих положений (законов в материальном смысле). См. П. Сарнэцки, *Комментарий к ст. 16, а также к ст. 163 Конституции* в: Л. Гарлицки (ред.), *Конституция Республики Польши. Комментарий,* т. IV, Варшава 2005. (P. Sarnecki, *Komentarz do art. 16 oraz do art. 163 Konstytucji* w: L. Garlicki (red.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. IV, Warszawa 2005).

[28] Что вызывает не только необходимость законодателя воздерживаться от излишнего вмешательства в компетенции етс, но также обязанность уважать предоставленную самостоятельность. См. Также, напр. Б. Банашэк, *Конституционное право*, Варшава 2004, с. 593; З. Невядомски, *Территориальное самоуправление в Конституции РП*, «Территориальное самоуправление» 2002, № 3. (B. Banaszak, *Prawo konstytucyjne*, Warszawa 2004, s. 593; Z. Niewiadomski, *Samorząd terytorialny w Konstytucji RP*, „Samorząd Terytorialny" 2002, nr 3).

А) общим и достаточным законным основанием для вынесения решения о реализации и финансировании задания гминой являются постановления ст. 6 и / или ст. 7 закона о гминном самоуправлении (в связи со ст. 164 абзац 3 Конституции РП) – именно там определяется чёткое полномочие гмины на исполнение всех публичных заданий местного значения (без оговорки о других субъектах). Причём надо подчеркнуть, что безусловно должны соблюдаться существующие в данных делах приказы и законные запреты. Другое дело, что не все положения должны восприниматься как приказы / запреты[29].

Б) компетенция в вынесении решения принадлежит гмине, т.е. согласно с урегулированиями государственного строя – гминному совету (ст. 18 и ст. 41 закона о гминном самуправлении);

В) процедура принятия акта должна отвечать тебованиям закона о государственном строе, а также постановлениям гминного устава в этой сфере;

Г) акт должен быть опубликован согласно процедуре обнародования актов местного права[30].

Учитывая специфику организации и финансирования заданий в рамках организационной структуры етс, стоит вспомнить о некоторых различиях по отношению к актам внутреннего права (в том числе, бюджетных постановлений[31], многолетних финансовых прогнозов или постановлений по делам дотаций для бюджетных предприятий, организаций). В случае их принятия, объём свободы решений (по финансовым делам) чаще всего уже, чем по отношению к актам местного права. Конечно, такое утверждение требует обоснования. В самом начале надо указать, что из диспозиции ст. 93 Конституции РП[32] вытекает «только» то, что акты внутреннего права издаются «только на

[29] Напр., ошибочным было бы убеждение, что учитывая диспозицию ст. 81. Закона от 23 июля 2003 г. об охране памятников культуры и старины и их попечении (ЖЗ 2005г. № 239, поз. 2019 с дальнейшими изменениями) гминный совет не может решать о других формах финансирования, чем дотации (напр. в форме возврата понесённых расходов), а также, что диспозиция ст. 71 абзац 2 в/н закона из названных там правовых оснований на памятник исключакт договор о ссуде, заключённый между гминой и приходом (см. аналогичное мнение : Приговор Воеводского административного суда в Гданьске от 26 апреля 2010 г. , ISA/Gd 249/10, Lex (577290). См. Также: А. Островска в: И.М. Саляхна (ред.), *Бюджет и многолетний финансовый прогноз единиц территориального самоуправления*, Гданьск 2010, с. 273-274. (A Ostrowska w: J.M. Salachna (red.), *Budżet i wieloletnia prognoza finansowa jednostek samorządu terytorialnego*, Gdańsk 2010, s. 273-274).

[30] Урегулированной законом от 20 июля 2000 года об обнародовании нормативных актов и некоторых других актов (ЖЗ № 62, поз. 718 с позднейшими изменениями).

[31] До недавнего времени в доктрине бюджетное постановление считалось как особенный нормативный акт – обоснование признания постановления актом внутренненго права см. И. М. Саляхна *Ответственность за несоблюдение процедуры создания и исполнения бюджета единицей территориального самоуправления*, Варшава 2008, с. 80 и след. (J.M. Salachna, *Odpowiedzialność za nieprzestrzeganie procedury tworzenia i wykonywania budżetu jednostki samorządu terytorialnego*, Warszawa 2008, s. 80 i nast.).

[32] Кстати, надо сказать, что закреплено мнение о том, что это урегулирование имеет открытый характер в том смысле, что каталог актов внутреннего права может пополняться на основе

основании законов» и направлены (обязывают) исключительно на организационные единицы, подчинённые органу издающему акт. Обычно в сфере финансов законы устанавливают чаще всего более подробные требования, касающиеся конструкции актов внутреннего права етс, а также соответствующий орган принимающий акт или процедурные принципы его принятия[33]. Поэтому органы етс обязаны соблюдать законные требования, с одной стороны - должны соответствовать определённым законом критериям (компетенции, конструкции и порядок принятия) актов, с другой стороны – если полномочие определяется подробно и имеет закрытый характер – не могут регулировать таким актом проблем непредвиденных законодателем. Это однако не означает, что в таких актах не могут оспариваться целенаправленность и суммы расходов на задания етс (гминные). Всё это в виду вытекающего из компетенции гмины в области удовлетворения нужд местной общины, принципа подсудности гмин в сфере определения публичных дел[34], а также связанной с этим политической свободой «в определении направлений и сумм публичных расходов»[35]. Стоит добавить, что свободу в сфере издания исполнительных актов пытаются время от времени противозаконно огрничить / расширить другие органы или организации. Примером может послужить опубликованный на страницах Министерства финансов документ *«Многолетний финансовый прогноз единицы территориального самоуправления. Методика разработки»*[36]. В нём находится образец многолетнего финансового прогноза, который не отвечает всем законным требованиям и вдобавок «вводит» новые непредвиденные законом конструкции - модифицируя отсутствие полномочий объёмом «полномочия и законными пределами»[37]. При этом, что существенно, етс фактически будут заставлены в

конституионных или законных постановлений – более подробно см. Напр., Приговор КТ от 1 декабря 1989 г., K 21/98, OKT СЗ 1998, № 7, поз. 116.

[33] Напр., в сфере бюждетного постановления его конструкция и компетенции по принятию определяют положения ст. 211 абзац 5, статьи 212, 214, 222, 235-237, 239 закона от 27 августа 2009 г. о публичных финансах (ЖЗ, № 157, поз. 1240 с позднейшими изменениями); что касается дотаций для бюджетных предприятий - к ним применяются положения ст. 219 абзац 4 в связи с абзацем 6 ст. 15 закона о публичных финансах.

[34] Ср. Приговор Воеводского административного суда в Быдгоще от 28 июля 2010 г. ISA/Bd 498//10 с неожиданным указанием, что орган надзора (RIO) должен был по отношению к оспариваемому бюджетному постановлению существенно обосновать (рассчитать) утверждение о заниженной сумме дотации (расхода из бюджета). И только учитывая отсутствие того, Воеводский административный суд признал недействительным надзорное решение RIO, утверждающее отмену бюджетного постановления в части приложения бюджетных расходов частично (отдел 921, раздел 92109, параграф 2480).

[35] Т. Дэмбовска-Романовска, *Публичные расходы, их формы..,* ук. соч., с. 114. (T. Dębowska-Romanowska, *Wydatki publiczne, ich formy* ..., op. cit., s. 114).

[36] www.mofnet.gov.pl; материал был опубликован 7 июля 2010 г. (в настоящее время доступен в линке Архива).

[37] См. Также И.М. Саляхна, Многолетний финансовый прогноз как предмет контроля и надзора RIO, приложение к «Коммунальным финансам» 2010, № 10. (J.M. Salachna, Wieloletnia prognoza finansowa jako przedmiot kontroli i nadzoru RIO, dodatek do „Finansów Komunalnych" 2010, nr 10).

известной степени применять этот образец, потому что он уже тестируется в применяемой территориальными самоуправлениями программе Bestia@[38].

4. Выводы

Проведённые рассуждения позволяют утверждать, что поставленный тезис о необходимости пересмотрения сегодняшних мнений на тему объёма свободы / самостоятельности вынесения решений етс, в особенности гмин, является обоснованным. На практике чаще всего имеем дело со слишком свободной интерпретацией (свободное уточнение, дополнение) в общем правильного правлиа, что в публичном праве разрешается то, на что разрешает закон. Одновременно отсутствует при этом раздумье на тему формирования объёма законного разрешения в зависимости от категории дел и вида принимаемых етс разрешений.

В описываемой области должны быть, конечно, приняты более глубокие научные исследования. Однако на практике многое принадлежит региональным счётным палатам (RIO), которые не должны оспаривать постановлений в финансовой сфере (актов местного права, а также внутреннего права, касающихся сущности / расходов) только на такой основе, что отсутствует подробное положение, предусматривающее принятие гминой такого решения. Остаётся возлагать надежду на то, что со временем можно будет убедить как региональные счётные палаты RIO, так и административные суды к такому подходу.

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[38] Таким образом, данные из образца находящиеся в документе, вероятно будут нужны для аналитических целей Министерства финансов; етс в свою очередь, чтобы такие данные представить, будут вынуждены разработать прогноз в порядке, предлагаемом Министерством финансов.

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Некоторые вопросы правового регулирования налогообложения недропользователей в Республике Казахстан

(Some Points of the Legal Regulation of Subsoil Users Taxation in the Republic of Kazakhstan)

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Аннотация: В статье раскрываются особенности правового регулирования налогообложения недропользователей в Республике Казахстан. Автор проводит сравнительный анализ норм налогового законодательства и положений контрактов на недропользование.

Ключевые слова: налоговый режим, недропользователь, налоговый суверенитет, стабильность договора, международный арбитраж.

Abstract: The article reveals the peculiarities of legal regulation of subsoil users taxation in Kazakhstan. The author provides a comparative analysis of tax legislation norms and regulations on subsoil use contracts.

Keywords: tax treatment, the subsoil user, tax sovereignty, stability of agreement, international arbitration.

Проблемы, с которыми сталкивается сегодня Республика Казахстан при регулировании сферы недропользования, в том числе и в вопросах налогообложения, сконцентрированы преимущественно на определении адекватного механизма правового регулирования. Государство и недропользователь придерживаются разных оснований при разрешении возникающих споров. Одни указывая на то, что недра, являясь собственностью государства и стратегически важным сырьем для страны, требуют централизованного, преимущественно, административного регулирования сферы

недропользования, их оппоненты, ссылаясь на международный опыт и риски, которые несут инвесторы при этом, настоятельно рекомендуют более гибкий, в частности, диспозитивный метод правового регулирования.

При этом следует отметить, что обе стороны убеждены, что какие-либо институциональные изменения в сфере использования недр, а также разрешение спорных вопросов между участниками данных отношений, должны явиться откуда-то извне и должны быть навязаны субъектам, которых они касаются. В плане разрешения спора одна сторона указывает на национальный суд, который независим от регулирующих различные вопросы недропользования административных органов, другая – предпочитает политически не ангажированные международные арбитражные центры.

«Однако мы видим, - справедливо отмечает нобелевский лауреат Э. Остром, - что пока в мире сложилась ситуация, когда ни государство, ни рынок не демонстрируют каких-либо значимых успехов в деле предоставления индивидам возможности устойчивого экономического развития на базе производительного использования систем природных ресурсов»[1].

Сложности правового регулирования налогообложения недропользователей обусловлены политическими факторами. Само по себе налоговое законодательство, как известно, обладает высокой степенью политической напряженности. Вовлеченность политических сил в принятие финансово-правовых актов многократно увеличивается, если предметом регулирования становятся недра. Недра всегда были и остаются вопросом большой политики.

1. Налоговое законодательство и контракты на недропользование

В условиях становления правовой системы с целью скорейшего вывода страны из экономического кризиса инеобходимостью предоставления определенных гарантий инвесторам в 90-е годы XX века Республикой Казахстан были заключены долгосрочные контракты на недропользование. Поставив субъектов общественных отношений в исходные юридические позиции, созданная правовая модель тем самым предопределила своеобразие используемого в области недропользования всего комплекса юридического инструментария.

При этом как сами положения контрактов на недропользование, касающиеся вопросов налогообложения, в частности, стабильности налогового

[1] Остром Э. Управляя общим: эволюция институтов коллективной деятельности / Пер. с англ. – М.: ИРИСЭН, Мысль, 2010. С.22.

режима, так и нормы налогового законодательства, действовавшие на момент подписания этих контрактов, носили обобщенный и противоречивый характер.

Так, например, впервые понятия «налоговый режим» и «стабильность налогового режима», на которые постоянно ссылаются недропользователи, были введены в налоговое законодательство с 01 января 1997 г[2]. До этого времени в казахстанском налоговом законодательстве отсутствовал четкий подход к урегулированию вопросов налогообложения недропользователей.

Слишком общий и неопределенный характер налоговых норм, которые не могли реализоваться непосредственно и допускали широкие рамки их толкования в подзаконных актах, фактически приводил к нейтрализации налоговых законов. Налоговое правоприменение того периода характеризовалось тем, что общее правило налогового закона становилось исключением, а исключения подзаконных актов – общим правилом[3].

В последующем положения налогового законодательства Республики Казахстан, закрепляя нормы о стабильности налогового режима контрактов на недропользование, всегда допускали, в случае изменения налогового законодательства, возможность для сторон внесения соответствующих изменений в контракты на недропользование. Тем самым предполагалось, что стабильность налогового режима по контрактам на недропользование не является юридической константой. Более того, в течение определенного периода времени положения налогового законодательства допускали необходимость обязательного применения к контрактам при определенных обстоятельствах в виде исключения к общему правилу о стабильности налогового режима по контрактам на недропользование новых налоговых законов[4].

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[2] Следует отметить, что многие государства в своих национальных законодательствах не предусматривают включение стабилизирующих оговорок в инвестиционные контракты и при этом международные нефтяные компании не испытывают в связи с данным обстоятельством никаких трудностей. Так, например, Норвегия, Великобритания, Канада, США и Австралия не имеют подобных стабилизирующих оговорок и все равно привлекают достаточно инвестиций.

[3] Ситуация изменилась в связи с принятием 23 июня 2006 г. Нормативного постановления Верховного Суда Республики Казахстан №5 «О судебной практике применения налогового законодательства». Разъяснения и комментарии уполномоченного государственного органа были признаны не относящимися к нормативным правовым актам и, тем самым, на суды была возложена обязанность при рассмотрении налоговых споров такие поднормативные предписания оценивать с учетом их соответствия нормам налогового законодательства.

[4] В частности, положения Указа о налогах от 1995 года в первоначальной редакции прямо предусматривали необходимость изменения контрактов на недропользование в случае изменения налогового законодательства. Положения Указа о налогах от 1995 года в редакции до введения в действие изменений и дополнений от 15 апреля 1998 года параллельно с нормами о гарантиях стабильности налогового режима содержали указание на исключение из этого правила. Данное исключение, предусмотренное п.2 ст.94-3 Указа о налогах от 1995 года, касалось изменений в законодательстве, которые приводят к невозможности дальнейшего соблюдения первоначальных условий контракта или приводят к существенному изменению его первоначального экономического баланса. В этом случае сторонам было предоставлено право вносить изменения в контракт с целью восстановления первоначального экономического баланса.

Следует также заметить, что стабильность налогового режима была прямо предусмотрена не во всех контрактах. Некоторые соглашения на недропользования вообще не содержали положений о стабильности налогового режима, а в других - определялись нечетко сформулированными конструкциями, которые давали лишь возможность предполагать для недропользователя стабильность налогового режима.

Положения контрактов не содержащие достаточно полных, исчерпывающих указаний об условиях действия, дополнялись ссылками на действующее в тот период законодательство, которое в свою очередь само находилось в процессе становления. Поэтому ни сами контракты на недропользование, ни казахстанское законодательство по объективным причинам не могли восполнить имеющиеся пробелы. Отсюда предусмотренные в контрактах оговорки о необходимости внесения дополнений и изменений в их положения в случае принятия соответствующих нововведений в нормативные правовые акты республики.

Пробельность системы налогового права привела к расширению использования усмотрения чиновников при разрешении конкретных правовых вопросов. Посредством дальнейшего внесения различного рода новаций и корректив в контракты на недропользование, а это неизбежно в период формирования правовой системы, не всегда соблюдался первоначальный экономический баланс интересов сторон. Положения ряда дополнительных соглашений к контрактам, изменяющие налоговый режим, свидетельствуют о несоблюдении принципа взаимной выгоды в отношении государства.

Основной чертой первоначального этапа становления законодательства Республики Казахстан было то, что обособившиеся управленческие группы использовали законы, в том числе и налоговые, преимущественно для распределения имеющегося в стране богатства, а не содействия в его увеличении. Огромное количество нормативных актов являлись лишь механизмом перераспределения благосостояния между различными группировками.

До принятия Указа Президента **Республики Казахстан от 24 апреля 1995 года № 2235 «О налогах и других обязательных платежах в бюджет» (*далее – Указ о налогах от 1995 г.*)** действовало 77 законодательных актов, посвященных вопросам налогообложения, причем 37 из них по своему основному содержанию вовсе не относились к налоговым законам, т.е. налоговые вопросы ими затрагивались лишь косвенно.

Сложившаяся в тот период правовая система, чьей единственной задачей было перераспределение, по точному замечанию Эрнандо де Сото, «плоха и для бедных, и для богатых, а выгодна лишь тем, кто наилучшим образом организовался для поддержания тесных связей с власть имущими. И это означает,

что на рынке остаются лишь те виды бизнеса, которые наиболее эффективны политически, но не экономически»[5].

2. К истории вопроса

Проблема определения эффективного механизма правового регулирования в сфере недропользования известна уже давно. К различным сферам отношений горной отрасли применялись различные приемы юридического воздействия.

Так известный ученый В.А. Лебедев (1833-1909) указывал, что «правоотношения, возникающие в горном деле, входят в область гражданского права, а разные мероприятия, относящиеся до здравия и безопасности рабочих, подлежат ведению полицейского права; ведению же финансовой науки подлежит фискальная сторона горного дела»[6].

В XVIII - XIX веках было устойчивым мнение, что горные продукты должны быть собственностью казны, как res nullius, что недра земли принадлежат не владельцу земли, а государству. «Отсюда и явилось, - по мнению В.А. Лебедева, - понятие о т.н. горной регалии, т.е. о праве государства на добывание горных продуктов не только в недрах земель, но и в недрах казенных земель частных лиц. В немецком и некоторых других законодательствах было даже определено, до какой глубины почва должна считаться частной собственностью (напр., на один локоть глубины), а глубже того почва считалась собственностью государства. Такие постановления были крайне стеснительны для частных землевладельцев. Однако мало-помалу эта идея горной регалии в таком ее значении исчезла, и в настоящее время преобладает взгляд, что недра земли принадлежат тому, кто владеет поверхностью ее»[7]. «Если же допустить какие-либо ограничения свободной деятельности частных лиц в горном деле, то они должны состоять только в высшем надзоре за этой промышленностью со стороны государства и обложении их определенным сбором в пользу казны. Такого взгляда - заключает В.А. Лебедев, - и держится наше законодательство»[8].

Таким образом,только в конце XIX века в связи с переходом развитых стран к индустриализации, для осуществления которой ресурсы недр имели большую ценность, чем земельный участок, происходит разделение права собственности на недра и на землю. Во многих европейских странах законодательство регулирующее вопросы недропользования постепенно начинает меняться в пользу рынка.

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[5] Сото Э. де. Иной путь: Экономический ответ терроризму / Пер. с англ. – Челябинск: Социум, 2008. С.202.

[6] Лебедев В.А. Финансовое право. Учебник. – М.: «Статут» (в серии «Золотые страницы финансового права России»), 2000. С.245.

[7] Там же. С.246.

[8] Там же. С.247.

В связи с этим представляются интересными замечания известного норвежского экономиста Эрика Райнерта. Основную разницу между богатыми и бедными странами он видит в том, «что все богатые страны прошли этап развития без свободной торговли, который в случае своей успешности приводил к тому, что свободная торговля становилась им выгодна. Эта стадия в истории нынешних развитых стран сегодня запрещена: бедным странам не разрешается эмулировать экономический строй богатых стран. Рынки способны чудодейственным образом искоренить бедность не больше, чем решить проблемы глобального потепления или загрязнения окружающей среды»[9].

На смену отношений субординации, что свойственно публичному праву, между пользователем недр и государством-реципиентом инвестиций, при активном содействии развитых стран внедряется система партнерских отношений, отношений равноправных субъектов.

В отношении контрактов на недропользование проф. М.К. Сулейменов уверяет, что «практически весь мир переходит к признанию того, что государство, вступая в частно-правовые отношения, выступает как обычный субъект частного права, теряющий свои властно-правовые функции и право на судебный иммунитет»[10]. Иначе говоря, Республика Казахстан, вступив в договоренности с целью получения инвестиций, по собственной инициативе примерила на себя одежды участника гражданско-правового соглашения, отложив в сторону свой статус суверена и собственника недр[11].

3. Выводы

Как нам кажется, ситуация с контрактами, и тем более, вопросы правового регулирования налогообложения недропользователей не так однозначны.

Во-первых, в процессе правоприменительной практики всегда следует учитывать специализацию положений, поскольку право по своему юридическому строению неоднородно. При анализе контрактов на недропользование необходимо четко отграничивать публично-правовые начала от частноправовых.

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[9] Райнерт Э.С. Как богатые страны стали богатыми, и почему бедные страны остаются бедными / Пер. с англ. – М.: Издательский дом Гос. ун-та – Высшей школы экономики, 2011. С.30.

[10] Сулейменов М.К. Государство и контракты // Юрист, 2004, №7, С.25.

[11] Следует отметить, что одним из ключевых вопросов, обсуждаемых в казахстанских публикациях, является установление правовой природы контрактов на недропользование, поскольку от этого зависит определение применимого к нему права и определение конечного статуса контрагентов. По поводу правовой природы СРП сложились две основные позиции. Например, А. Диденко и Е. Нестерова полагают, что «контракту на недропользование присуща смешанная правовая природа, и гражданское законодательство применяется к нему субсидиарно лишь в части тех отношений, которые могут быть урегулированы в контракте на недропользование на началах юридического равенства сторон». - См., Диденко А., Нестерова Е. Правовая природа контрактов на недропользование и инвестиционных контрактов // Гражданское законодательство. Статьи. Комментарии. Практика. – Выпуск 29. – Алматы, 2007.С.190-191. А.И. Худяков считает, что СРП являются гражданско-правовыми договорами, и несут в себе черты договора подряда. - См., Худяков А.И. Налоговое право Республики Казахстан. Особенная часть. – Алматы, 2006. С. 87.

Правила о незыблемости договорных условий, их приоритете перед изменившимся законодательством и неприменении законодательных положений, ухудшающих положение инвестора, являются гражданско-правовыми конструкциями, установленными в неналоговом законодательстве. Данные нормы не могут регулировать налоговые отношения. Противоположный подход входит в противоречие с основополагающими принципами налогового и гражданского законодательства, разграничивающими предметы правового регулирования соответствующих отраслей, создает неоправданное смешение частно-правовых и публично-правовых регуляторов общественных отношений[12].

В связи с заключением контракта на недропользования возникают две группы правоотношений с участием государства.

В первую группу входят те отношения, которые могут быть урегулированы в контрактах на началах равенства сторон: права и обязанности сторон, сроки, ответственность. Вторую группусоставляют публичные отношения, которые построены на началах субординации: административные отношения, отношения по уплате недропользователями налогов и других обязательных платежей.

По этому вопросу судья Высшего арбитражного суда Российской Федерации, проф. Л.А. Новоселова отмечает, что «отношения, основанные на властном подчинении одной стороны другой, не могут быть урегулированы договором. В рамках публично-правового регулирования государство устанавливает обязательные для сторон правила, которые не могут быть отменены или изменены по воле их участников»[13]. В связи с этим воспроизведение в договоре императивных положений публичного законодательства не означает, что данное положение является условием договора. Включение подобных положений в договор юридически безразлично.

«При изменении воспроизведенных норм в договоре императивных норм публичного законодательства (налогового, бюджетного, законодательства о лицензировании и т.д.) договор в этой части, безусловно, не подлежит применению»[14].

«При дублировании императивных норм публичного законодательства положения инвестиционных соглашений в этой части не могут рассматриваться как сохраняющие силу, поскольку такие положения не могут рассматриваться в качестве договорного условия. Следовательно, сохранение прежнего налогового

[12] Данный вывод находит свое подтверждение как в положениях налогового законодательства, которые с момента принятия Указа о налогах от 1995 года запрещали включение в неналоговое законодательство вопросов, связанных с налогообложением (п.2 ст.1 Указа), так и в п.4 ст.1 Гражданского кодекса РК.

[13] Новоселова Л. Соотношение договора и закона по гражданскому праву // Гражданское законодательство. Статьи. Комментарии. Практика. – Выпуск 29 / Под ред. А.Г. Диденко. – Алматы: Раритет, Институт правовых исследований и анализа, 2007. – С. 221.

[14] Там же.

режима возможно лишь в случае наличия в налоговом законодательстве специальной нормы»[15].

Во-вторых, как отмечает Дэниэл Джонстон, «число фискальных систем, регулирующих отношения с нефтедобытчиками, больше, чем национальных государств, так что в одной и той же стране подрядчики могут работать на совершенно разных условиях»[16], отчего во многих странах, в том числе и в Казахстане, существует изрядное многообразие договорных условий, но это не должно быть поводом к бессистемному применению налоговых законов.

В своем выступлении 22 января 2010 года на совещании в Правительстве Президент Республики Казахстан Нурсултан Назарбаев отметил: «Все наши контракты работают по налоговому законодательству на момент их подписания, нам надо проработать вопрос о том, чтобы выходить из зоны неприкосновенности, чтобы все работали по тем же изменениям в налоговом законодательстве, которые произойдут в будущем».

По итогам данного совещания Премьер-Министр Казахстана Карим Масимов распорядился подготовить предложения по реформе налогообложения для сырьевых компаний и поручил проработать вопрос применения налогообложения на основе текущего законодательства ко всем сырьевым компаниям, в том числе работающим на основе Соглашений о разделе продукции(*далее - СРП*).

Согласно статье 308-1 Кодекса Республики Казахстан о налогах и других обязательных платежах в бюджет № 99-IV ЗРК от10 декабря 2008 года (*далее – НК РК*) для 15 контрактов по разведке и добыче углеводородного сырья, осуществляемых на условиях раздела продукции, сохранена стабильность налогового режима[17].

В некоторые из указанных контрактов с момента их заключения вносились изменения. При этом дополнительными соглашениями вносились новации и в налоговые режимы (например, изменения касались ставок НДС, социального налога, роялти) этих контрактов. Таким образом, налоговый режим недропользователя с учетом дополнительных соглашений может состоять из

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[15] Там же. С.238-239.

[16] Джонстон Д. Международный нефтяной бизнес: налоговые системы и соглашения о разделе продукции / Пер. с англ. – М.: ЗАО «Олимп-Бизнес», 2000. С.21.

[17] Данная норма, на наш взгляд, противоречит принципу справедливости налогообложения (ст.7 НК РК). Ст.10Договора к Энергетической Хартии (г. Лиссабон, 17 декабря 1994 г.) (с изменениями, внесенными Поправкой к связанным с торговлей Положениям Договора к Энергетической Хартии от 24 апреля 1998 года) (ратифицирован Указом Президента РК от 18 октября 1995 г. № 2537) обязывает принимающие страны предоставлять инвестициям инвесторов других Договаривающихся Стран и их соответствующей деятельности, включая управление, поддержание, пользование, владение или распоряжение, режим, не менее благоприятный, чем тот, который она предоставляет инвестициям своих собственных инвесторов или инвесторов других стран, т.е. национальный режим или режим наибольшего благоприятствования**,** в зависимости от того, какой из них является наиболее благоприятным.

налогов различных нормативных актов. Например, налогов предусмотренных **Указом о налогах от 1995 г. и** Кодексом Республики Казахстан о налогах и других обязательных платежах в бюджет № 209-II от 12 июня 2001 года. Получается, что правовое регулирование налогообложения недропользователей, для которых сохранена стабильность налогового режима, фактически осуществляется не только действующим НК РК, но также нормативными актами утратившими силу.

В-третьих, стороной заключавшей от имени Республики Казахстан контракты на недропользование было Правительство Республики Казахстан (либо иной орган, входящий в его структуру) в компетенцию которого никогда не входило определение налогового режима, тем более предоставление гарантии налоговой стабильности, для инвесторов. Установление и введение налоговявляется прерогативой Парламента Республики Казахстан.

Таким образом, заключая контракт, исполнительный орган власти вправе был лишь воспроизвести нормы действующего на тот период налогового законодательства, а инвестор мог и должен был знать что и в каких рамках ему может гарантировать исполнительный орган страны.

Кстати, за все время заключения контрактов на недропользование не было выработано не одного нормативного правового акта, который бы регулировал процессуальный порядок заключения таких соглашений и контроль за его исполнением.

В-четвертых, как известно, налог представляет собой законодательно установленный государством в одностороннем порядке обязательный денежный платеж. Установление и взимание налога является одним из признаков государства, свидетельством его суверенного состояния.

Одним из наиболее важных юридических принципов налогообложения, по мнению А.И. Худякова, является налоговый суверенитет, т.е. исключительное право государства на установление и взимание налогов[18]. С учетом этого, установление в налоговом законодательстве публично-правовых гарантий стабильности налоговых режимов контрактов на недропользование является односторонним властным актом государства, воплощенным в форме закона, но не согласованной волей участников правоотношения.

Как отмечает В. Иванов, суверенитет един и неделим, нельзя же быть суверенным во внутренних делах и несуверенным во внешних, и тем более наоборот[19]. Если государство ограничивает себя, тем более в области правового регулирования налогообложения, оно не суверенно.

Таким образом, соглашаясь с мнением, что государство в рамках контрактов на недропользование частично отказывается от своего статуса

[18] Худяков А.И., Бродский Г.М. Теория налогообложения. - Алматы, 2002. С.124-125.
[19] Там же. С.16.

суверена и вступает в налоговые отношения с недропользователем в качестве равноправного субъекта, следует признать за государством отсутствие статуса суверена в целом. Нет суверенитета – нет и государства.

В-пятых, в положениях контрактов на недропользование закреплены две последовательные формы разрешения споров.

СРП предусматривают предварительное разрешение спора путем проведения переговоров между сторонами. В случае если спор не урегулирован в ходе переговоров, то он разрешается в международном арбитраже.

По условиям СРП арбитражное разбирательство проводится в соответствии с Правилами Комиссии Организации Объединенных Наций по праву международной торговли (UNCITRAL), с Правилами арбитража Международной торговой палаты, а также МЦУИС (ICSID)в соответствии сКонвенцией об урегулировании инвестиционных споров между государствами и гражданами иностранных государств от 18 марта 1965 года и Арбитражными правилами Центра (Дополнительного органа).

Юрисдикция международного арбитража при рассмотрении споров, связанных с СРП, помимо предусмотренной в СРП арбитражной оговорки, вытекает из имеющих приоритет перед законодательством Республикой Казахстан международных договоров, ратифицированных Казахстаном[20].

Республика Казахстан присоединилась к Договору Энергетической Хартии (г. Лиссабон, 17 декабря 1994 г.) (с изменениями, внесенными Поправкой к связанным с торговлей Положениям Договора к Энергетической Хартии от 24 апреля 1998 года) (ратифицирован Указом Президента РК от 18 октября 1995 г. № 2537) (*далее – «ДЭХ»*) и к Конвенции об урегулировании инвестиционных споров между государствами и физическими или юридическими лицами других государств International Centre for Settlement of Investment Disputes от 18 марта 1965 г., а также заключило около 40 договоров с другими государствами о поддержке и защите инвестиций (двусторонние инвестиционные договоры)(*далее – «ДИД»*)**.**

ДЭХ включает в себя положения о защите иностранных инвестиций, аналогичные включенным в большинство ДИД, и предусматривает право инвесторов обратиться за разрешением споров между государствами и инвесторами в области энергетики в арбитраж.

Основным многосторонним соглашением, предусматривающим арбитражное рассмотрение инвестиционных споров, является Вашингтонская конвенция 1965г. об урегулировании инвестиционных споров между

[20] В соответствии с п.3 ст.4 Конституции Республики Казахстан международные договоры, ратифицированные Республикой, имеют приоритет перед ее законами и применяются непосредственно, кроме случаев, когда из международного договора следует, что для его применения требуется издание закона.

государствами и лицами других государств, ратифицированная Республикой Казахстан.

Согласно Конвенции споры, вытекающие из отношений между иностранным частным лицом и государством-реципиентом по поводу инвестиций, подлежат рассмотрению в специальном органе - Международном центре по разрешению инвестиционных споров при Всемирном банке.

Подписав ДИДы и присоединившись к ДЭХ и Вашингтонской конвенции 1965г., Казахстан, тем самым, дал согласие на рассмотрение инвестиционных споров по контрактам на недропользование с иностранными инвесторами международными арбитражами.

Хотя в целом ДЭХ не рассматривает вопросы налогообложения, тем не менее, ДЭХ защищает иностранных инвесторов от конфискационных налогов. Так согласно п.(5) Ст.21 ДЭХ, положение об экспроприации (Ст.13) применимо и к налогам. Вследствие этого, иностранный инвестор может заявить, что налоговая мера, по сути, является экспроприацией.

Однако инвестору не разрешается немедленно передавать этот вопрос на рассмотрение в международный арбитраж. Он должен предварительно обратиться в компетентные налоговые органы. При этом обязанность инвестора сотрудничать с государственными органами связана с обязанностью уполномоченных органов со своей стороны соблюдать требования «due process» (справедливого процесса).

Таким образом, как показывает международная арбитражная практика изменения налогового законодательства, влекущие неоправданное непропорциональное увеличение налогового бремени или иные негативные последствия для инвестора, могут быть признаны непрямой экспроприацией.

Оговорка о третейском суде предусматривалась уже в первом в истории СРП, заключенном 18 августа 1966 г. индонезийской государственной компанией «*Permina*» и «*Independent Indonesian American Petroleum Company*», представлявшей интересы нефтяных предпринимателей из Денвера (США). Механизмом гарантирования инвестиций в этом соглашений выступала оговорка о третейском судье, которого должен был назначить Президент Женевского земельного суда.

В настоящее время подобные разрешения споров имеют не всегда однозначную оценку у международных экспертов.

Как известно, в конце 90-х XX в. США было разработано Многостороннее соглашение по инвестициям[21], которое должно было реализоваться в рамках Всемирной торговой организации. «Но эти усилия, - как пишет Ноам Хомский, -

[21] Текст проекта Многостороннего соглашения по инвестициям: OECD, Multilateral Agreement on Investment: Consolidated Text and Commentary (OLIS January 9, 1997; DAFFE/MAI/97;Confidential); доступен в Центре публичной политики «Преамбула» (1737 21st. St. NW, Washington, D.C. 20009).

были заблокированы странами третьего мира, в особенности Индией и Малайзией, которые признавали, что предложенные меры не позволят им применять ухищрения, используемые богатыми ради завоевания собственного места под солнцем»[22].

Негативную реакцию данный проект вызвал и в других странах.

Например, в Канаде, провинция Британская Колумбия заявила в Палате общин, что она «резко против» предлагаемого договора, отметив его «неприемлемые ограничения», касающиеся избранных правительств на федеральном, провинциальном и местном уровнях; его пагубное воздействие на социальные программы (здравоохранение и т.д.) и на охрану окружающей среды и управление ресурсами; необычно широкий диапазон определения термина «инвестиция», а также прочие удары по демократии и правам человека. Наибольшей критике со стороны Правительства этой провинции подверглись статьи, разрешающие корпорациям преследовать правительства в судебном порядке, тогда как сами корпорации никакой ответственности не подлежат и улаживают выдвигаемые против них обвинения в «не избираемых и никому не подотчетных арбитражных судах», которые следует образовывать из «специалистов по торговле»; суды эти будут работать, не учитывая доказательственного материала, без гласности и возможности апелляций[23].

Как отмечается в Докладе Специального представителя Генерального секретаря ООН по вопросу о правах человека и транснациональных корпорациях и других предприятиях, «опыт последних лет позволяет предположить, что некоторые договорные гарантии и положения контрактов могут чрезмерным образом ограничивать способность правительства принимающей страны добиваться достижения своих законных политических целей, включая выполнение им принятых международных обязательств в области прав человека»[24].

Налоговыеправоотношения государства и недропользователя в Республике Казахстан являются специфическими. Ранее они представлялисобой скорее даже исключение из правил установленных налоговым законодательством. С момента заключения первых СРП правовое регулирование налогообложения недропользователей стало развиваться в автономном режиме. И это привело к негативным последствиям. Государство ради привлечения инвестиций не только допустило ослабление своих позиций, но и тем самым способствовало к деформированию всей правовой системы.

[22] Хомский Н. Прибыль на людях / Пер. с англ. Б.М. Скуратова. – М.: Праксис, 2002. С.204.
[23] Там же. С.206.
[24] См., A/HRC/11/13, 22 April 2009.

В последние годы в республике пытаются изменить сложившуюся ситуацию, однако в связи с существенным влиянием в сфере недропользования обособленных управленческих групп, а порой ичастичными уступками инвесторов, реформы ограничиваются лишь «ямочным ремонтом» налогового законодательства.

Proposals for Taxation of the Financial Sector in Poland in the Context of Post-crisis Activities

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Abstract: During the recent financial crisis some governments countries, realizing the negative economic and social consequences that could follow the bankruptcy of the largest banks, decided to provide the entities at risk of loss of liquidity with budget funds. The experience gained during the crisis made a lot of countries think about imposing on banks and other financial institutions different new burdens in the form of taxes or levies which would provide additional funds to the budget or be accumulated and allocated for financing the activities aimed to stabilize the financial market. To date, 10 EU Member States have implemented or are conducting legislative works on the implementation of such regulatory solutions.
There were also attempts to implement similar solutions in Poland. The activities were taken within the parliamentary initiative (two drafts) and the government initiative.
It may not be explicitly stated that the banks will transfer the additional costs of the caution levy to their customers. There is such risk, but strong competition and fight for customers using, other among, in the field of process will probably prevent it. Therefore, the question whether an entity decides to transfer the economic burden of the caution levy to customers will depend on the business strategy (including marketing strategy) of such entity.

Introduction

During the recent financial crisis some governments countries, realizing the negative economic and social consequences that could follow the bankruptcy of the largest banks, decided to provide the entities at risk of loss of liquidity with budget funds. According to the estimates made by the European Commission, the financial aid given to the banking sector by EU Member States since the beginning of the crisis in December 2009 reached a considerable sum being the equivalent of 13% of the European Union's GDP[1].

Although Poland has avoided the necessity to make outlays on rehabilitation of the endangered financial institutions, it has to prepare for potential turbulence due to the globalization of financial markets.

[1] Communication from the Commission of 20 October 2010.

1. The Polish anti-crisis back stops mechanisms

In the context of the foregoing, on October 13th, 2008 the Minister of Finance announced the so-called regulatory package, including:

1. Act of 7 November 2008 on the Financial Stability Committee (Dz. U. [Journal of Laws] No 209, item. 1317).
2. Act of 23 October 2008 amending o the act on the Bank Guarantee Fund (Dz. U. No 209, item 1315).
3. Act of 12 February 2011 on e State Treasury support to financial institutions (Dz. U. No 39, item 308, as amended).
4. Act of 12 February 2010 on recapitalisation of some financial institutions (Dz. U. No 40, item 226, as amended).

1.1 Act on the Financial Stability Committee

The purpose of the Act on the Financial Stability Committee is to lay down the terms of cooperation, including exchange of (public and classified) information (public and classified), between the main financial security institutions (Ministry of Finance (MF), National Bank of Poland (NBP) and Polish Financial Supervision Authority (KNF)), as well as activities in support of financial stability, including coordination of activities of the Committee's members in the case of direct threat to the stability. The Act on the Financial Stability Committee became effective on December 13th, 2008.

1.2 Amendment to the Act on the Bank Guarantee Fund

The amendment to the act was aimed at restoring trust in the banking sector, among others by raising the protection level of deposits from EUR 22,500 (100% of which is guaranteed up to EUR 1,000, and 90% of which is guaranteed above the said amount) to EUR 50,000 (100% of which is guaranteed) - from November 28th, 2008. From December 30th, 2010 the limit is EUR 100,000.

1.3. Act on State Treasury support to financial institutions

In accordance with the Act on State Treasury support to financial institutions, it is possible to provide support to financial institutions seated in the territory of Poland to maintain their payment liquidity. The purpose of the Act is to provide the Minister of Finance with instruments aimed at counteracting financial crises. The Minister of Finance will be able to take certain actions upon request of a given financial institutions having consulted the Chairman of the Financial Supervision Authority and the President of the National Bank of Poland. The Act enables also the support of payment liquidity of a domestic bank in connection with the development of its lending activity. The support specified in the Act may be given, i.e. in the form of State Treasury guarantees, loans under state treasury securities, sale of state treasury securities with a deferred

payment date, sale of state treasury securities with payments split into installments, sale of state treasury securities by way of an offer addressed to a specific financial institution. The Act entered into force on March 13th, 2009 and must be notified to the European Commission every six months (as a form of state aid). By decision of the European Commission dated June 28th, 2011 SA.33008 and SA.32946, the applicable programme providing for the amount of the budget planned accounting for PLN 40 billion ("Programme of financial support for banks in Poland") was prolonged until December 31st, 2011.

1.4 Act on recapitalisation of some financial institutions

The Act enables the Ministry of Finance to respond immediately to problems with capitalization of a financial institution by providing a State Treasury guarantee of capitalization of such institution. The capitalization may take the form of a State Treasury guarantee of increase in a financial institution's equity by acquisition of its shares, bonds or bank securities. The guarantee may be issued to financial institutions in which it is necessary to develop a reconstruction programme (banks) or plan of restoration of proper financial relations (insurance companies). In circumstances endangering the solvency of a financial institution, the Council of Ministers, upon request of a minister in charge of financial institutions, to ensure stability of the national financial system, will be able to take over such institution on behalf of the State Treasury, having consulted the President of the National Bank of Poland and the Chairman of the Financial Supervision Authority and, in the case of banks, also the Bank Guarantee Fund. The Act was adopted on February 12th, 2010. By decision of the European Commission dated June 28th, 2011 SA.33007 (2011/N) the applicable programme providing for the amount of the budget planned accounting for PLN 40 billion ("Programme of recapitalisation of Polish banks") was prolonged until December 31st, 2011.

To date, no support provided for in the regulatory package has been given, and no financial institution covered by the regulatory package has applied for support.

2. The role of the Bank Guarantee Fund

One of the key institutions performing tasks in the area of financial stability is the Bank Guarantee Fund. Art. 4 of the Act on the Bank Guarantee Fund provides for, among others, the following tasks of the Bank Guarantee Fund:

- guaranteeing the funds gathered at banks;
- providing financial aid to entities subject to the deposit guarantee system which are at risk of insolvency.

The Bank Guarantee Fund performs tasks which, at the EU level, are determined in Directive 94/19/EC of 30 May 1994, pursuant to which: *"(...) the harmonious development of the activities of credit institutions throughout the*

Community should be promoted, (...) while increasing the stability of the banking system and protection for savers" or "(...) Directive constitutes the fundamental instrument of substantiation of the internal market in the sector of credit institutions, from the viewpoint of the freedom of entrepreneurship and freedom of providing financial services whilst increasing the stability of the banking system and protecting depositors" - according to the draft Directive. This function of guaranteeing deposits is aimed at stabilisation in the banking system by preventing the so-called "banking panic". For banking institutions, this hazard forms a systematic risk which is reduced due to the existence of deposit guarantee system.

The function of the financial aid provided by the Bank Guarantee Fund is aimed at limitation of the threat of insolvency and reduction in the risk of bankruptcy of a bank. The function enables to maintain trust in the banking system being one of the fundamental factors stabilizing the same.

3. Proposals for taxation of the financial sector in Poland

The experience gained during the crisis made a lot of countries think about imposing on banks and other financial institutions different new burdens in the form of taxes or levies which would provide additional funds to the budget or be accumulated and allocated for financing the activities aimed to stabilize the financial market. To date, 10 EU Member States have implemented or are conducting legislative works on the implementation of such regulatory solutions.

As a consequence of the Member States activities At the Community level have been taken works aimed at harmonization of the domestic solutions regarding the processes and tools of managing the crisis in the banking sector have been taken at the Community level. In the communication dated May 26th, 2010 the European Commission emphasised the need to create bank resolution funds "*built up on the basis of contributions from banks ex ante*". The funds would "*facilitate the resolution of failing banks in ways which avoid contagion, allow the bank to be wound down in an orderly manner and in a timeframe which avoids the "fire sale" of assets*"[2]. The proposal of creation of funds and charging levies on banks was accepted by the governments of EU Member States, which, at the European Council of 17 June 2010, unanimously agreed that introduction of a system of levies and taxes imposed on financial institutions was necessary to ensure equal distribution of consequences of the crisis in the banking sector. The European Commission upheld its standpoint in the Communication from the Commission of 20 October 2010 to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the

[2] Communication from the Commission of 26 May 2010.

Regions and the European Central Bank: An EU Framework for Crisis Management in the Financial Sector[3].

There were also attempts to implement similar solutions in Poland. The activities were taken within the parliamentary initiative (two drafts) and the government initiative (two variants).

3.1. Parliamentary draft on taxation of some financial institutions (Sejm paper No 4250)

The draft provides the taxation of assets of some financial institutions from January 1st, 2012 to December 31st, 2015 by introducing the so-called tax on financial institutions.

The tax on financial institutions would be imposed on:

- national banks,
- branches of foreign banks,
- branches of credit institutions,
- national insurance companies,
- national reinsurance companies,
- branches of foreign insurance and reinsurance companies,
- main branches of foreign insurance and reinsurance companies,
- investment funds.

The tax rate would be fixed at 0.25 % of the taxation basis, including:

- in the case of taxpayers including banks, national insurance companies, national reinsurance companies, investment funds – the sum of assets shown in the taxpayer's annual financial statement approved in accordance with Art. 53 (1) of the Accounting Act of 29 September 1994,
- in the case of taxpayers including branches of credit institutions and branches of foreign banks - the sum of assets shown in the taxpayer's annual financial statement,
- in the case of taxpayers including branches and main branches of foreign reinsurance and insurance companies - the sum of assets shown in the taxpayer's annual financial statement.

According to the draft, advances on the tax on financial institutions would be paid to the tax office by the 20th day of each calendar month and would account for 1/12 of the tax payable according to the most recent approved annual financial statement (tax return). The obligation to pay the advance for the following accounting period would occur in the month following the submission of the tax return. Banks that allocate the total profit for an accounting year to an increase in equity could be exempt from such tax. The funds derived from the tax would finance the Demographic Reserve Fund.

[3] Communication from the Commission of 20 October 2010.

In order to protect consumers against the potential transfer of the costs of the new burden onto customers, the imposition of the tax could not form a basis for amending the terms of providing financial and insurance services rendered pursuant to civil-law contracts, i.e. in connection with the act becoming effective and introduction of the tax on financial institutions, the institutions would not be entitled to worsen the terms of contracts with their customers.

The authors of the draft estimate the income derived from the aforementioned tax at approximately PLN 2 billion a year[4].

3.2. Parliamentary draft on tax on some financial institutions (Sejm paper No 3838)

According to the draft, the tax would be imposed on:

- national banks,
- branches of foreign banks,
- branches of credit institutions,
- national insurance companies,
- national reinsurance companies,
- branches of foreign insurance and reinsurance companies,
- main branches of foreign insurance and reinsurance companies,
- investment funds.

Analogically as in the case of the previous parliamentary draft, the tax would be imposed on assets of financial institutions, i.e. it would be a kind of tax on property.

The tax on some financial institutions was foreseen as an alternative to the VAT increase proposed by the government. According to the authors of the draft, the estimated tax income with the rate of 0.39% would be PLN 5 billion, including[5]:

- PLN 4.1 billion from the banking sector;
- PLN 538 million from insurance companies;
- PLN 405 million from investment funds.

According to the draft, assets with a value not exceeding PLN 10,000,000.00 would be exempt from tax. The intention of authors of the draft was to protect small banks and insurance companies which, according to him, positively affect the market competition and the taxation of which could lead to their financial problems.

3.3. Government's solutions

3.3.1. Establishment of the Stabilisation Fund within the Bank Guarantee Fund

The Agenda of the Council of Ministers includes a mention of draft on the Stabilization Fund, whose task would be to collect funds ex ante to cover expenses on

[4] Draft on taxation of some financial institutions (Sejm paper No 4250).
[5] Draft on tax on some financial institutions (Sejm paper No 3838).

ensuring stability of the financial sector. It seems to be legitimate to consider two variants of location of such fund[6]:

- within the Bank Guarantee Fund;
- as a separate special-purpose fund.

The establishment of a new own fund (the so-called stabilization fund) within the Bank Guarantee Fund and the imposition on some financial institutions of the so-called caution levy in the form of an obligatory public-law charge corresponds with a wider trend observed during nearly three years in the legislation of some EU Member States.

Adoption of the aforementioned construction would cause that the stabilization fund would be governed by rules governing the financial economy of the Bank Guarantee Fund. Such solution would also enable to use the infrastructure and human resources of the Bank Guarantee Fund.

The main reason for imposition of an additional charge on some financial institutions was to increase their participation in the effects of potential financial crises and to provide additional financing sources for reorganization activities, analogical to e.g. financing the tasks in connection with recapitalization of a domestic bank comprising the giving by the State Treasury of guarantees to increase a domestic bank's equity and takeover by the State Treasury of a domestic bank as specified in Art. 3 (1) and Art.14 (1) of the act of 12 February 2010 on recapitalization of some financial institutions (Dz. U. No 40, item 226, as amended). The goal of such solution would not be to totally eliminate the current budgetary sources of financing such tasks and to replace them with funds from the stabilization fund, but to ensure additional, alternative funds the use of which should depend on a reliable assessment of the market situation and a possibility to incur the total costs of reconstruction activities in a way specified in the act on the Bank Guarantee Fund and recapitalization act.

The possibility to allocate the funds deriving from the stabilization fund for the aid measures currently performed by the Bank Guarantee Fund within the aid fund and/or payment of guaranteed funds would have to be considered. It could be assumed that the Board of the Fund, having obtained the approval of the Minister of Finance, could allocate the funds from the stabilization fund for payments of guaranteed funds. The tasks of deposit guarantees should be financed by the Stabilization Fund solely in exceptional cases, with full respect to the basic goal of this fund. Therefore, for a better assessment of the legitimacy of use of the resources of the stabilization fund for payment of the guaranteed funds, the decision on such utilization of funds should be preceded by approval of the minister in charge of financial institutions.

Also the matter of determination of the basis for the levy imposed on entities should be discussed. The first solution would include determination of the basis for the caution levy analogically as the levy on the Bank Guarantee Fund, i.e. as a product of

[6] Agenda of the Council of Ministers 2011, p. 7.

the levy basis and a rate determined and communicated to obliges by the Board of the Fund by the end of the calendar year preceding the year in which the levy is to be paid. The basis is determined differently in reference to national banks and to branches of foreign banks which are subject to the obligatory guarantee system due to different organizations and rules of operations of such entities. In the case of national banks, the caution levy is calculated on the basis of equity and liabilities presented in the bank's approved financial statement for the year preceding the year in which the levy is paid. The sum would be reduced by the bank's master fund referred to in Art.127 (1) of the Banking Law Act and the amount of guaranteed funds referred to in Art. 2 (2) of the act on the Bank Guarantee Fund. Master funds are excluded from the levy basis due to their loss absorption function. The levy is not charged on the funds subject to the deposit guarantee system either, because their refund to depositors up to a specific limit (currently, EUR 100,000) is already secured (the costs of deposits guarantees are incurred by institutions obliged to provide such guarantees).

A solution based on the current methodology of charging the levy on the Bank Guarantee Fund, i.e. solvency ratio denominator (total capital requirement x 12.5) would have some advantages.

It seems to be illegitimate to determine a specific caution levy rate. Similarly as in the case of the annual levy, the rate for the following year would be determined and communicated to entities obliged to pay the levy by the Board of the Fund by the end of the calendar year preceding the year in which the levies are to be paid. The caution levy should be anti-cyclical, i.e. the annual rate should depend on the phase of the economic situation and situation of the banking sector (even 0%). In the case of economic growth and stability of the aforementioned sectors, the levy charged could be higher, and in the period of crisis, the rate would be reduced so as not to excessively burden financial institutions while they are facing difficult economic situation. Striving after such determination of the levy, the Board of the Fund would establish the levy amount after having consulted the members of the Financial Stability Committee, i.e. the Minister of Finance, the President of the National Bank of Poland and the Chairman of the Financial Supervision Authority.

In order to protect the banking sector against excessive burden, the maximum aggregate limit of all levies paid in a given year by an oblige (i.e. the caution levy and annual levy) would have to be determined. The entities subject to the obligatory deposit guarantee system are already burdened with a periodic levy to the Bank Guarantee Fund in the form of the annual levy. Bearing the foregoing in mind, it could be assumed that the sum of the annual levy and caution levies paid in a given year by an entity being subject to the guarantee system may not exceed 0.3% of the annual levy basis set out in Art. 13 (1) (a) of the act on the Bank Guarantee Fund, irrespective of the caution levy basis. It is notable that banks are already obliged to pay annual levies to the Bank Guarantee Fund, potentially up to the maximum rate specified in the act on the Bank

Guarantee Fund. The said levy rate is determined every year by the Board of the Fund in November of the year preceding the year in which the levy is paid. In the cases determined by the act on Bank Guarantee Fund, the Minister of Finance may increase the maximum limit from 0.3% to 0.6%. The levy basis is calculated as an Mount corresponding the total capital requirements multiplied by 12,5 (solvency ratio denominator).

The current estimated maximum burden of the banking sector due to the levies in question could account for approximately PLN 2 billion a year (with the rate of 0.3%). In this context, it is notable that the current amount of levies paid to the Bank Guarantee Fund in accordance with Art. 13 (4) of the act on the Bank Guarantee Fund forms a tax-deductible expense as defined by the CIT act. The introduction of the maximum aggregate limit of levies equal to the current limit of the annual levy will thus not result in losses of CIT income due to reduction in taxation basis which would exceed those resulting from the regulations in force.

Empowering the Board of the Fund to determine the caution levy rate (within the limits set out by the act) may form an example of an anti-cyclical tool. In a longer perspective, the Board of the Fund would probably make the caution levy rate conditional on the market situation and risk of interruptions to the sector due to reasonable construction and management of funds of the Stabilisation Fund so that the new aid-related tasks of the Bank Guarantee Fund provided for in the act may be performed.

The introduction of the caution levy would require the banking sector to make some outlays on the stabilisation fund. However, it should be borne in mind that the funds gathered in the stabilisation fund will be used to support activities aimed at maintenance of the financial stability of the banking sector.

3.3.2. Stabilisation fund as the state-owned special-purpose fund

In order to collect funds derived from the caution levy, a new state-owned special-purpose fund, i.e. Stabilisation Fund, could be established within the public finance sector. This fund would be governed by the act of 27 August 2009 on public finance (Dz. U. No 157, item 1240, as amended).

The Stabilisation Fund would have a form of a bank account maintained by Bank Gospodarstwa Krajowego, which, pursuant to the new Art. 196 (5) of the act on public finance adopted by the act of 16 December 2010 (Dz. U. No 257, item 1726), would be obliged to handle the Fund. The funds collected on such account would be managed by, e.g. Minister of Finance as the Fund administrator.

The decision on performance of activities with the use of the resources of the Stabilisation Fund and allocation of a sufficient sum to such activities would be always made by the Fund administrator, i.e. the minister in charge of financial institution. The occurrence of disturbances in the banking sector would not correspond to an automatic

necessity to finance aid activities from the Fund. The Fund would finance activities taken by the Minister of Finance and the Government, e.g. under the act on recapitalisation, before budgetary funds are used.

Key activities include all activities aimed at protection of the domestic market against the negative impact of potential circumstances that destabilise the financial sector. In view of the foregoing, when imposing additional fiscal burdens on some entities of the financial sectors (in the form of taxes and levies), the financial safety of such entities should be taken into account and the superior goal being the increase in the financial stability of the banking sector should be attained. Therefore, some European countries have commenced legislative works on burdening the banking sector with special levies to finance (through separate special resolution funds) different types of activities either increasing or restoring the stability of the financial sector instead of classical tax being a source of indefinite budgetary income.

4. Conclusion

The assumption of the fiscal character (accumulation of additional funds in the state budget) of burdens imposed on the financial sector is incorrect. We should rather consider introduction of obligatory levies that would be allocated for the financing of outlays in connection with a specific activity (e.g. support of the financial sector in the case of a crisis).

In order to secure the stability of the financial sector and to eliminate or reduce the necessity for the public sector to finance aid activities in the case of potential turbulence on financial markets, the concept presented on the EU forum consisting in the establishment of a special resolution fund to be financed by additional levies imposed on the financial sector should be taken into account. The creation of a separate fund would ensure that the total income from additional burdens is allocated to stabilisation purposes.

After the crisis of global financial markets, the aid function became much more significant which is followed especially by development of "resolution" activities. A lot of factors confirm that such activities will become a standard in the security network of European banking systems. "Resolution" activities seem to be a natural direction in which will develop the current aid functions of the Fund. Therefore, it should be expected that the Fund will perform such functions in the future, implemented to the Polish legislation based on general European solutions. The creation of the Stabilisation Fund at the Bank Guarantee Fund is compliant with the "resolution" concept. Also organizational benefits support the creation of the Stabilisation Fund within the Bank Guarantee Fund. In the author's opinion, such draft resolution should be proceeded with. As regards the aforementioned state aid, also the issue of its notification to the European Commission should be discussed. The notification process is time-consuming and much complicated, which may cause that reconstruction activities are delayed or

not taken at all. Therefore, activities should be taken at the EU level enabling the Member States to take activities immediately or procedures of the European Commission concerning notification of aid programs regarding "resolution" activities should be changed.

In view of the foregoing, the solution proposed by the Council of Ministers seems to be the most desirable.

A significant content-related objection to parliamentary drafts includes the scope of entities subject to taxation. Such entities include national banks, branches of foreign banks, branches of credit institutions, national insurance companies, national reinsurance companies, branches of foreign insurance and reinsurance companies, as well as investment funds. It is, beyond any doubt, a very wide group including the majority of the participants of the Polish financial sector. However, the selection of entities proposed by authors of the draft, especially imposing the tax on investment funds and omission of cooperative savings and credit unions, which conduct operations similar to banking operations, arouse some doubts. The authors of the draft failed to present the reasons for exclusion of such unions. Irrespective of the forgoing, it is notable that within the works conducted on the European forum on potential additional charges of financial institutions to finance reorganisation activities, first of all it is proposed to impose such charges solely on credit institutions. Furthermore, the inclusion of investment funds into the catalogue of entities subject to the said tax seems to be incorrect for several reasons. The character of investment funds, taking advantage of exemption from the corporate income tax, justifies their exemption from any form of tax covering the estate only, which the fund is. It is notable that the specific structure of an investment fund as a legally governed estate causes that imposition of a tax calculated on the value of assets (i.e. a property tax) will actually correspond to the imposition of the tax on the fund's participants.

The implementation of the tax in the proposed form would result in an unjustified preference of individual investment forms at the cost of collective investment forms, in this case via the agency of investment funds. It is notable that, in the majority of cases, the funds paid to investment funds will be derived from professional, economic activity or remuneration for work which have been already taxed with income tax. The funds generated and taxed as aforesaid, after being included in the fund's assets, would be taxed again within an investment fund, irrespective of whether investments made by the investment fund will generate profits. The tax settled annually, deducted in the form of monthly advance payments will reduce the assets of an investment fund, and thus the value of a participation unit or investment certificate, and directly affect the funds in possession of individual participants. In this context, it must be borne in mind that, in the majority of cases, participants of investment funds

include natural persons, hence the tax in question will adversely affect the society's financial condition[7].

As regards actual effects of taxation of investment funds and rules of operation of the funds, the justification presented by the authors of the draft according to which: *"The imposition of tax on investment funds is supplementary. The imposition of tax on assets of banks and insurance companies without imposing a tax on investment funds would result in banks and insurance companies transferring the assets to investment funds and consequently in tax evasion"* is non-understandable. Each entity contributing funds to an investment fund becomes a participant thereof, because it receives a relevant number of participation units or investment certificate with a specific value which are later presented in a relevant item of the financial statement of such entity and affect its assets. Therefore, the actual burden of the tax, as opposed to the statements of the authors of the draft, would affect the customers of an investment fund. Therefore, the statement presented in the justification of the draft act reading: *"the tax on assets of financial institutions is de facto a property tax, hence it should not be transferred into customers"* may not be agreed with.

Another issue having a negative impact on the concept of parliamentary drafts is the method of determination of the taxation basis. As regards the determination of the taxation basis, it is notable that the taxation of assets of financial institutions proposed in the draft act is de facto a tax on the scale of their respective operations. Such approach renders it impossible to take into account the risk assumed by a given institution. In addition, the wide definition of the taxation basis (which will result in a high sum of the tax paid) may potentially adversely affect the conditions of banks' operations, including the amount of new loans given. It should be also borne in mind that the taxation pursuant to the terms laid down in the draft act could result in a relocation of the sector's operations towards transactions that do not affect the balance sheet sum of financial institutions in order to avoid the tax. In consequence, the transparency of the financial statements of such institutions would deteriorate which does not support the stability of the financial sector.

Furthermore, one should pay attention to the selective approach to the problem of allowances and exemptions referred to in parliamentary draft acts. In accordance with Art. 107 (1) of the Treaty on the Functioning of the European Union (OL of 2004, No 90, item 864/2, as amended): *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"*. Therefore, the aid granted to an entity is considered state aid if the following conditions are satisfied[8]:

[7] Standpoint of the Council of Ministers and Draft standpoint of the Council of Ministers.
[8] Ibidem.

- it is granted by a state or through state resources,
- it results in receipt by an enterprise of an economic benefit that it would not obtain under ordinary market conditions,
- it is selective (favouring certain undertaking or undertakings or the production of certain goods),
- it distorts or threatens to distort competition and affects trade between EU Member States.

The tax exemptions referred to in parliamentary draft acts would be state aid as defined by Art. 107 (1) of the Treaty on the Functioning of the European Union which should be notified to the European Commission in accordance with Art. 108 (3) of the Treaty on the Functioning of the European Union. In order not to be subject to the regime of the EU regulations on state aid, the authors of the draft should equally treat all entities subject to the tax obligation and grant them the right to allowances and exemptions.

In recapitulation, the most favorable solution seems to include creation, within the Bank Guarantee Fund, of a special-purpose fund dedicated to recapitalisation and resolution institutions subject to the deposit guarantee system. The location of the Bank Guarantee Fund as a legal person would have to be discussed.

The entry into force of the act of 27 August 2009 on public finance (Dz. U. No 157, item 1240, as amended) resulted in some changes in the approach to the scope of the public finance sector. New solutions introduce a category of unincorporated state-owned special-purpose funds, executive agencies and other state-owned legal persons established pursuant to the act in order to perform public tasks. The act on public finance of 30 June 2005 contained the concepts of special-purpose funds (which could have legal personality) or state-owned legal persons established by the act in order to perform public tasks.

The status of the Bank Guarantee Fund is unclear in this respect. Established pursuant to the act of 14 December 1994 on the Bank Guarantee Fund, the Fund is a legal person, in accordance with Art. 3 (2) of the said act. However, it is not a state-owned special-purpose fund, because the aforementioned act does not expressly stipulate so. Furthermore, Art. 17a (formerly, Art. 44) of the said act stipulates that the Bank Guarantee Fund is not a state-owned legal person and is not an entity of the public finance sector.

Although the aforementioned provisions excluding the Bank Guarantee Fund from the public finance sector have been introduced to the act on the Bank Guarantee Fund, there are still many doubts in this respect.

In the opinion of the European Central Bank dated January 17th, 2008 issued upon request of the Minister of Finance of the Republic of Poland concerning the draft amending the act on the Bank Guarantee Fund (CON/2008/5), it is stated that the Fund is an “entity of the public law”, because it was established as a legal person pursuant to

the act on the Bank Guarantee Fund, and its organization and public function and powers exercised by it towards commercial banks are determined in the said act and relevant secondary legislation. According to the European Central Bank, it is important that the Fund is subject to regulatory and control powers exercised by the Minister of Finance and the National Bank of Poland, and, in accordance with the amendments to be made by the draft act, by the Supreme Audit Office. In the opinion of the European Central Bank, the Bank Guarantee Fund is considered as an entity of the public law irrespective of the provisions of the draft act, which, from the viewpoint of the Polish administrative and budgetary laws, stipulate that the Fund is not a state-owned legal person and does not form an entity of the public finance sector. During works on the draft act on an amendment to the act on the Bank Guarantee Fund implementing Directive 2009/14/EC, the aforementioned problems were also emphasized by the Office of Competition and Consumer Protection, which, de facto, agreed with the standpoint of the European Central Bank.

Table No 1. Banking tax in EU Member States

Country		Single entity (S) / consolidated (C)	Intra-group exposures	Rate	Base	Ceiling	Rendez-vous clause
1.	LV	S		0,036%.	Liabilities excluding equity capital, deposits subject to a deposit guarantee scheme, mortgage bonds and subordinated liabilities that are included in equity capital as subordinated capital.	no	no, but future revisions are possible
2.	DE	S	not deducted	Progressive levy for liabilities 0.02% for liabilities under €10bn, 0.03% over €10bn; and 0.04 %above €100bn , flat levy for derivatives , 0.00015% Capped at 15% of credit institution's annual profit (after tax).	Liabilities excluding capital and deposits, andderivatives, (nominal value).	no € 1 bn p.a.	not needed in law as revision to accommodate for EU developments is both common practice and poss
3.	FR	C	not relevant (consolidated basis)	0.25 percent of the capital requirements (based on RWA).	Risk weighted assets (RWA).	no €500 mn - €1 bn p.a.	yes
4.	CY	S	deducted	0,095% on the overall level of deposits in Cyprus (see base) for the years 2011 and 2012. Capped at 20% of credit institution's taxable income for the two years 2011 and 2012.	Overall level of deposits (of residents and non-residents) in Cyprus, excluding the interbank deposits of credit institutions operating in Cyprus. The tax imposed for 2011 shall be calculated on the basis of deposits at 31/12/2010. Respectively for 2012, the tax imposed shall be calculated on the basis of the deposits at 31/12/2011.	no	yes 25/60 of the total annually received revenue for the years 2011 and 2012 will be deposited in a special account and will be constitute as a part of the independent Financial Stability Fund which will be set up
5.	AT	S	not specified.	No levy < € 1 bn 0,055% € 1 bn <base> € 20 bn; and 0,085% base > € 20 bn+0,015% on the volume of all financial derivatives	Unconsolidated balance sheet total excluding subscribed capital and reserves, secured deposits and certain liabilities to banks, provided they are necessary to fulfil liquidity provisions + add on for financial derivatives on trading book.	no	yes
6.	PT	S	not specified.	0,05% on banks' liabilities 0,00015% on off-balance-sheet derivatives	(i) liabilities excluding tier 1 and tier 2 capital and insured deposits (only the amount effectively covered); (ii) national value of off-balance-sheet derivatives will also be "levied" (excluding those used for hedging). For both cases, the amount on which the levy will be calculated corresponds to the annual average of each end-of-month balance.	no around € 170 mn p.a.	a recital has been included mentioning the need to revise the law In line with the EU developments

7.	DK	S	N.R.	Ex post levy depending on the need but annual contributions capped at 0.2% of covered deposits and securities.	Covered deposits and securities.	n.a.	yes in the context of DGS
8	HU	S	not specified	0.15 % below and 0.5% above HUF 50 bn.	Balance-sheet corrected for interbank loans.	no HUF 200 bn p.a.	no
9.	SE	S	(see base)	0.036% after 2010 0.018% for 2009 and 2010	Liabilities excluding equity capital, debt securities included in the capital base, group internal debt transactions between those companies paying the levy and debt issued under the guarantee program.	stability fund targeted to reach 2.5% of GDP over the next 15 years	no but revisions possible
10.	UK	C	intra-group exposures fall out for UK groups as well as intra-group liabilities relevant to the levy for non-UK groups	01 January 2011- 28 February 2011: 0,05% for short-term chargeable liabilities and 0,025% for long-term chargeable equity and liabilities. 01 March 2011 - 30 April 2011: 0,1% for short-term chargeable liabilities and 0,05% for long-term chargeable equity and liabilities. 01 May 2011 - 31 December 2011: 0,075% for short-term chargeable liabilities and 0,0375% for long-term chargeable equity and liabilities. 1 January 2012 onwards: 0,078% short-term chargeable liabilities and 0,039% for long-term chargeable equity and liabilities.	Liabilities excluding Tier 1 capital, insured deposits, policy holder liabilities and assets qualifying for FSA liquidity buffer.	no £2 bn annually, but only £1.5 bn for 2011	No but review of effectiveness in 2013

Source: Report on financial levies - Preparation for the European Council of 12 May 2011.

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Public Finances and Autonomy of State Higher Educational Institutions and State Corporations

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Abstract: The present article describes system of public entities in the Russian Federation and defines the legal status of state higher educational institutions and state corporations with standpoint of their autonomy.

Keywords: budget institution, autonomous institution, government institution, higher educational institution, state corporation.

Before considering the status and the autonomy of state higher educational institutions and state corporations, it seems appropriate to describe briefly the system of public entities that nowadays exists in the Russian Federation.

In accordance with Civil code of the Russian Federation public entities may be established in the form of commercial organizations and non-commercial organizations.

State commercial organizations include state and municipal unitary enterprises, that is commercial organizations which do not have the right of ownership to the property allotted to them by the owner. Property of unitary enterprise belongs to the Russian Federation, to regions of the Russian Federation or to municipalities as the right of ownership. Unitary enterprises are entitled to have only those civil rights and perform obligations that answer the purposes of their establishment fixed in statutes.

State and municipal unitary enterprises can be established:

- on the right of economic competence;
- on the right of operating administration (government enterprise).

Authorities of unitary enterprise established on the right of economic competence according to disposal of allotted property and monetary funds are wider then authorities of unitary enterprise established on the right of operating administration. At the same time, authorities of the owner the property of government enterprises according to property and profits of government enterprise are wider them similar authorities of the owner the property of unitary enterprise established on the right of economic competence.

Non-commercial organizations, in contrast to the commercial organizations, do not have making profits as the main purpose of their activity and do not distribute received profits among their members. Non-commercial organizations are established for social, charitable, cultural, educational, scientific and administrative purposes in order to protect citizens' health, development of physical culture and sport, satisfaction

of spiritual and other nonmaterial needs of citizens, protection of the rights and legitimate interests of citizens and organizations, settlement of disputes and conflicts, rendering legal assistance, as well as for other purposes aimed at the achievement of public values.

Civil code of the Russia Federation provides the establishment of state or municipal institutions, that is, non-commercial organizations set up by the owner for the implementation of managerial, social, cultural or other functions of non-profit types.

State or municipal institutions can be established in the following legal forms: budget institutions, autonomous institutions and government institutions. Mentioned system of institutions was established by the Federal law dated 08.05.2010 № 83-FZ "On amendments to certain legislative acts of the Russian Federation in connection with improvement of the legal status of state (municipal) institutions", which entered into force on the 1st of January, 2011.

Budget institution is a non-commercial organization established by the Russian Federation, regions of the Russian Federation or to municipalities for carrying out works, rendering services in order to ensure the implementation of stipulated by the legislation of the Russian Federation powers of the state authorities (state bodies) or local authorities respectively in science, education, health, culture, social protection, employment of population, physical culture and sports, as well as in other areas (article 9.2 of Federal Law № 7-FZ dated 12.01.1996 «On non-commercial organizations»).

Legislation defines autonomous institution similar to budget institution as a non-commercial organization established by the Russian Federation, regions of the Russian Federation or to municipalities for carrying out works, rendering services in order to ensure the implementation of stipulated by the legislation of the Russian Federation powers of the state authorities or local authorities respectively in science, education, health, culture, mass media, social protection, employment of population, physical culture and sports, as well as in other areas and situations fixed in federal laws (article 2 of Federal Law № 174-FZ dated 3.12.2006 «On autonomous institutions»). It is appreciable that legal definition of autonomous institution limits areas of their activity.

Government institution is a state (municipal) institution rendering state (municipal) services, carrying out works and (or) performing public (municipal) functions to ensure the realization of stipulated by the legislation of the Russian Federation powers of state authorities (state bodies) or local authorities. Financial support of activity of government institutions is carried out due to means of the corresponding budget on the basis of the budget estimates (article 6 of Budget code of the Russian Federation).

There are differences in the authorities of the mentioned types of institutions, their governing bodies, the order of creation, reorganization and liquidation, the order

of their financing by the owner, the responsibility for the obligations. The main differences are the following:

Comparison criteria	**Budget institution**	**Autonomous institution**	**Government institution**
Disposal of the property	has a right to dispose of all the property except: а) especially valuable movable property allotted by the owner; б) any real estate.	has a right to dispose of all the property except: а) especially valuable movable property allotted by the owner; б) real estate alloted by the owner.	does not have a right to dispose of any property.
Right to conclude big transactions (transactions whose cost are more then 25% of the cost of the institution's whole property)	Conclusion of big transactions requires preliminary consent of the founder.	Conclusion of big transactions requires preliminary consent ofthe supervisory board.	does not have a right to conclude big transactions.
Financial support	put into effect in the form of subsidies (in accordance with founder's tasks), budget investment and subsidies for other purposes. Income comes into independent disposal of budget institution.	put into effect in the form of subsidies (in accordance with founder's tasks), budget investment. Income comes into independent disposal of autonomous institution.	put into effect on the basis of budget estimates. Income is included in budget.
Possibility of receipt of borrowed current assets	has a right to receive borrowed current assets with restrictions on big transactions.	has a right to receive borrowed current assets.	does not have a right to receive borrowed current assets.
Conclusion of contracts and other civil law transactions	concludes contracts and other transactions in its own name (with the exception of conclusion of state contracts).	concludes contracts and other transactions in its own name.	concludes contracts and other transactions on behalf of public subject.

Accounting	Accounting according to simplified budget plan of accounts.	Common accounting	Budget accounting
Financial control and control of the founder	Generally, it issubsequent control(control of execution of the state tasks). It also can be preliminary control (confirmation of special-purpose subsidies and budget investment)	Subsequent control(control of execution of the state tasks).	Preliminary control of all expenditures (the Treasury inspects existence of monetary obligation), running control and subsequent control
Tax burden: Value added tax _____ Corporate income tax _____ Simplified system of taxation	pays VAT with tax allowances. _____ pays corporate income tax (subsidies are not included into tax base) _____ does not have a right to apply simplified system of taxation.	pays VAT with tax allowances. _____ pays corporate income tax (subsidies are not included into tax base) _____ has a right to apply simplified system of taxation.	pays VAT with tax allowances. _____ does not pay corporate income tax _____ does not have a right to apply simplified system of taxation.

Considering present topic it should be noted that the financial support of budget institutions was amended with the estimated financing for financing on the basis of subsidies within the limits of the implementation of the state task. A subsidy for rending of services in accordance with the state's task is calculated on the basis of the actual costs of the institution, in the progressive unification of the groups of institutions implementing similar activities. The state task sets of indicators of efficiency and volume, the categories of recipients of public services, as well as the results of rending of services.

Thus it is very important that the fixed system of financing establishes a direct connection between the financial support of the institutions and quality (results) of their work. The rest of provided subsidies that has not been used before the end of fiscal year shall remain at the disposal of the budget institution.

According to Federal Law № 125-FZ dated 22.08.1996 «On higher and postgraduate professional education», higher educational institution is educational institution established and acting on the ground of legislation of the Russian Federation on education, having a status of legal entity and implementing educational programs of higher professional education in accordance with a license.

There are four types of higher educational institution in the Russian Federation: federal university, university, academy, institute.

Federal university is a higher educational institution that:

- implements innovative educational programs of higher and postgraduate professional education integrated into world educational community;
- provides system of modernization of higher and postgraduate professional education;
- carries out preparation, retraining and (or) improvement of professional skill of the staff on the basis of application of modern educational technologies for comprehensive socio-economic development of the region;
- carries out fundamental and applied scientific researches on a wide range of sciences, ensures the integration of science, education and production through the dissemination of the results of intellectual activity to practical application;
- is the leading scientific and methodical centre.

University is a higher educational institution that:

- implements educational programs of higher and postgraduate professional education in a wide range of areas of training (specialties);
- carries out preparation, retraining and (or) increase of qualification of the staff of higher qualification, scientific and scientific-educational workers;
- carries out fundamental and applied scientific researches on a wide range of sciences;
- is the leading scientific and methodical centre in the fields of its activity.

Academy is a higher educational institution that:

- implements educational programs of higher and postgraduate professional education;
- carries out preparation, retraining and (or) increase of qualification of the staff of higher qualification for certain area of scientific and scientific-educational activity;
- performs fundamental and applied research mainly in the certain area of science and culture;
- is the leading scientific and methodical centre in the fields of its activity.

Institute is a higher educational institution that:

- implements educational programs of higher professional education and, as a rule, educational programs of postgraduate professional education;

- carries out preparation, retraining and (or) increase of qualification of workers for certain area of professional activity;carries out fundamental and applied scientific researches.

We would like to go into detail on the status of federal university.

Federal universities are established in the form of autonomous institutions by the Government of the Russian Federation and according to the decision of the President of the Russian Federation. They are established on the basis of the state higher educational institutions under the jurisdiction of the Russian Federation, scientific organizations under the jurisdiction of the federal authorities of executive power, state academies of sciences and their regional branches.

Accordingly, all the above-said about autonomous institutions is applied to the federal universities.

It should be noted that Federal Law "On higher and postgraduate professional education" contains a separate article devoted to the autonomy of educational institutions (article 3).

Autonomy of the educational institution is defined as its independence in the selection and placing of personnel, implementation of the educational, scientific, financial, economic and other activities in accordance with the legislation and the statute of the higher educational institutions, approved by the procedure established by the legislation.

It is necessary to distinguish the categories of "academic "and "financial and economic" autonomy. According to experts, in respect of academic autonomy considerable level of self-government has been already achieved and achieved level makes it possible for higher educational institution to implement mechanisms of self-organization, self-development and self-regulation[1].

Thus, higher education institutions are independent in forming of its structure, except establishing branches. Branches of federal state institutions of higher education are established by the founder by agreement with the federal body of executive power performing functions of state policy elaboration and normative legal regulation in the area of education.

The higher education institution shall be liable for its activities to the individual, society and the state. Control of compliance of the activity of higher educational institution with the objectives fixed in its statute is conducted by the founder of the higher educational institution and the federal body of executive power performing functions of control and supervision in the area of education that issued a license to carry out educational activities. Control is conducted within the limits of the competence of the said authorities.

[1] См.: Гретченко А. «Автономизация вузов России и Болонский процесс» // Высшее образование в России. 2006. № 6. С. 26.

For the purposes of ensuring the activities fixed in its statute, the founder of the higher educational institution allots buildings, structures, property complexes, equipment, facilities as well as other necessary property of consumer, social, cultural and other purposes on the right of operational administration. Higher education institutions have the right to act as the lessee and (or) the lessor of the property.

Financial support of the activity of federal universities is put into effect in the form of subsidies from the corresponding budget of the budgetary system of the Russian Federation as well as from the other sources not prohibited by the federal legislation. Federal universities independently fix areas of using of funds received from the corresponding budget and from the other sources not prohibited by the federal legislation if the order of granting of certain funds does not established any other procedure.

Higher educational institutions have a right to implement paid activity in the area of education as well as in other areas. Such activities may be carried out only insofar as it serves for achievement of the purposes for which institutions were established and answers that purposes. Possibility of implementation of such activities should be provided in statute of higher educational institutions.

Paid activity of higher educational institution may not be implemented instead of those educational activity whose financial support is carried out due to funds of the corresponding budget. Otherwise, profits earned as a result of such activity shall be exacted by the founder of higher educational institutions.

Implementing paid activity higher educational institutions independently settle issues of the conclusion of contracts, definition of obligations and other conditions that do not contradict the legislation of the Russian Federation and the statute of higher educational institution.

Speaking of other non-budget income of the higher educational institution, it seems appropriate to give the following classification[2]:

1. Income derived from basic activities:
   - paid educational activities,
   - scientific and technical activities,
   - activities of the educational institution to ensure educational, scientific and-research processes.
2. Income derived from other activities and other income:
   - work (services) performed with use of resources of the educational institution (territories, premises, etc.),
   - non-operating income (share holding in the activities of other institutions and organizations, the acquisition of the securities and receipt of income

[2] См.: Беляков С.А. Организационно-экономический механизм устойчивого развития системы высшего профессионального образования в условиях формирования национальных университетов, системообразующих и инновационных вузов. – М., 2007. С. 58.

derived from them, providing the resources of the educational institution for rent, etc.),

- other receipts (contributions of legal entities and individuals, including of trustees, trust sponsorship contributions, etc.).

Let's proceed to the state corporations.

According to the article 7.1 of Federal Law «On non-commercial organizations», a state corporation is a non-commercial organization that does not have a membership, established by the Russian Federation on the basis of property contribution in order to implement social, managerial or other socially useful functions.

The property that was transferred to the state corporation by the Russian Federation is the property of the state corporation. State corporation uses the property only for purposes defined by the law on the establishing of the state corporation.

State corporation has a right to implement entrepreneurial activities only insofar as it serves for achievement of the purposes for which state corporation was established and answers that purposes.

State corporation is established on the basis of federal law. Characteristics of the legal status of the state corporation are fixed in the law on the establishing of the state corporation. At the present time the following state corporations have been established and function in the Russian Federation:

- State Atomic Energy Corporation «Rosatom»[3] - delegated authorities on behalf of the Russian Federation to carry out state management of atomic energy, state management of the implementation of activities related to the development, manufacture, utilization of nuclear weapons and nuclear power units of military purpose as well as legal regulation in the area of atomic energy;
- State Corporation for Assistance to Development, Production and Export of Advanced Technology Industrial Product «Rostekhnologii» (State Corporation «Rostekhnologii»)[4] - its purposes are assistance in developing, production and export of high-technology industrial products in the domestic and foreign markets by providing support of the Russian organizations - developers and manufacturers of high-technology industrial products, the organizations, in which State corporation "Rostechnologies" due to prevailing participation in their authorized capitals and in accordance with agreements concluded between them has the ability to affect the decisions taken by these organizations, as well as through the attraction of investment for organization of various branches of industry including defense industrial complex;

[3] Federal Law № 317-FZ dated 01.12.2007 «On the State Corporation for Atomic Energy Rosatom».
[4] Federal Law № 270-FZ dated 11.11. 2007 г. «On state corporation «Rostekhnologii».

- State corporation «Deposit Insurance Agency»[5] - delegated authorities to keep the register of member banks, collect insurance premiums from banks and monitor their timely and full receipt to the deposit insurance fund, take measures to record depositors' claims and reimburse insured depositors, request the Bank of Russia to impose sanctions against banks that violate provisions of bank law as well as exercises some other authorities related to its purposes of establishment. Deposit Insurance Agency also fulfills functions of a bankruptcy trustee (liquidator) in bankruptcy proceedings in credit institutions;
- State Corporation «Bank for Development and Foreign Economic Affairs (Vnesheconombank)»[6] - acts to promote competitiveness of the Russian Federation economy, its diversification, encouragement of investment activity through investment, foreign economic affairs, insurance, consultancy and other activity in order to implement projects in the Russian Federation and abroad, including projects involving foreign capital, aimed at development of infrastructure, innovations, special economic zones, environmental protection, support of export of Russian goods, works and services, as well as small and medium business support;
- state corporation «Russian Corporation of Nanotechnologies» («RCNT»)[7] – acts in order to facilitate the implementation of the state policy in the area of nanotechnologies, development of innovation infrastructure in the area of nanotechnologies, realization of projects of creation of perspective nanotechnologies and nanoindustry;
- state corporation «Fund of assistance to reforming of housing and communal services» (is valid until the 1th of January 2013)[8] - established in order to make a safe and favorable conditions of residing of citizens and stimulate the reform of the housing and communal services, forming of efficient mechanisms of management of the housing stock, introduction of resource-saving technologies by providing financial support through the Fund;
- State Corporation on Construction of Olympic Venues and Development of Sochi as Mountain Climatic Resort (SC «Olympstroy»)[9] – carries out managerial and other socially useful functions relating to engineering survey for the construction as well as to construction design, construction and re-construction, and organization of the functioning of the venues needed for the purpose of holding the XXII Olympic Winter Games and the XI Paralympic

[5] Federal Law № 177-FZ dated 23.12 .2003 «On insurance of deposits of households in the banks of the Russian Federation».
[6] Federal Law № 82-FZ dated 15.05. 2007 «On Bank for Development».
[7] Federal Law № 139-FZ dated 19.07.2007 г. «On Russian corporation of Nanotechnologies».
[8] Federal Law № 185-FZ dated 21.07.2007 «On Fund of assistance to reforming of housing and communal services».
[9] Federal Law № 238-FZ dated 30.10.2007 «On state corporation on construction of Olympic venues and development of Sochi as mountain climatic resort».

Winter Games in 2014 in Sochi, and also for the purpose of developing of Sochi as a mountain climatic resort.

Analysis of the federal legislation on state corporations allows to make a conclusion, that the level of their autonomy is high, although it varies considerably. For example, for some state corporations, the Government of the Russian Federation approves the list of property of the corporation, the transactions with which are subject to the endorsement with the Government of the Russian Federation (e.g. Rosatom), for other state corporations restrictions on the use of property are not provided (e.g. Rostekhnologii). Other examples include the absence of restrictions on the conclusion of big transactions and the possibility of investment of temporarily-free funds of the state corporation.

It is obvious that state corporations were established in significant for the state and society, but cost-based sectors of the economy. Nevertheless, state corporations were considered by the leaders of the state as a temporary form of state involvement in the economy, subject to the gradual transition to the free market economy[10].

It should be noted that state corporation as the legal form causes a number of unfavorable comments in the scientific and practical literature. The most significant are the following:

- the absence of legal restrictions on the purposes of establishment and functions of state corporations;
- retirement of state property and monetary funds transferred to the state corporation as a property contribution. As a result the state has no proprietary rights on the property (as in the case with state and municipal unitary enterprises) and no liability rights regarding the state corporation (as in the case of joint stock companies with state interest in);
- lack of mechanisms of influence of the founder on the activities of the state corporation and the lack of control procedures over the implementation of entrusted functions by the state corporation;
- the absence or inadequacy of criteria for the achievement of fixed purposes by the state corporations as well as the absence of sanctions for failure to meet fixed purposes and programs.

Referring to comparative analysis of state and municipal institutions carried out above, it can be concluded that the legal form of the institutions creates enough incentives to improve the efficiency of the activities of organizations of the public sector.At the same time the state (local government) remains the possibility of a rather rigid control of the state (municipal) property. This, in particular, reduces the risk of withdrawal of assets and provides a minimum of necessary dimension and quality of the rendering services.

[10] См.: Алексанян В. А. «Государственные корпорации: становление и перспективы развития» // Вестник Академии. 2011. № 11. С. 59.

It is obvious, that public entities need a certain level of financial independence and autonomy for the effective and adequate performing functions of the state. However, excessive independence in combination with a weak control can lead to a substantial violation of the interests of the state and society as a whole.

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3. Алексанян В. А. «Государственные корпорации: становление и перспективы развития» // Вестник Академии. 2011. № 11. С. 58 – 62.

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The Financing and Management of Public Universities in the Czech Republic

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Abstract: This article deals with the position, financing and management of public universities in the Czech Republic. Because the subjects are on managing public property, it is necessary that the legislation pertaining to this contains all appropriate institutions and rules for the economy. The author pays attention mainly to the legislation and the status of public universities and how they manage according to their budgets. While examining the financing of public universities, the author also explores suggestions for the legislation adjustments de lege ferenda.

Keywords: self-governance of an interest group, public university (public higher education institution), management, funding, public property, public corporation, public institute.

1. Introduction

Education is classified as public service which is guaranteed, ensured and also provided by the state on the basis of public choice. In each country the level of support is influenced by the historical, cultural and social development of said country. Because the quality of the educational process also largely depends on the sufficiency of financial means, the financing of education is becoming one of the priorities of society at present. In this article we will focus on the managing and financing of tertiary education; the legislation of which has undergone several essential changes during last few years. Within these reforms there are the much-discussed matters of defining and realizing the new balance between decentralization and the role of the state, as well as issues involving the allocation and diversification of resources, control, etc. In the following article, we will concentrate on the legal nature of public universities and managing their assets. Within the chapter regarding the financing of public universities, I will also mention the suggestions for the legislation adjustments de lege ferenda; which are based on the factual intention of law pertaining to pubic universities, as discussed by the Council for Higher Education Reform.

2. The status of public universities

A public university represents an academic autonomy. This type of subjects is considered as the representative of so-called "other autonomy" along the lines of territorial and self-interest autonomy. In this context, Sládeček states that the main character which distinguishes it from the territorial and self-interest autonomy is the particular subject of autonomy which, "is not a public corporation but a legal subject which is dependent (non self-governing) in number of things, subjected to state administration …" This autonomy is administered only by some sort of authority (or authorities); respectively, it administers this autonomy only on a few occasions which indicate the varied character of said subjects[1]. Other authors consider the public university as a representative of an interest group, along with chambers of professions, because of its characteristic marks. These aspects are mainly the legal basis of its foundation, the legal basis as a subject with legal subjectivity, the economic basis (because the public university has its own property and economy) and the personnel basis because it always relates to persons - mainly the natural person[2].

This classification divides the self-autonomous subjects into subjects based on territorial principle and the personal principle. Because of this, we discuss both territorial and personal self-autonomy and can also add other examples of self-autonomy. The term "interest self-autonomy" seems to be used regularly; however, it is not quite accurate. It is, in the fact, the interest of a specific community; even if it is territorial or a different sort of self-autonomy[3]. An accurate characterization could be a negative definition, in which these types of self-autonomous subjects could be described as having non-territorial autonomy[4]. We can also see the classification by which the self-autonomy is divided into territorial, professional, academic and economic types[5]. Because the self-interest autonomy is not mentioned in the constitution of Czech Republic (unlike the territorial autonomy), we can also find conception, where this self-autonomy is understood as territorial autonomy[6].

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[1] SLÁDEČEK, V. *Obecné správní právo.* 2., aktualizované a přepracované vyd. Praha: ASPI, a.s., s. 323 – 324. ISBN 987-80-7357-382-9.

[2] KOUDELKA, Z. *Právní předpisy samosprávy.* 2. aktualizované a přepracované vyd. Praha: Line Praha, a.s., 2008, s. 285 - 286. ISBN 978-80-7201-690-7.

[3] SLÁDEČEK, V. O (neúzemní) samosprávě. In JIRÁSKOVÁ, V., SUCHÁNEK, R (eds.) *Pocta prof. JUDr. Václavu Pavlíčkovi, CSc., k 70. narozeninám*. Praha: Linde Praha, a.s., 2004, s. 529, ISBN 80-7201-487-0.

[4] KOUDELKA, Z. *Právní předpisy samosprávy.* 2. aktualizované a přepracované vyd. Praha: Line Praha, a.s., 2008, s. 285. ISBN 978-80-7201-690-7.

[5] FILIP, J. *Ústavní právo 1. Základní pojmy a instituty. Ústavní základy ČR.* Brno: Masarykova univerzita a nakl. Doplněk, 1999, s. 489, ISBN 80-210-3032-6.

[6] SLÁDEČEK, V. O (neúzemní) samosprávě. In JIRÁSKOVÁ, V., SUCHÁNEK, R (eds.) *Pocta prof. JUDr. Václavu Pavlíčkovi, CSc., k 70. narozeninám*. Praha: Linde Praha, a.s., 2004, s. 529, ISBN 80-7201-487-0.

The local self-government is guaranteed in the article eight of the Constitution of the Czech Republic. According to this article the self-government of territorial self-governing units is warranted.

K. Beran pays attention to the definition of the legal nature of universities. According to him, the legal nature has to deal with the degree of autonomy of the universities which has been granted to them while completing their mission. The autonomy, or the authorization to autonomic standardization, is a specific sign of a public corporation. It is the competence of autonomous standardization which distinguishes the public corporations from other private or public subjects. The university must be bound to the valid law of the Czech Republic; yet on the other hand, the university is a subject which can legally practice autonomous standardization. The fulfilling of academic autonomy can be seen when the university is entitled to issuing its own regulations. The legal nature of a university can be seen on the degree of autonomic standardization which the university is entitled to. If the university is entitled to accept autonomic rules, it shows the nature of public corporations. If the university is subjected to order, it is more like public institution. While defying the legal nature of universities, according to K. Beran, it is necessary to notice which area of autonomy it deals with, such as if it deals with science and education or the management of property and the assignment of resources[7].

Because the university has some signature signs such as state institution and public corporation, we can talk about it as a hybrid unit which combines these two signs. The legal nature of university is best defined by H. J. Wolf who states that the university is "mixtum compositum", where the state institution and public corporation stand next to each other. In the meaning of corporation, the university entails the academia, which alone and in its own way organizes itself and is formed by all the members of academia, i.e., teachers and students. The independence of a corporation lies mainly in the possibility of autonomous organization of the study in the competence to grant academic degrees, scientific titles, establishing internal organizational structure and in authorization to elect autonomous academic bodies. In the definition of a public institution, the university is understood as a facility which disposes of personal and material resources for securing free cultivation of science. We can agree with the opinion of K. Beran, according to whom the ideal organization of a relationship between the institution and a corporation should prevent that individual and while other logically competing material interests get favored and should enable the academic freedom to truly and fully develop[8].

One if the key terms in this issue is public property. We understand public property as owning the subject of public nature. It can be a state, a territorial, self-

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Z. Koudelka considers the mention of the self-governance of an interest group in the constitution in preamble of the Charter of Rights and Freedoms as very faint, in which the „self-governing traditions of our nations" is acknowledged.
KOUDELKA, Z. Zájmová samospráva a její předpisy. In *Bulletin advokacie*, 2001, č. 5, s. 9-18, ISSN 1210-6348.

[7] BERAN, K. *Právnické osoby veřejného práva*. Praha: Linde Praha, a.s., 2006, s. 107, ISBN 80-7201-598-2.

[8] Ibidem, p. 125-126.

autonomous unit, subject of self-interest autonomy, another public corporation, legal personality of public law, respectively any public subject in general[9]. The object of public property is an item determined for public purposes; however, we need to mention one important prerequisite - that the subject has the condition of being competent to own, and, obviously, if the item itself can be a subject of property rights[10].

The autonomy of universities is fully practiced at public universities. We can apply it to state universities (military[11] and police[12]) and also to private universities in an adapted version. In the material which classifies these things, universities are split between two groups; the way they have been established and the way they are financed. State universities do not handle their own property and have no legal personality. The property which they dispose of belongs to the state[13]. Private universities utilize non-typical system of autonomy in legal personality in civil law. For the private university it is necessary to have a permit from the state and the state must give it a part of public authority. In the range of the status of a university that is registered by the Ministry of Education, Youth and Sports (hereinafter "the Ministry"), the academia of private universities has the right to decide without the owner to intercept[14]. The article deals with public universities which are defined by act No. 111 Coll. on Higher Education Institutions of 22th April 1998 and on Amendments and Supplements to Some Other Acts (The Higher Education Act) in the section 2 paragraph 2 as a legal personality. From this point of view, act No. 40/1964 Coll., from the civil code in the valid version, it is a legal personality according to section 18 paragraph 2, letter d), i.e., other subjects which are determined by law.

A Public university is a typical representative of so-called academic autonomy. Mainly because it's an autonomous operation while being relatively independent action connected to responsibility for its own all-around development which simultaneously respects the public interest[15]. Public universities are defined by public universities law.

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[9] For more details see HAVLAN, P. *Veřejné vlastnictví v právu a společnosti*. Praha: C. H. Beck, 2008, s. 28-43, ISBN 978-80-7179-617-6.

[10] HAVLAN, P. *Veřejný majetek*. Brno: Masarykova univerzita, 2008, s. 10, ISBN 978-80-210-4742-6.

[11] The University of Defence in Brno.

[12] The Police Academy in Prague.

[13] With the exception of the Police Academy, which had legal personality from January 1st 2001 as the institution fully funded from the State Budget according to the statement 31 and 32 of the Act. No. 576/1990 (which were abrogated by the Act. No. 218/2000 of 27th June 2000 on Budgetary Rules and on amendments of some related acts – budgetary rules) and according to the statement 95, paragraph 1 of the act No. 111 Coll. on Higher Education Institutions of April 22th 1998 and on Amendments and Supplements to Some Other Acts (The Higher Education Act).

[14] KOUDELKA, Z. *Samospráva*. Praha: Linde Praha, a.s., 2007, s. 364, ISBN 978-80-7201-665-5.

[15] HAVLAN, P. *Veřejné vlastnictví v právu a společnosti*. Praha: C. H. Beck, 2008, s. 221, ISBN 978-80-7179-617-6.

To the concept of the „public interest" see e.g.:

PRŮCHA, P. *Správní právo. Obecná část*. Brno: Masarykova univerzita v Brně a nakladatelství Doplněk, 2004, s. 52-53, ISBN 80-210-3350-9.

HENDRYCH, D. et al. *Správní právo. Obecná část*. Praha: C. H. Beck, 2003, s. 86, ISBN 80-7179-671-9.

HOETZEL, J. Zájmy veřejné. In HOETZEL, J., WEYR, F. et al. *Slovník veřejného práva československého.* Brno: Nakladatelství Rovnost, 1948, s. 577 –578.

In this article we see the public university as a distinctive property subject who is entering legal relationships whose subject is property, respectively, its economy and treatment. The subjects who are entering these relationships with a university have the same status at the university. Even if they are private, typically contractual legal relationships, they have distinct public characteristics[16].

3. The financing of public universities

Education is in most countries understood as one of the main duties of the state and it is usually financed and secured by the state. Education at public universities in Czech Republic is free, the private financing sources are not important. The low share of private funding is because universities cannot collect tuition and all other fees are very limited. We need to say that in the last year Czech universities were also financed by international institutions, which were established mainly to support education.

In the article we have outlined the autonomy of the public universities, the state has also influence on its management because it gives them the most money.

The public universities law defines the sources of income for the public universities, which are mainly contributions for education, science, research, development, innovation, art and creative activities from the state budget, support of research, experimental development a innovation from public funding according to special law, grants from state budget, student fees, income from property, other income or other contributions from state funds, from the national fund and the budgets of cities and counties, yields from additional actions and income from gifts and income from inheritances. Public universities are financed according to approved state budget from the budget chapter 333 - resort of the Ministry of Education, Youth and Sports. The most important items for the income of public universities include donations and grants, which are the foundation of their budgets. Public universities have legal right to get them. The Ministry of Education, Youth and Sports also monitors the use of these funds.

The financing of public universities is realized through donations and grants from the state budget, which are provided according to section 18 of the Higher Education Act on the basis of the decision of the Ministry of Education, Youth and

GOULLI, R. Veřejný zájem: pozitivní přístupy a stručné ekonomické teze. In MALÝ, I. (ed.). *Problémy definování a prosazování veřejného zájmu. Sborník referátů z teoretického semináře pořádaného Katedrou veřejné ekonomie ESF MU v Brně ve spolupráci s Asociací veřejné ekonomie*. Brno: Masarykova univerzita v Brně, 1999, s. 10 – 11, ISBN 80-210-2236-1.
POMAHAČ, R. *Průvodce veřejnou správou*. Praha: ISV nakladatelství, 1999, s. 144, ISBN 80-85866-42-0.
GROSPIČ, J. Stát a veřejný zájem v konstitucionalistice a ústavním právu. In JIRÁSKOVÁ, V. (ed.) *Konference 2001. Český stát a vzdělanost*. Praha: Nakladatelství Karolinum, 2002, s. 332 – 335, ISBN 80-246-0491-4.

[16] HAVLAN, P., NEUMANNOVÁ, H. Veřejné vysoké školy jako subjekty vlastnického a jiných majetkových práv. In *Právní rozhledy*, 2006, roč. 14, č. 6, s. 199-205, ISSN 1210-6410.

Sports on providing a donation and a grant according to the section 7 paragraph 1 and section 14 of the Act No. 218/2000 of 27th June 2000 on Budgetary Rules and on amendments of some related acts (budgetary rules), and according to the section 87 of the Higher Education Act. The donations from the state budget for the activities of public university are determined according to the type and financial demands of the educational programs, the number of the students and results achieved in educational, scientific, research, developmental, innovational, and artistic and other creative activities. The amount of the donations depends on the longtime concept of the public university and the longtime concept of the creative activities, which is created and updated yearly by the ministry. The university can be also supported from European funds through targeted supports. The grants for development of public universities are provided mainly for accommodations and sustenance for students.

Donations and grants for the public universities are provided according to Rules for Providing Donations and Grants to Public Universities made by the Ministry of Education, Youth and Sports.[17] In general we can say that the activities of public universities are mainly financed straight from the state. The education is in a significant way financed through unit costs set for one student (and since 2005 also for graduates). According to special regulations, the public universities are getting the means for the research and development, and also the means for catering and accommodating students and investing funds. According the financial demands of provided preparation, the study programs are divided into seven specialization groups with ratios of difficulty from 1 to 5,9. The grant in total is determined as the product of the basic unit cost or the unit cost of one student, which are announced by the ministry every year, of the ratio of the financial demands of the study programs and the number of students/graduates in each program[18]. This way of financing with the use of different algorithms allows then to monitor and to improve the efficiency of the use of public resources in higher education and also allows then to react to the demands of the state educational policy and to the requirements of the job market at the time in question[19].

The Council for the Reform of University Education is currently discussing the proposition for a new law for the universities, which the Ministry is discussing with representatives of the universities. The factual intention of this law, which is a part of the reform of higher education, contains essential changes which are expanding the autonomy of the universities, modifies their relationships with the state and proposes elements of contract financing of public universities. According to the factual intention

[17] Issued by the Ministry of Education, Youth and Sports (the reference number 2434/2011-33).

[18] Eurydice: *Struktury systémů vzdělávání a odborné přípravy v Evropě: Česká republika*. 2009/2010. [cited on the 11th of August 2011] It is accessible from <http://eacea.ec.europa.eu/education/eurydice/documents/eurybase/structures/041_CZ_CS.pdf> s. 12

[19] OCHRANA, F., PAVEL, J., VÍTEK, L. a kol. *Veřejný sektor a veřejné finance.* 1. vyd. Praha: Grada, Publishing, a.s., 2010, s. 123. ISBN 978-80-247-3228-2.
To the issue of financing of the public universities comp. e.g.PEKOVÁ, J., PILNÝ, J., JETMAR, M. *Veřejná správa a finance.* 2., přepracované vyd. Praha: ASPI, a.s., 2005, 270 – 278 s. ISBN 80-7357-052-1.

this law should determine that a university has the right to get institutional financing from the state budget through the donation for the activities of the public university, if the public university fulfills its obligations resulting from the law and enters into an agreement of public service with the ministry. Awarding the contribution and determining the amount is critical the general agreement, especially the agreed indicators of the performance and its value achieved in the previous year. In agreement with the mission statement of the government is the factual intention on creating a solution for the implementation of tuition at the public universities in connection with the prepared law on financial help for the students[20].

4. The management of public universities

In the section number six, paragraph one of the act No. 111 Coll. on Higher Education Institutions of 22th April 1998 and on Amendments and Supplements to Some Other Acts (The Higher Education Act) there are specified activities belonging to the self-governing competence of the university. The autonomy of public higher education institutions (public universities) encompasses financial management of the higher education institution and the management of assets in compliance with special regulations as well[21]. State authorities may only intervene in the activities of public higher education institutions on this basis and within the confines of the law and in a manner established by said law[22].

The Assets of public higher education institutions are specified in the provision of section 19. From this provision it is apparent that the possessory capacity of public higher education institution. In accordance with this section public higher education institutions possess the assets required for carrying out the activities for which they were established. In the cited provision is incorporated demonstrative enumeration of public higher education institutions' assets. The assets of public higher institutions include movables, residential and non-residential property, rights and other kinds of assets. The management of assets of a public higher education institution falls within the competence of the Rector or an officer or official body or person so designated in the Statutes of the public higher education institution. The Higher Education Act references to cases, in which the decision is made by the Rector with the prior consent of the Board of Trustees of the public higher education institution, and according to section 9, paragraph 2, the Academic Senate expresses its view on these subjects as well. The Board of Trustees can be comprehended as one of controlling institution, which can prevent an abuse of right. The prior written consent is required:

[20] *Pracovní návrh věcného záměru zákona o vysokých školách.* [cited on the 11th of August 2011] It is accessible from <http://www.msmt.cz/file/14689>.
[21] According to the provision six, paragraph one, letter k) of The Higher Education Act.
[22] According to the provision six, paragraph three of The Higher Education Act.
More information about the autonomy of public higher education institutions you can see in HAVLAN, P. *Veřejné vlastnictví v právu a společnosti*. Praha: C. H. Beck, 2008, s. 222, ISBN 978-80-7179-617-6.

- for legal acts pertaining to the higher education institution's acquiring property or transferring property to another party;
- for legal acts pertaining to the higher education institution's acquiring movable assets or transferring movable assets to another party, should the value of those assets be greater than five hundred times to amount according to which such assets are regarded as tangible assets as per special regulation[23];
- for legal acts pertaining to the higher education institution's intention of securing a right of use or right of first option;
- for legal acts pertaining to the higher education institution's intention of establishing another legal entity and for making financial and non-financial investments in these and other legal entities[24].

The Board of Trustees of a public university must notify the Ministry of Education, Youth and Sports of this within seven days giving the prior written consent to these legal acts. In case that the Board of Trustees doesn't give the prior written consent to these legal acts, or if the Board of Trustees doesn't notify the Ministry, these legal acts will be deemed void[25]. The legal act would be valid evidently in situation, when the Academic Senate wouldn't express its view on these subjects. The legal regulation of these aspects is different from the territorial self-governing units' legal regulation. The public higher education institutions don't have an obligation to attaching the approval of a legal act's clause to deeds by competent authorities of the higher educational institutions. This obligation is convenient especially in the above exhaustive appointed cases, which were deemed void without prior written consent by The Board of Trustees. The other difference is an obligation to publish the intent to accomplish legal acts pertaining to property[26]. S. Plíva inclines towards the opinion that the prior written consent by The Board of Trustees should be attached to legal act as its supplement because all of these acts must have written form[27]. It isn't inconsiderable, that the consent of The Board of Trustees isn't required for example in following cases: assignment of a claim, making a lien (the public higher education institutions are not empowered to take out of mortgage charging the real estate according to the provision 20, paragraph three of The Higher Education Act), waiver of debts, borrowings, leases (corporeal chattel or real estate) and other things. The legal acts mentioned in the provision 15, paragraph one of the Higher Education Act appear randomly, particularly

[23] According to the provision 26, paragraph 2 of the Act No. 586/1992 Coll., on the Income Tax, are real assets *„separate movable assets, or set of movable assets, with separate technical-economic determination, whose initial price (§ 29) is higher than forty thousands of Czech crowns and have operating-economic determination long than one year."*

[24] According to the provision fifteen, paragraph one, letter a) to d) of The Higher Education Act.

[25] According to the provision 15, paragraphs six and seven of The Higher Education Act.

[26] HAVLAN, P. *Veřejné vlastnictví v právu a společnosti*. Praha: C. H. Beck, 2008, s. 227, ISBN 978-80-7179-617-6.

[27] PLÍVA. S. Postavení veřejné vysoké školy v soukromoprávních vztazích. In *Právo a podnikání*,1999, č. 5, s. 17, ISSN 1211-1120.

that the Board of Trustees gives consent e.g. to sale real property regardless of its value, but the consent isn't required to long-standing contract of lease or contract of borrowing of real estate regardless of its value as well. The statement 15, paragraph 2, letter b) is either arguable, because according to this statement the Board of Trustees of a public higher education institution only expresses its view on the budget of the higher education institution without having any possibility to influence its content[28].

There is convenient to point out the another important rule contained in the statement 15, paragraph 5 of the Higher Education Act, that the Board of Trustees may not approve a legal act should it fail to comply with the requirement that the higher education institution's assets be properly used or should this jeopardise the institution's ability to fulfil its responsibilities and commitments. The Higher Education Act doesn't excessively limit the higher education institution in concluding legal acts. Some of these acts demand observance of certain rules, or rather procedure, which are regulated in statement 15 of the Higher Education Act[29]. In the statement 20, paragraph 3 of the Higher Education Act there is an enumeration of the acts, which the public higher education institutions are not empowered to make[30].

The public universities follow in pursuance of management and dispose of property not merely legislation, but its internal regulations as well. These internal regulations of a public higher education institution are especially the Statutes of the public higher education institution, the Election Regulations and the Rules of Procedure of the Academic Senate of the public higher education institution, internal salary regulations, the Rules of Procedure of the Scientific Board of the public higher education institution, Regulations on Competitive Selection Procedures for filling academic positions, Study and Examination Regulations, Scholarship and Bursary Regulations, the Student Disciplinary Code and other regulations, should these be stipulated in the Statutes of the public higher education institution[31]. The Ministry supervises the accordance of these internal regulations with laws. This control is performed already when the internal regulations are registered. According to the statement 36, paragraph 4 of the Higher Education Act the internal regulations yet to come into effect when they are registered. If the internal regulation is contrary to the Act or any other legal regulations, the Ministry will issue a ruling rejecting the

[28] HAVLAN, P. *Veřejné vlastnictví v právu a společnosti*. Praha: C. H. Beck, 2008, s. 228, ISBN 978-80-7179-617-6.

[29] Other exceptions are mentioned e.g. in statement 19, paragraph 3 and in statement 20, paragraph 3 of the Higher Education Act.

[30] Public higher education institutions are not empowered to stand surety for the debts of other persons or to take out a mortgage on property. Public higher education institutions are not empowered to become partners in a public business enterprise or general partners in a limited partnership. Nor are public higher education institutions empowered to invest in business enterprises or cooperatives property acquired from the state, a block grant pursuant to subsection 18 (paragraph 3) or a subsidy pursuant to subsection 18 (paragraph 4). Financial and non-financial investments in legal entities are subject to the public higher education institution's internal regulations.

[31] According to the provision seventeen, paragraph one of The Higher Education Act.

application for registration. Should any measures of a public higher education institution or one of its constituent parts contradict the Act or another legal regulation and should the Act not stipulate any other means of review, the Ministry will call upon the higher education institution to remedy the situation within a reasonable length of time (statement 37 of the Higher Education Act).

The control of management of the public university is necessary to prevent from abusing of rights. This control is performed by the Ministry, because according to the statement 87, letter e) of the Higher Education Act the Ministry monitors the financial management of public higher education institutions pursuant to the Czech National Council Act No. 552/1991 Coll. on state inspection, as amended. Because the most of the financial means, needed for action of the public higher education institutions, are allocated from the public budget, the public control is necessary, apart from internal control (represented by the governing control and internal audit). The Board of Trustees, the Academic Senate of a public higher education institution and the Academic Senate of the faculty have especially the capacity as this control in higher education. The activity of the Board of Trustees is mentioned above, the action of the Academic Senate consists in approve of the budget of the higher education institution, which is submitted by the Rector, and in monitor the financial management of the higher education institution (according to the statement 9, paragraph one, letter c) of the Higher Education Act). The Academic Senate of the public higher education institution approves the annual reports on the activities and on the financial management of the higher education institution, which are presented by the Rector and approves the evaluation of the activities of the higher education institution, presented by the Rector as well. The Academic Senate of the faculty has the same capacity, but in pursuance of the particular faculty, and these documents about the allocation of the financial resources of the faculty control their use are presented by the Dean. The other entity, which participates in the control of public higher education institutions are as follows:

- The Parliament of the Czech Republic – its control is oriented to the Executive by means of committees as its control and initiative bodies;
- The Government of the Czech Republic, which carries out a control through the Ministry;
- The Office for Protection of Competition, which pursue a control of outsourcing and realization of public procurement, because the public higher education institutions can outsource public procurements;
- The Supreme Audit Office, an independent institution which audits the management of state property and the performance of the national budget. The control of this office can head towards provide, derive and use of national budget's financial means, which were rendered from the chapter of State Budget. The controlled bodies can be both the public higher education institutions and the Ministry.

5. Conclusion

The self-governing interest group legislation, unlike the local authority's legislation, is theoretically underdeveloped. There is apparently less interest in this topic of legal theorists, so it is desired and needed to engage in this theme in detail and point out some imperfections in legal regulation.

In my opinion the circumstance of management with public property of these entities should lead to passage of a legal regulation which would comprehensively regulate the issue in the form of law not merely the action of these bodies in legislative in assets area, but rules of management and disposal of property of the public higher education institutions as well. The legal regulation should regulate appropriate mechanism of liability and control.

With the reference to intended subject-matter of the law of the Higher Education Act it's evident that the tertiary education area is going through the reform nowadays, which is relating to financing of public higher education institutions as well. The education is presently financed through the costs unit – norms – stated on student and from the year 2000 to graduate, whereas according to the proposed subject-matter of the law there is possibility of declaration of benefit from the state budget and possibility of establishment its amount in compliance with general agreement and particularly in compliance with performance and its value in previous calendar year. Although the financing of public university comes from more sources, the most of them is allocated from public means. Nevertheless, it's known that public higher education institutions are financed insufficiently, which poses a threat to their stability. This aspect impedes their quantitative and qualitative development. The substance of a law in this context supposes the establishment of school fees, because a very low share of private financing for public higher education institutions leads to universities and students which aren't involved in quality and efficiency of education. From these arguments it's obvious that the change of financing of public higher education institutions is de lege ferenda necessary. The approval of school fees will be matter of political negotiation, compromises and decisions. The subsequent practise show if this approval will produce positive effects in financing of public higher education and satisfaction of demand for university education.

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Публичные финансы и местное самоуправление. Полномочия органов местного самоуправления по регулированию налогов в Литовской Республике

(Public Finances and Local Self-government. Powers of Self-government Institutions on Tax Regulation in the Republic of Lithuania)

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Аннотация: Статья 119 Конституции Литовской Республики (далее – Конституция) гарантирует административно-территориальным единицам право на самоуправления. Практическое осуществление данного конституционного права невозможно без обладания определенными финансовыми ресурсами (публичными финансами местного самоуправления), без права органов местного самоуправления самостоятельно распоряжаться публичными финансами, находящимися в их распоряжении. В статье, основываясь на анализе действующего налогового законодательства и практической деятельности органов местного самоуправления, рассматривается вопрос о пределах самостоятельности органов местного самоуправления в области регулирования и сбора налогов.

Ключевые слова: местноесамоуправление, налоги, публичные финансы.

Abstract: The right to self-government is guaranteed by the Article 119 of the Constitution of the Republic of Lithuaniato administrative units of the territory of the State. For realization of this constitutional right self-government institutions (local authorities) must obtain certain powers in managing public finances that they ownes. The article deals with the question of competence of local self-government institutions in the field of tax.regulation.

Keywords: self-government, taxes, public finance.

1. Введение. Публичные финансы местного самоуправления в Литовской Республике

Согласно статье 50 Закона о местном самоуправлении[1] финансовые ресурсы местных самоуправлений (далее –самоуправлений) составляют: 1) получаемые в соответствии с законами и другими правовыми актами за счет налогов доходы бюджетов самоуправлений; 2) доходы от имущества (собственности) самоуправлений; 3) штрафы, полученные в установленном законодательством порядке; 4) установленные законодательством местные сборы; 5) доходы бюджетных учреждений самоуправлений за предоставляемые услуги; 6) доходы за остатки средств самоуправлений на текущих счетах; 7) доходы, полученные за сданную в аренду государственную землю и водоемы государственного фонда внутренних вод, а также доходы, полученные после распределения в установленном Правительством порядке денежных средств за проданные государственные земельные участки несельскохозяйственного назначения; 8) дотации из государственного бюджета; 9) иные установленные законодательством доходы; 10) не подлежащая возврату финансовая помощь (денежные средства); 11) ссуды. Финансовые ресурсы (публичные финансы) местного самоуправления являются объектом общественной (публичной) собственности, накапливаются в основном в местном бюджете, который является самостоятельным и не входит в состав государственного бюджета Литовской Республики. Согласно статье 22 Закона о бюджетном устройстве 2 и статье 2 Закона о методике установления доходов бюджетов самоуправлений3 доходы местного бюджета подразделяются на две основные части – налоговые и неналоговые доходы. Например, доходную часть бюджета г. Вильнюс на 2011 г. составляют:

[1] *Valstybės žinios*, 1994, nr. 55-1049; 2008, nr. 113-4290.
[2] *Valstybės žinios,* 1990, nr. 24-596; 2004, nr. 4-47.
[3] *Valstybės žinios*, 1997, nr. 69-1743; 2001, nr. 94-3307.

	Доходы	сумма (тыс. литов)
1.	Налоги (2+3+7)	454290,0
2.	Подоходный налог с населения	323714,0
3.	Имущественные налоги (4+5+6)	117133,0
4.	Земельный налог	3898,0
5.	Налог с имущества, переходящего в порядке наследования	830,0
6.	Налог за недвижимое имущество	112405,0
7.	Налоги за товары и услуги (8+9+10)	13443,0
8.	Налог за загрязнение окружающей среды	3130,0
9.	Государственный сбор	1238,0
10.	Местные сборы	9075,0
11.	Другие доходы	543642,7
	Всего	987932,7

Существование публичных финансов и самостоятельного бюджета самоуправлений с первого взгляда может создать впечатление, что самоуправления не только обладают собственными финансами (доходами), но и пользуются неограниченным правом полностью регулировать и контролировать их сбор в свой бюджет. Возникает, однако, вопрос: действительно ли бюджет самоуправления (особенно в своей доходной части) полностью независим от бюджета государства и „воли“ центральной власти, а органы самоуправления обладают абсолютной самостоятельностью в регулировании его доходов? В поиске ответа на заданный вопрос в первую очередь следует обратиться к налоговому законодательству, так как доходы от налогов, как видно из выше представленной таблицы, составляют значительную часть доходов местного бюджета (публичных финансов местного самоуправления).Вместе с тем следует учитывать и то обстоятельство, что статья 9 Европейской хартии о местном самоуправлении[4] обязывает подписавшие её государства, члены Совета Европы не только обеспечивать право органов самоуправления в рамках национальной экономической политики на обладание достаточными собственными финансовыми средствами, которыми они могут свободно распоряжаться при осуществлении своих функций, но и создать условия для того, чтобы „по

[4] *Valstybės žinios,* 1999, nr. 82-2418.

меньшей мере часть финансовых средств органов местного самоуправления [...] поступала бы за счет местных сборов и налогов, ставки которых органы местного самоуправления вправе устанавливать в пределах, определенных законом“[5].

2. Общая характеристика государственной системы налогов Литовской Республики

Литовская Республика, как и любое другое государство, имеет свое налоговое устройство и государственную (национальную) систему налогов, предопределенную особенностями устройства государства. Ныне существующую государственную систему налогов Литвы начато формировать сразу же после восстановления независимости в 1990 году, так как до этого времени взимаемые по советским законам налоги уже не соответствовали ни новых реалий политической и экономической жизни, ни статуса и потребностей независимого государства[6]. Именно поэтому уже в первые годы независимости были приняты такие важные налоговые законы, как: Закон о налоге на прибыль юридических лиц[7] (31 июля 1990 г.) и Временный закон о подоходном налоге с физических лиц[8] (5 октября 1990 г.). Сама же государственная система налогов (ее составляющие налоги) впервые получила законодательное закрепление в первом Законе о налоговом администрировании[9], принятом 28 июня 1995 г.

Как гласит статья 10 Конституции[10] Литовская Республика является унитарным государством, территория которого едина и неделима на какие либо государственные образования, и власть в котором осуществляет Сейм (Парламент), Президент Республики, Правительство и Суд (статья 5). Статья 67 Конституции закрепляет исключительное право Сейма устанавливать государственные налоги. Это означает, что в Литве существует единая, основанная на законах государственная система налогов.

Сегодняшнюю государственную систему налогов[11] Литовской Республики согласно статье 13 Закона о налоговом администрировании[12] от 13 апреля 2004 г. составляют: 1) налог на добавленную стоимость; 2) акцизы; 3) подоходный налог с населения; 4) налог на недвижимое имущество; 5) земельный налог; 6) налог на

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[5] Сейм Литвы ратифицировал Хартию Законом от 25 мая 1999 г. (*Valstybės žinios*, 1999, nr. 82-2411).
[6] MARCIJONAS, A.; SUDAVIČIUS, B. Lietuvos Respublikos mokesčių sistemos teisiniai pagrindai ir jų reforma. *Teisė*, 2002, t. 43, p. 128-129.
[7] *Valstybės žinios*, 1990, nr. 24-601.
[8] *Valstybės žinios*, 1990, nr. 31-742.
[9] *Valstybės žinios,* 1995, nr. 65-1525.
[10] *Valstybės žinios*, 1992, nr. 33-1014.
[11] Следует отметить, что в Литве отсутствует институт местных налогов (налогов, право введения которых полностью принадлежит органам местной власти). Здесь под местными налогами понимаются лишь те налоги, которые в соответствии с законодательством зачисляются в местный бюджет.
[12] *Valstybės žinios*, 2004, nr. 63-2243.

государственные природные ресурсы; 7) налог на нефтегазовые ресурсы; 8) налог за загрязнение окружающей среды; 9) консульский сбор; 10) гербовый сбор; 11) налог с имущества, переходящего в порядке наследования; 12) взносы по обязательному страхованию здоровья; 13) взносы в Гарантийный фонд; 14) государственный сбор; 15) налог на лотереи и азартные игры; 16) налоги за регистрацию объектов промышленной собственности; 17) налог на прибыль; 18) взносы по государственному социальному страхованию; 19) налог на избыток в сахарном секторе; 20) налог на производство в сахарном секторе; 21) таможенные пошлины; 22) отчисления от доходов в соответствии с Законом о лесах; 23) плата за пользование государственным имуществом на праве доверительного управления; 24) плата за разовый выкуп дополнительной квоты на производство белого сахара и добавочной квоты на производство изоглюкозы.

Существование единой государственной системы налогов в Литве, как и в других унитарных государствах, однако, еще не означает, что административно-территориальные единицы (местные самоуправления[13]) тут не обладают определенными полномочиями при установлении налогов и (или) при регулировании их сбора.Так, самоуправления часть доходов получают за счет налогов, ставки (тарифы) которых, не превышая предусмотренных законодательством размеров, устанавливают советы самоуправлений; самоуправления (или от их имени Ассоциация самоуправлений Литвы) согласовывают проекты правовых актов, в соответствии с которыми предусматривается изменение функций, доходов и (или) расходов самоуправлений, вместе с прилагаемыми к ним финансовыми расчетами и т. д.

3. Налоговая компетенция самоуправлений

3.1 Общие положения

Статья 119 Конституции гарантирует административно-территориальным единицам право самоуправления, что предопределяет возникновение проблемы налоговой компетенции (суверенитета)[14] и необходимость ее разрешения на законодательном уровне. В соответствии с ныне действующим законодательством порядок налогообложения определенным налогом

[13] **Местное самоуправление** согласно законодательству Литвы – самоорганизация и инициативность общины постоянных жителей установленной законом государственной административно-территориальной единицы, обладающей гарантированным Конституцией правом самоуправления, в рамках компетенции, определенной Конституцией и законами.

[14] Под **налоговой компетенцией** в статье подразумевается совокупность полномочий, предоставляемых государству, его административно-территориальным единицам при установлении налогов, в процессе сбора налогов, а также в процессе контролирования сбора налогов. Следует отметить, что налоговое законодательство Литвы практически не предусматривает возможности органам местного самоуправления участвовать в процессе сбора налогов или в деятельности по контролю за их сбором.

устанавливается исключительно определенным налоговым законом или принятым на его основании постановлением Правительства, а также принятым на их основе другим правовым актом. Таким образом, основные полномочия в области налоговой компетенции при установлении основных структурных элементов налога: объекта, субъекта, ставки и др. сконцентрированы в основном в руках органов центральной власти. Между тем следует отметить, что законы предоставляют право органам самоуправления детализировать (корректировать) отдельные элементы налогов, хотя само установление этих элементов остается исключительным правом органов государственной (центральной) власти. К тому же, органы самоуправления обладают правом на установление и предоставление налоговых льгот, правом на использование доходов, полученных в форме налогов и т. д.[15] Это означает, что в Литве при установлении налоговой компетенции, основываясь на признании единой государственный системы налогов, сочетаются элементы централизации и децентрализации[16]. Следует иметь ввиду, что статья 36 Закона о местном самоуправлении предусматривает право самоуправлений на получение доходов от налогов, ставки которых устанавливают сами органы самоуправлений, а Конституция и другие законы предоставляют право советам самоуправлений вводить на своей территории местные сборы, которые в определенном смысле выполняют роль местных налогов в Литве[17]. Следовательно, можно делать вывод, что органы самоуправлений участвуют в процессе налогового регулирования и обладают определенной самостоятельностью в этой области.

Как уже отмечалось, совет самоуправления имеет право на корректировку ставок налогов и предоставления налоговых льгот за счёт своего бюджета. Осуществляя такие права, органы самоуправлений детализируют положения налоговых законов. Однако, следует учесть то обстоятельство, что при этом

[15] Следует отметить, что дополнительные и превышающие план доходы бюджета, полученные при выполнении бюджета, а также сэкономленные средства (расходы) остаются в самоуправлениях, за исключением установленных законодательством случаев.

[16] MARCIJONAS, A.; SUDAVIČIUS, B. *Mokesčių teisė*. Vilnius, 2003, p. 22.

[17] Совет самоуправления вправе на территории самоуправления устанавливать местные сборы только за: 1) выдачу разрешения на проведение землеройных работ на территории общественного пользования самоуправления, на ее ограждение или ограждение ее части либо ограничение движения по ней; 2) выдачу разрешения на торговлю или предоставление услуг в установленных советом самоуправления общественных местах; 3) выдачу разрешения на установку внешней рекламы на территории самоуправления; 4) выдачу разрешения на организацию коммерческих мероприятий на территориях общественного пользования, принадлежащих самоуправлению или управляемых им на праве управляющего; 5) выдачу разрешения на въезд на механических транспортных средствах на охраняемые государством территории, в учрежденные самоуправлениями охраняемые заповедники, на территории провозглашенных ими объектов ландшафта и в установленные защитные зоны местного значения; 6) использование установленных советом самоуправлений мест для стоянки автомобилей 7) регистрацию и содержание животных (собак, котов) в многоквартирных домах; 8) сбор коммунальных отходов; 9) выдачу разрешения на оборудование временных переносных сооружений на территории самоуправления; 10) выдачу разрешения на продажу средств гражданской пиротехники класса; 11) использование общественной инфраструктуры населенных пунктов, имеющих статус курорта.

органы самоуправления действуют строго в соответствии с требованиями налоговых законов.

Несмотря на то, что государственную систему налогов Литвы составляет даже двадцать четыре налога, в местный бюджет (полностью или частично) зачисляются лишь: 1) подоходный налог с населения (лит.: *gyventojų pajamų mokestis*); 2) налог на недвижимое имущество (лит.: *nekilnojamojo turto mokestis*); 3) земельный налог (лит.: *žemės mokestis*); 4) налог с имущества, переходящего в порядке наследования (лит.: *paveldimo turto mokestis*); 5) налог на государственные природные ресурсы (лит.: *mokestis už valstybinius gamtos išteklius*); 6) налог на лотереи и игры (лит.: *loterijų ir lošimų mokestis*); 7) государственный сбор за услуги, предоставленные органами самоуправления (лит.: *valstybės rinkliava už savivaldybiės institucijų teikiamas paslaugas*); 8) налог за загрязнение окружающей среды (лит.: *mokestis už aplinkos teršimą*). Однако и по отношению к этим налогам права органов самоуправлений различны.

3.2 Полномочия органов самоуправлений по установлению ставки налога

Как уже отмечалось, не только Европейская хартия о местном самоуправлении, но и национальное законодательство гарантирует право самоуправлений на получение доходов от налогов, ставки которых устанавливают сами органы самоуправлений. В Литве, однако, осуществление этого права крайне ограниченно и предусмотрено лишь по отношении двух налогов, зачисляемых в местный бюджет.

Несмотря на то, что основную часть налоговых доходов (публичных финансов) самоуправлений составляют доходы от подоходного налога с населения, органы самоуправленийв общем не имеют права ни регулировать (уменьшать или увеличивать) ставку данного налога, ни освобождать от его уплаты, ни откладывать срок уплаты этого налога.

Однако, существует определенные исключения при налогообложении доходов, получаемых жителями от деятельности, которая осуществляется при наличии предпринимательского свидетельства[18]. Согласно части 3 статьи 6 Закона о подоходном налоге с населения[19] за доходы, полученные от деятельности, которая осуществляется при наличии предпринимательского свидетельства, уплачивается установленный советами самоуправлений

[18] **Предпринимательское свидетельство** – выданный в установленном порядке документ, подтверждающий уплату подоходного налога установленного фиксированного размера при осуществлении индивидуальной деятельности, внесенной в установленный Правительством список видов деятельности. Это: предоставление сельскохозяйственных услуг; заготовка древесины; производство дров; торговля и др. Исчерпывающий список видов деятельности и порядок выдачи предпринимательских свидетельств установлен постановлением Правительства № 1251 от 19 ноября 2002 г. „О Правилах выдачи предпринимательских свидетельств жителям“ (*Valstybės žinios*, 2002, nr. 112-4992.

[19] *Valstybės žinios*, 2002, nr. 73-3085.

подоходный налог фиксированного размера. Однако величина данного подоходного налога не может быть меньше подоходного налога, подсчитанного от одной минимальной месячной зарплаты с учетом действующейна 1 января ставки подоходного налога. Таким образом, совет самоуправления в данном случае имеет право самостоятельно устанавливать ставку подоходного налога и тем самым в определенной мере воздействовать на свои публичные финансы.

Например,доходы, полученные от деятельности, которая осуществляется при наличии предпринимательского свидетельства, в столице Литвы (г. Вильнюсе) начиная с 1 января 2010 г. облагаются подоходным налогом руководствуясь Решением Совета самоуправления г. Вильнюс № 1-482. Этим решением доходы, полученные от всех видов деятельности, которая осуществляется при наличии предпринимательского свидетельства, облагаются единым (в размере 1440 литов[20]) годовом подоходным налогом. Решением Совета самоуправления г. Каунас от 4 ноября 2010 г. № T-631 величина подоходного налога надоходы, полученные от деятельности, которая осуществляется при наличии предпринимательского свидетельства, составляет от 120 литов (предоставление сельскохозяйственных и других услуг) до 900 литов (торговля). Меньшего размера фиксированный подоходный налог, руководствуясь предписанием Закона о подоходном налоге с населения, установлен для: 1) безработных, зарегистрированных на территориальных биржах труда; 2) лиц с недугами (нетрудоспособных лиц); 3) лиц, достигших пенсионного возраста; 4) одиноких родителей; 5) лиц, приобредших предпринимательское свидетельство на занятие традиционными видами ремесла и т. д. Решения аналогичного содержания приняты и в других самоуправлениях. Однако, существуют и определенные особенности. Иногда для того, чтобы лицо воспользовалось бы правом на льготную ставку налога, предусматриваются и дополнительные условия. Например, Совет самоуправления Шилутского района Решением от 26 ноября 2009 г. № T-1161 „Об утверждении видов индивидуальной деятельности, величины фиксированного налога и налоговых льготах“ установил, что льготная ставка налога применяется лишь в том случае, еслипредпринимательское свидетельство приобретается на определенный срок (в зависимости от вида деятельности). В отдельных случаях совет самоуправления вправе совсем отказаться от предоставления льгот (так, например, поступил Совет города-курорта Друскиникай).

Следовательно, советы самоуправлений путем регулирования ставки подоходного налога с доходов, полученных от деятельности, которая осуществляется при наличии предпринимательского свидетельства, не только

[20] Официальный курс лита по отношению к базовой валюте (евро) установлен постановлением Правления Банка Литвы № 15 от 1 февраля 2002 г. „Об официальном курсе базовой валюты и лита“ (*Valstybės žinios*, 2002, nr. 12-453) и равен 3,4528 лита за 1 евро.

регулируют занятость жителей, воздействует на общую экономическую ситуацию на своей территории, но и регулируют доходы местного бюджета.

Другой налог, ставку которого вправе устанавливать совет самоуправления, это налог на недвижимое имущество. Налог на недвижимое имущество (за исключением земли) – единственный налог, зачисляемый в местный бюджет, по отношению к регулированию которого самоуправления обладают большими правами.

Согласно Закону о налоге на недвижимое имущество[21] конкретную ставкуналогасовет самоуправленияобязан установитьдо 1 июня текущего налогового года. Однако Законом установлены границы ставки этого налога - 0.3 – 1 % от стоимости недвижимого имущества. Установленная ставка налога применяется на территории соответствующего самоуправления с начала следующего налогового года. Закон также предоставляет право советам самоуправленийустановить и несколько различных ставок налога в зависимости от:1) предназначения недвижимого имущества (ствоений); 2) состояния его технического присмотра; 3)категории налогоплательщика (размер или юридическая форма юридического лица, социальное положение физического лица); 4) месторасположение недвижимого имущества на территории самоуправления. В случае, если совет самоуправления не установит ставки налога до 1 июня текущего года, в следующемналоговом году действует ставка прошлого года.

Так, в г. Вильнюс с 1 ярваря 2011 г. действнют две ставки налога на недвижимое имущество – общая ставка в 0,8 процента и ставка в 1 процент от стоимости неиспользуемого (используемого не по назначению, заброшенного или не присмотренного) имущества (строений). Решением Совета самоуправления г. Каунас недвижимость облагается по общей 0,9 процентной ставке. Однако строения, находящееся на территории старого города и используемые в целях торговли антикварными изделиями, сувенирами, книгами, предоставления услуг питания и т. д. облагаются налогом по меньшей (0,6 процентной) ставке. По данным Государственной налоговой инспекции лишь в одном – Рокишкском самоуправлении недвижимое имущество облагается налогом по минимальной – 0,3 процентной ставке.

3.3 Полномочия органов самоуправления по установлению и применению налоговых льгот

Намного шире полномочия органов самоуправлений в области налоговых льгот. Согласно части 8 статьи 2 Закона о налоговом администрировании налоговая льгота – это исключительные условия налогообложения,

[21] *Valstybės žinios,* 2005, nr. 76-2741.

предоставляемые налогоплательщику или группе налогоплательщиков. По общему правилу налоговые льготы устанавливаются лишь налоговыми законами. Как гласит часть 1 статьи 4 Закона о налоговом администрировании налоговую льготу или льготы предусматривает лишь законы об определенных налогах, устанавливающие порядок налогообложения данными налогами. Однако при выяснении специфики установления и предоставления налоговых льгот, следует учесть то обстоятельство, что в определенных случаях налоговые льготы вправе устанавливать и применять Правительство и органы самоуправлений[22]. Как констатировал Конституционный Суд Литовской Республики, правовое регулирование налогов – это не только их введение законом, но и порядок осуществления этих законов, который может быть урегулирован и подзаконными актами[23]. Следовательно, правом на установление налоговых льгот обладает не только Сейм, но и другие компетентные институции, в том числе и советы самоуправлений. Как гласит статья 121 Конституции советы самоуправлений вправе устанавливать налоговые льготы за счёт своего бюджета. То обстоятельство, что советы самоуправлений имеют право на установление налоговых льгот, не должно расцениваться как отклонение от принципа, закрепленного в статье 4 Закона о налоговом администрировании и предусматривающего законодательную форму установления налоговых льгот, так как советы местных самоуправлений, принимая вешения о налоговых льготах всегда действуют в соответствии с требованиями закона[24] и вправе устанавливать и применять налоговые льготы лишь по отношению к тем налогам, которые зачисляются в местный бюджет.

В отличие от налоговых льгот, предусмотренных законами о налогах, и имеющих всеобщий характер, налоговые льготы, установленные решениями советов самоуправлений, как правило имеют индивидуальный характер, применяются по отношению к конкретному налогоплательщику по его письменной просьбе[25]. Так, решением Совета самоуправления г. Вильнюс от уплаты налога на недвижимое имущество за 2010 год были освобождено 13 налогоплательщиков (девятерым было отказано); от уплаты земельного налога за 2010 год были освобождены два налогоплательщика (одному срок уплаты налога был отложен); 4 налогоплательщикам в 2010 году был отложен срок уплаты налога за имущество, переходящего в порядке наследования. Как видно, советы

[22] SUDAVIČIUS, B.Mokesčių lengvatos Lietuvos mokesčių teisės kontekste. *Teisė*, 2010, t. 76, p. 106.
[23] *Valstybės žinios*, 2000, nr. 23-585.
[24] Право советов самоуправлений на предоставление налоговых льгот индивидуального характера в форме полного освобождения от уплаты налога, уменьшения размера уплачиваемого налога, отсрочки срока уплаты налога предусмотрено в статье 7 Закона о налоге на недвижимое имущество. статье 7 Закона земельном налоге (*Valstybės žinios,* 1992, nr. 21-612), статье 7 Закона о налоге на имущество, переходящее в порядке наследования (*Valstybės žinios,* 2002, nr. 123-5531), статье 7 Закона о сборах (*Valstybės žinios,* 2000, nr. 52-1484).
[25] MEDELIENĖ, A.; SUDAVIČIUS, B. *Mokesčių teisė.* Vilnius, 2011, p. 94.

самоуправлений не часто принимают решения по предоставлению налоговых льгот. Однако, несмотря на это, критике зачастую подвергается процедура принятия решений по освобождению от уплаты или уменьшению величины налога для отдельных налогоплательщиков, так как закон не обязывает членов Совета указывать мотивы принятия таких решений, что создает предпосылки для нарушения принципа социальной справедливости в сфере налогообложения.

Наряду с этим, в отдельных случаях советы самоуправлений, пользуясь правами, предоставленными им Конституцией и Законом о местном самоуправлении, устанавливают льготы общего характера по налогам для отдельных категории налогоплательщиков. Так, Решением Совета самоуправления г. Шяуляй от 28 января 2010 г. № Т-5 „О налоговых льготах лицам, поддерживаюших культуру и спорт“ налоговыми льготами по налогу на недвижимое имущество и земельному налогу пользуются лица, которые оказывают поддержку(финансовую и другую) мероприятиям города (праздники, фестивали, выставки), известным деятелям культуры, художественным и культурным коллективам города, международным спортивным мероприятиям, организуемым в городе, перспективным спортсменам и командам. Несмотря на положительную оценку такого Решения в целом, следует отметить и один его недостаток – за Советом самоуправления остается право определять размер льгот, предоставляемых конкретному лицу, в зависимости от его вклада в развитие культуры и спорта.

К тому же советы самоуправлений, руководствуясь статьей 16 Закона о местном самоуправлении, зачастую предусматривает льготы по налогу на недвижимое имущество для отдельных категорий налогоплательщиков, занимающихся определенными видами деятельности. Например, льготами по налогу на недвижимое имущество в г. Клайпеда пользуются лица, осуществляющие деятельность в старой части города, связанную с развитием туризма.

Заключение

Самоуправления в Литве имеют в своем ведение собственные публичные финансы, основным источником которых являются налоги. На основании проведенного анализа, однако, следует сделать вывод, что органы самоуправлений зачастую (за исключением налога на недвижимое имущество и налога с доходов от деятельности которая осуществляется при наличии предпринимательского свидетельства) ограничены в области регулирования сбора своих доходов от налогов, так как основные элементы налогов (налогоплательщиков, налоговую базу, ставку и др,) вправе устанавливать исключительно Сейм, руководствуясь исключительными полномочиями, предоставленными ему Конституцией. Вследствие этого сдерживается

фискальная инициатива и ответственность органов самоуправлений, их деятельность в сфере публичных финансов теряет свою эффективность[26], а уровень фискальной децентрализации в Литве признается недостаточным[27]. Финансовую самостоятельность самоуправлений ограничивает и то обстоятельство, что доходы от налогов, зачисляемых в местный бюджет (земельный налог, налог на недвижимое имущество и др.) составляет лишь незначительную часть (до 10 процентов) доходов местного бюджета.

Вместе с тем следует не забывать, что расширению компетенции органов самоуправлений в области регулирования налогов препятствует не только то, что исключительные права в сфере налогового регулирования Конституцией и налоговым законодательством предоставлены органам центральной власти, но и объективные обстоятельства, - в первую очередь недостаточная компетенция местных политиков и служащих органов самоуправлений[28].

Несмотря на то, что в местный бюджет зачисляется государственный сбор за услуги, предоставляемые органами самоуправления (выдача лицензий, регистрация актов гражданского состояния), органы самоуправлений не имеют никаких прав по регулированию этого налога. Думается, что в целях повышения фискальной самостоятельности самоуправлений следовало бы пересмотреть действующее регулирование и предоставить право советам самоуправлений самостоятельно устанавливать размер (ставку) государственного сбора за предоставляемые органами самоуправлений услуги (в настоящее время таким правом пользуется Правительство), придерживаясь порядка, установленного в статье 5 Закона о сборах: „Государственный сбор устанавливается в размере не менее 3 литов и не более 270 тыс. литов и исчисляется с учетом расходов, связанных с предоставлением услуги, которые составляют расходы: 1) на оплату труда, связанного с предоставлением услуги; 2) на изготовление бланка документа, обладающего юридической силой; 3) на проверку выполнения установленных правовыми актами требований“.

В основном деятельность самоуправлений в области регулирования налогов связана с решением вопроса о предоставлении налоговых льгот. Думается, что советам самоуправлений в своих решениях о предоставлении налоговых льгот следовало бы указывать мотивы принятия таких решений, что способствовало бы реальному воплощению принципа искоренения злоупотребления властью, означающего, что институциям местной власти запрещается принимать решения по своей компетенции в целях, противоречащих

[26] BUŠKEVIČIŪTĖ, E. *Mokesčių sistema*. Kaunas, 2005, p. 208.
[27] DAVULIS, G. Lietuvos savivaldybių finansai: struktūra, raida, perspektyvos. *Lietuvos statistikos darbai,* 2006, nr. 45, p. 32-40.
[28] ASTRAUSKAS, A. Vietos savivalda ir vietos savivaldos problemos Lietuvoje. *Viešoji politika ir administravimas*, 2002, nr. 3, p. 71-81**;** DAVULIS, G. Lietuvos savivaldybių finansų analizė fiskalinės decentralizacijos požiūriu. *Ekonomika ir vadyba: aktualijos ir perspektyvos*, 2004, t. 4, p. 69–78.

законом установленным целям. Тем самым практическое воплощение получил бы один из основных принципов самоуправления, закрепленный в статье 4 Закона о местном самоупралении – принцип прозрачности деятельности, означающий, что „деятельность органов самоуправления и других субъектов публичного администрирования самоуправления должна быть ясной и понятной жителям самоуправления, которые интересуются этим, для них создаются условия для получения разъяснений по поводу предпринимаемых действий и причин этих действий“.

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Management of Municipal Property in the Czech Republic

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Abstract: This paper shall focus on the issue of municipal property management in Czech municipalities. The text aims to describe the situation in the Czech Republic, however it could be said that ideas provided in this paper could be applicable and useful generally regardless of the state territory.
At the beggining, explanation of basic terms is given and principals of municipal property in the Czech Republic are presented. A brief introduction to regulation of municipalities is provided including presentation of rules and limitations which apply to management of municipal property by the representatives of a municipality. Certain recommendations and suggestions for good and effective municipal management are included.

Keywords: municipality, municipal property, local tax revenues, income, debts.

1. Municipality

Municipality is described as a public corporation that constitutes a basic unit of public administration. Hence it is a community of citizens living in the same territory and exercising its right to self-government.

According to the Czech Civil Code (the basis of private law regulation) municipality has a status of an artificial person. Czech municipalities, in their present form, originated in the middle of 19th century (1850) when the reform of the public administration was realized and municipalities, as basic administration units, were created. During the following period additional competencies for municipalities (such as „transferred“ competencies from some branches of the state administration) were defined. For example: profits from business operations utilizing municipal real estate, a specific share of state taxes, communal housing rental and local taxes and fees were defined to be revenues of municipalities (by the 1867 Constitution of Austro-Hungarian Empire)[1].

Further, following the establishment of the independent Czechoslovak Republic, self-government territorial units (including muncipalities, regions and districts) were established. This brought strengthening of democratic principles of

[1] Local Governments in Central and Eastern Europe: Local Government in the Czech Republic. p. 258. Available at http://lgi.osi.hu/publications/books/decentralization/Chapter%206.pdf .

public administration, counting also principle of independence from the state administration and principle of elected representatives.

The substantial turnover happened in 1948 when the local government system in the Czechoslovak Republic was completely annihilated. New system of public administration was brought and all of the administration was given to the local, district and regional national committees which performed both the state and local administration.

It took more than 40 years to bring the administrative power back to local communities and its bodies. New local government principles were introduced after 1990, in time of many reforms and legislative changes, following the revolution in the Czechoslovakia (and also following the dissolution of it and establishment of the independent Czech Republic). Municipalities have been defined as autonomous economic entities.

The new powers and independence brought many novelties which could cause some troubles to municipalities. Suddenly, they became owners of property with all rights derived from the status of ownership. Municipalities were given their property which they possessed in the year 1948, and further they were also given some of other property previously owned by the state[2].

2. Contitutional guarantees

Municipality, as a public corporation, comprises of its personal base and economic base. Personal base means all the members of a municipality corporation, i.e. its citizens. To be able to exist and serve to the needs of its citizens, a municipality requires an economic base.

The basic guarantees for local government are given by the Constitution of the Czech Republic (Act no. 1/1993 Coll.). It says that municipalities are „basic territorial self-governing units“ that shall be „independently administered by their representative body“ and that municipalities „may own property and manage their affairs on the basis of their own budget“.

The right to ownership is guaranteed also by the Deed of Basic Rights and Freedoms where the ownership of all owners is declared to be on the same level of protection.

The status and power of local government are defined strictly by law, so the power of local government can be determined only by law and can not be determined by any secondary regulation.

[2] The special law was issued that enumerated certain state property transferred to municipalities.

3. Regulation

The public administration is performed by state administration (central) and by local self-administration. This local administration is represented by two different levels: district and local. As regards the local self-administration (municipalities), it was enpowered to perform certain responsibilities of the state administration under the supervision of the state district administration. In case of executing the transferred competences, municipal representatives are bound by law and by guidelines and decisions of the state government. When executing the self-government power, municipal representatives are bound by law and by the interest of their citizens.

Municipalities are defined by the terrritory of the municipality. The main regulation is set by the Act no. 128/2000 Coll., Municipalities Act[3].

The practical implementation of basic principles in the economic sphere enables the municipality to:

- draft and approve municipal budgets and financial reports;
- freely allocate funding for services to meet public demands;
- use municipal real estate and other property to further the development of the municipality;
- approve the membership of municipal enterprises and foundations and oversee their financial activities;
- determine local fees (local taxes).

In order to implement these tasks, the municipality may:

- own real estate;
- acquire financial resources;
- independently administer its budget;
- establish municipal budgetary organizations.

4. Long-term plans

Municipal representatives must have a plan for the development of the municipality, including financial affairs and property disposals. Question is whether the long-term plan to use and utilize municipal property, once approved, should stay unchangeable, especially when reflecting changes after elections.

In theory, it would be ideal if the plan resists (especially good plan) irrespectable of passing the election term. Contrary to the theory, we often witness significant changes after elections, when newly elected representatives cancel previously adopted decisions and replace them with new plans. Definitely, they have the right to do that. Therefore plans and conceptions are commonly subject to substantial changes every four years when elections of municipal bodies take place.

[3] The capital city Prague is subject to special regulation, it is not subject to the Municipalities Act.

From this perspective it is better when long-term contracts are concluded only for a limited time of duration. It should not overlap more election terms to enable changes or amendments in a future. Concluding contract for very long time might cause troubles in future, especially when termination of the contract is not possible. During the time conditions might change and the contract might not bring required profits to the municipality. Or another potencial contractor could be found that offers better conditions. For these reasons it is not good to enter into contracts for longer terms, unless there is some reasonable explanation for doing that.

5. Municipal representatives

The municipality is represented by its representatives. The highest authority of the municipality is the assembly – it comprises of representatives directly elected by citizens. The assembly is authorized to decide only in the scope of issue within the independent competence.

The executive activities lie on the municipal council, elected from the members of the assembly. From the members of the council mayor and his deputy are elected by the council. In small municipalities the powers of council are performed by mayor and the council is not in place.

6. Property

To determine what exactly could be called as municipality property, the definition is not easy to find. Usually the general legislative definition of property is used. Hence the property covers all things, rights and other property values.

According to the Municipality Act, a municipality has an obligation to take care of creating conditions for social care development and for satisfaction of demands of its citizens. This means especially needs of housing, health, transport, communication, education, culture and security. This implies, that a municipality is not created to generate business profits. Its primar goal is to provide and create conditions for social and economic development of the municipality and its citizens.

This is the difference between municipalities and business enterpreneurs. This does not say that a municipality can not run business and gain profits. A municipality is allowed to have business profit other than tax profit. However, the fundamental goal must be still the satisfaction of social, cultural and economic needs of citizens. Therefore it is essential for the municipal representatives to find the proportion of this goal and business activities.

When making any disposals with property of the municipality, the municipality performs within its independent competence. Any decision in this field can not be deemed as administrative-law decision, since it lacks the element of administrative superior power. In this case the municipality acts on the same level as other contractual parties.

7. Property management

The financial management of municipality is regulated by special law (Act no. 250/2000 Coll.) which imposes rules for preparing budgets of self-governmenting entities.

Being a public corporation in the interest of its citizens, municipality has to comply with basic rules set by the Municipality Act. In each municipality, there must be an annual budget and financial management must follow the approved budget during the year. Also a municipality must carefully monitor its claims and receivables and manage them properly.

To fulfill the requirement for transparency, rules for accounting and audit procedures are imposed and municipalities have to follow it.

Further, certain limitations are imposed by the Municipality Act when disposing the municipal property.

Revenues

Since the aim of a municipality is not to run business activities, the most important part of revenues should be represented by tax income. The authority to impose and levy certain taxes could be derived only upon law. In respect of municipalities, a special regulation exists that declares which tax revenues do pass to municipalities[4]. This law stipulates also the rate of national tax revenues that passes to municipalities.

This rate is derived from few parametres. The main parametre is a number of all citizens (those who have registered in the municipality) and the other is the size of a munipality.

The regulation has special incentives for municipalities and should support the activity of municipalities. The more interesting for businessmen and for employees the municipality is the more revenues from taxes it can get. The rate which municipalities take share on the national tax income depends on number of businessmen with their place of business in the municipality and on number of employees in the municipality. This shall be the incentive for municipalities to encourage business on their territory.

The other way how to increase tax revenues for a municipality and bring more money that could be used within municipal budget is the issue of local taxes. Local tax and its rate are a matter, that can be influenced by the municipality itself, unlike national taxes – rates of national taxes are set by the state.

There are two ways how a municipality can influence its local taxes.

One way is the possibility to impose local tax. This possibility is given to municipalities by law (since all taxes must be stipulated by law according to the

[4] Act no. 243/2000 Coll., on Budgetary Determination of Taxes

constitutional principle). It is important to say, that a municipality has a right to impose certain local taxes but it does not have any obligation to do so.

The legal basis for a local tax is the law and the municipality imposes the local tax by its own legal document (guideline of the municipality, which is generally binding). This guideline is issued within the competence of the municipality to act independently.

There are 9 different local taxes defined by law that can be imposed within municipality. Only these 9 local taxes could be introduced, any other kind of local tax would be illegal and unconstitutional.

Tax revenues (national taxes and local taxes) usually represent around half of the revenues. The other revenues could be: revenues from administrative fees, grants and donations, revenues from business activities and from investments[5].

Expenditures

Expenditures are dependent with the sum of incomes, reserves cumulated in the past and also with the possibility of liabilities. The final structure of expenditures corresponds to the preferences of the representatives (and citizens). According to the statistics from the past years[6] the biggest share on expenditures goes on citizen services (education, health, housing, waste disposal) – nearly half of all expenditures. About quarter of expenditures is given for administration (running costs). There is a difference in expenditure structure in small municipalities and large cities.

Property disposals

The authority to decide on disposals with municipal property is generally handed to an assembly. Consequently, the assembly is responsible for management of the property. If any illegal practise shall be committed while disposing the property, even a criminal penalties could be imposed on the member of the assembly (in case that criminal offence is proved, including the intention to act illegally).

In case a municipality wants to dispose its real estate property (disposing includes sale, donation, rent, lending or exchange), this is firstly notified by a council. The intention of disposal has to be notified in advance by the means of the official notice board (at least for 15 days before the final approval for disposal with the property is declared by an assembly). After the notification is published, potencial applicants for this offer can provide their offers to the municipality. Proper notification is essential for achieving the aim of disposal with the property, because the law expressly stipulates the

[5] Porovnání příjmů obcí podle velikostních skupin (Comparison of municipal revenues according to the size). Available at http://www.dvs.cz/clanek.asp?id=6370456.
[6] Výdaje obcí – porovnání vývoje a struktury obecních výdajů (Expenditures of municipalities).Available at http://www.dvs.cz/clanek.asp?id=6346154.

consequence if the notification has not been done properly. In case of improper process of previous notification, the disposal with the property is considered to be invalid from its beginning.

The importance of the notification could be explained by the initial objective - why awaited disposals have to be notified. Announcement of the information shall serve as a kind of control mechanism. It is the principle of transparency. Anyone is then able to perform the public control – what disposals the municipality does and the circumstances of it. In addition this also makes the opportunity to anyone to take part, submit their application and become a contracting party.

The other importartant fact in case of the abovementioned property disposals is the price. A municipality must manage its property in the interest of its citizens and according to its purposes. The Municipality Act imposes the obligation to contract such price which is common at the place and in such time. In case that price is concluded in any excess to the common price, such difference has to be explained. However, the law does not provide any details to whom and how the explanation should be made.

This is a real problem in many cases. Selling or renting municipal property at price much lower than the common price occurs quite a lot. Despite control principles that should eliminate these situations, it still happens. Some of these suspicious transactions are revealed by media, some are revealed by audits. However, it is quite rare that any illegal performance is proved and any criminal offence is declared.

Sale of property requires approval of an assembly, however rent is subject to approval by a council. In certain situation also rent could be subject to approval of an assembly – mostly in cases when the assembly reserves the right to decide on rents. This is quite useful in important rents of municipal property.

Question is, what exactly should be approved by the respective bodies. Sometimes only the fact of transactions is approved but the rest of the transaction is not dealt by the decision. However, details of the transaction (disposal) could be crucial for the final benefit of the transaction.

To follow the primar objective of the approval (i.e. to manage financial issues properly and take responsibility for it), it must be recommended that all relevant details should be decided in advance and approved. This comprises the price, the possibility to withdraw, the term (in case of rent), the possibility to terminate the contract and of course the payment conditions.

Payment conditions are crucial for financial management, especially in case of sale or purchase. The moment when a municipality receives the money can make a big difference. It might be paid in advance or the payment can be delayed and linked to certain conditions. This is crucial for further financial planning and budget preparation. Therefore decision on payment conditions should definitely be taken in the same time as the approval for the transaction.

It might not be clear whether the same abovementioned requirements apply also in case, when a municipality becomes obliged to enter in the certain contract in a future (could be also called as „pactum de contrahendo“). The answer is not difficult to find, if we think about the sence and aim of an approval as a requirement for property disposals. Since the obligation to enter the disposal contract in a future leads to disposal with the property, all legal requirement for property disposal need to be met also for these future obligations.

Situation is similar in case of purchase or in case of acceptance of donation. Approval of the relevant representative body is required.

To provide an example: The municipality would like to rent its building and prefers the tenant to be a provider of education services and language lessons. The council chooses the applicant that promise to run a language school. The approval of the council reads only for renting the building to the company. The rest is, as usually, left on further contraction process made by municipal officers. Unfortunately, they prepare the contract without including the duty of the tenant to run a language school. In that case, there are no instruments to force the tenant to follow the promised intention if this is not included in the contract.

At this point, it is recommended ensure the contract documentation is well prepared. It should not be prepared only by officer but specialist (lawyers) should be involved to ensure all aspects of the transaction.

Eventually, the contract in its final version might be reviewed again by the assembly (or council) to make sure that it fulfills the original intention of representatives. This step is not necessary in minor affairs, but could be helpful in case of important and crucial contract with significant financial impact.

Sale of real estate

Sometimes a municipality decides to sell its property. In respect of real estate, there can be several reasons why a municipality chooses to sell real estate, although real estate is ussually of great value. It could be the reason that municipality needs money instead of owning the real estate. Or the estate can be so expensive to manage and renovate, that the municipality can not afford it.

One of recommendation is to sell the estate by the means of auction (even electronic) which is public and provides enough transparency when choosing the purchaser. This is good in case the best offer is chosen only upon the offered price. Of course, they might be some restrictions when the auction could not be used, e.g. in case of rented real estate when the tenant has pre-emptive right. The experience with this way of sale is rather positive, since the revenues from sales are much higher than in other traditional ways of selling.

It can happen that the buyer offers less money than is the value of the estate (valuation). Such sale is allowed. However representatives shall weigh all relevant circumstances, if the sale is really urgent and neccessary. They have act as good managers in the interest of the municipality and their citizens.

If all legal requirements are properly met, real estate can be sold for lower price than valuation. The only legal requirement is the approval of the municipal assembly. It si understandable that the price does not need to be neccessarily the only criterium for choosing a buyer. Other conditions can prevails, for example future utilization of the estate. In this case it is highly recommended to take care of subsequent contracting process, as already mentioned above. The municipality and its officers should insist on including the promise of the buyer in respect of the future utilization into the contract. If they fail to do so the buyer might breach the earlier promises and might change the utilization substantially. In that case municipality does not own the real estate any more and the estate can not be used as planned and needed. There are no legal instruments how to force the buyer to keep former promises and moreover, the municipality looses money on the sale due to the lower price.

The contractual guarantee could be agreed as right to withdraw from the contract if the conditions are not fulfilled, or right to ask the resale of the estate to the municipality.

In respect of the future development of the municipality, representatives should ask what to do with the money gained from the sale. They should have an idea of this even before the realization of a sale. From the perspective of municipal financial management, money should be used for further development of the municipality. In general, it is not effective to use is as a source for financing running costs.

Indepedence

Some people are that opinion the decisions of assembly or council should be viewed and supervised by any other entity. Although this might seem to be a good solution to eliminate any ineffective decision regarding the property, it seems to be good only at the first sight. One can argue that there is no guarantee that the supervisory entity would possess an unbiased status and would be able to decide in the best interest of a municipality (question is if this could be decide at all). Other argument against introducing a supervisor, and must be said that this is an essential one, is the principle of self-government. The municipality is given a self-government status which means a right to decide its questions independently. Should the independence be breached in any way, it would mean an offence against the self-government principle.

Right to decide independently on internal matter also means the responsibility for such decisions. Therefore we can see that some of the municipalities in the Czech Republic did not performed their financial management very well and now they have to

face their responsibility for previous decisions. They are not able to pay their debts and it is possible that they will be forced to declare bankruptcy.

Movable assets and valuable rights

Municipal property includes also movable assets and valuable rights. Representatives must ensure that management of the property effectively deals with these parts of property as well. For instance rented assets. Special control mechanism shall be introduced and the rent contracts should be subject to control on regular basis. It should comprise whether rent are paid properly and whether conditions of the rent are followed.

8. Indebted municipalities

Municipalities are public corporation with their own property. When disposing and managing their property they act in their name and on their own responsibility. They are responsible for their budgets and their financial statements.

Sometimes situations occur when debts (expenditures) are higher than the assets and municipal property. It can even happen that a municipality is not able to pay its liabilities anymore.

The Czech state tried to introduce number of preventive instruments to eliminate the abovementioned situation of municipal debts, among which were also the transparency and control principles in case of property disposals. Although certain instruments exist, it does not mean that an indebted municipality can not occur. It happens in the Czech Republic and according to the latest statistics, number of municipalities endangered with bankruptcy has increased.

The Czech Ministry of Finance has introduced a specialist monitoring that analyzes and shows the financial management of municipalities and their budgetary organizations. It has been used since 2008. This monitoring has replaced previous system of indebtedness monitoring (2004-2008). The monitoring currently used is based on 18 different parametres which of them the liquidity and liabilities are most important. According to last results, 66 municipalities in the Czech Republic showed indebtedness at high level.

Indebtedness in large extend can cause serious troubles and consequences to the municipality and its citizens. Services provided within the independent competence could be canceled (it might be the public lightening, keeping paths and communications, waste disposal). Execution might be declared on municipal property which probably mean that the municipality would loose the property.

Indebtedness of municipalities causes trouble on national level as well. The debts of municipalities might be linked to national government debts. Government has

certain international obligations to have balanced budgets, including budgets on a local level. Therefore even state has interest in solving the threat of municipal debts.

Currently, Czech law does not have instruments to deal with bankruptcy of municipalities. Recently the Ministry of Finance announced its intention to prepare a special law to be applied in case of municipal bankruptcy. The law is still in preparation process, only its principles were published. The law intends to comprise preventive instruments, regulation of hight indebtedness situation and also the regulation of bankruptcy process.

9. Summary

In the Czech Republic, it is needed to perform an effective management of financial affairs in municipalities. Municipalities are public corporations with their own property. As regards management of the property, municipalities act in their name and on their own responsibility.

When disposing the property they are subject to private law and private law regulation, however some limitations exist. It is because municipalities serve special purposes in the public interest and they can not act in the interest of an individual. All property and financial management must be done in the interest of the municipality as a whole, its citizens and in the interest of future development. Therefore profit and business principle can not be at first place when dealing with property.

This text provided few recommendations for proper, effective and transparent management. They can be applied generally, not only on the Czech territory. They are inspired by troubles that sometime occur in the course of municipal financial affairs.

Municipality can come into situation, that the management does not work effectively and debts can overrun the incomes. The regulation in the Czech Republic is not prepared to solve the situation of indebtedness of municipality, but the government is aware of this demand and legislative process to issue a special law has already started.

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Autonomy of the Local Government Tax Bodies in Poland

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Abstract: This article applies to fiscal autonomy of local government in Poland. We analyzed self-government powers of tax authorities, which are the manifestation of local autonomy, i.e., the relative autonomy against state power. It also identifies the scope of these powers, which is limited autonomy. In the author opinion, the condition of financial independence is to create a clear mechanism to assess and collect local taxes and fees that directly links public budgets (municipalities, districts, provinces), and clear rules for tax preferences.
The author postulates elimination of two-tier structure of authorities for local tax collection, and to provide full administrative privileges in this regard to local government tax authorities.

Keywords: local government tax administration, autonomies.

1. Introduction

Public tasks at the lowest possible level of public authority are one aspect of the subsidiarity principle enshrined in the Polish Constitution[1] and the European Charter of Local Self-Government[2].

The concretization of the political system of this rule shall be the principle of decentralization of local government as expressed in art. 15, paragraph 1 in conjunction with art. 16 paragraph 2 of the Constitution. In this (systemic) sense it can be understood as a form of organizational decentralization of administration, in which different actors have clearly defined the administering powers established or transferred from other (higher) statutory bodies.

Tasks of the state governments passed by are not implemented on an autonomous and independent way, but within the statutory definition of supervisory body[3].

[1] Preamble of the Polish Constitution of 2 April 1997 (Journal of Laws No. 78, pos. 483 with amendments.) - further appointed as the Constitution.
[2] European Charter of Local Self-Government of 15 October 1985 (Journal of Laws of 1994 No. 124, pos. 607) - further appointed as EKSL.
[3] A. Błaś, J. Boć, J. Jeżewski, Public Administration, Kolonia Limited 2003, s. 185; J. Zimmermann, Administrative Law, Warsaw 2008, p. 133.

One of the most important conditions that guarantee the autonomy of local governments is to ensure their own income and possible influence on their amount. Rightly, it is noted that to granting such permission to local government powers shall mean the state government participation in the real exercise of power[4]. We currently do not question the granting tax powers to units of local government. Solutions provided in EKSL (Article 9, paragraph 3) and the Basic Law (Article 168 of the Constitution), consistently and clearly indicate that the revenues of local governments at least in part, should be the local fees and taxes, and these units have the right to determine their amount to the extent specified in the Act. But the manifestation of the power of financial self-government in respect of taxes is not only competent to take over receipts from individual taxes and regulation of local tax regulations (including the shaping of tax rates). A crucial element of the power, providing for autonomy and independence from central government authorities are also the powers enjoyed by local communities to administer the various government taxes and fees[5].

The subject of this study is to analyze the competence of the local tax authorities, which are the manifestation of local autonomy, i.e., the relative autonomy from state power, as well as an indication of where the independence of these powers is limited.

2. Local government tax authorities in Poland

The autonomy of local government tax administration as a consequence of decentralization and autonomy can be considered from the point of view of the political system, the task force (competency), and procedural aspects.

Given the ***systemic aspect*** so called the independence of local government tax authorities of state bodies should be emphasized, that is the independence from bodies that are subordinate to Minister of Finance. Art. 13 o.p. (Tax Ordinance) shows the division of tax authorities in two divisions, namely: state tax authorities subordinate to the Minister of Finance and local tax authorities. Into the latter category belongs the mayor, mayor (president), the governor and speaker of the region and local government appeals board. It should be noted, however, that credit for the tax authority of the district (county, poviat) governor and speaker of the region was associated with the reform of local government introduced in Poland in 1998[6]. The location of the structure of these local tax authorities is enshrined in Article 13 o.p. fiction, because the current

[4] L. Etel, The boundaries of the power units of local government taxation in the light of Article 168 of the Constitution, in: Constitutional determinants of the creation and use of financial and tax law (ed. P. J. Lewkowicz, J. Stankiewicz), Bialystok 2010, p. 379.

[5] A. Borodo, Competences to take over tax revenues and other fiscal powers of local governments, in: Ius suum quique. Legal-financial studies. Jubilee book dedicated to prof. W. Goronowski), Warsaw 2005, p. 150.

[6] Act of 5 June 1998, the county government, (t. jedn. Dz. U. z 2001 Nr 142, poz. 1592 with amendments.); Act of 5 June 1998 on the voivodship self-government) (t. jedn. Dz. U. z 2001 Nr 142, poz. 1590 with amendments).

legal state of the district and province do not have their own taxes, and the governor and speaker of the region do not perform the functions attributed to the tax authorities. Include them in this category results from the competence to make decisions in individual cases in public administration[7].

The active local government tax authorities are tax authorities that are exclusively competent to carry out taxes due the municipality, i.e. the mayor, town mayor (city president). These persons are also, based on article 39, paragraph 1 of the Local Government[8] authorized to take decisions in individual cases, including the public levies which revenues the municipality.

In local government tax authority the unique position has got the local government appeals board. It is the only currently functioning tax authority acting as a collegial body. The rules governing the activities of the colleges were established in the Act of 12 October 1994 on local colleges appeal[9]. The colleges are state appeals budget units, which are subject to administrative supervision exercised by the Prime Minister. He also appoints members of the College among the candidates selected through a competition and submitted at the request of the President of the College submitted after obtaining the opinion of the General Assembly of the College taken by secret ballot. In accordance with article 18 u.s.k.o. college composed of three rules in the form of a decision or an order following the hearing or session.

Analyzing the ***aspect of task (competence)***, autonomy of local government tax authorities refer to the art. 26 of the Local Government Act. It shows that the mayor (town mayor, city president) is a body of the municipality, not a municipal council, as is sometimes erroneously believed. This means that the mayor has some own (autonomous), a wide sphere of action, which does not execute the resolutions of the board, but performs its own task imposed on him/her by law[10]. Pursuant to article 13 § 1 point 1 o.p. mayor, town mayor (city president) is the tax authority pursuant to its jurisdiction. Therefore has a clearly defined original jurisdiction, local and functional, acting as a body of first instance. Municipal tax authorities carry out most of the taxes granted by law to the municipality acting on its behalf and for their benefit. They are also addressed to the local tax law and a representative of the community in legal-tax relation taking place between it and the taxpayer[11]. The basis for establishing this relationship is tax law in the form of positive law-creating local acts. In science, administrative law lists the competence and jurisdiction as a feature without which organizationally separate entity and acting within the public administration can neither

[7] Zob. art. 38 ustawy o samorządzie powiatowym oraz art. 46 ustawy o samorządzie województwa.
[8] Full test Dz. U. z 2001 Nr 142, poz. 1591 z późn. zm.
[9] full text Dz. U. z 2001 Nr 79, poz. 856 z późn. zm. – further appointed as u.s.k.o.
[10] Zob. A. Szewc, T. Szewc, Mayor, town mayor, city president, Warsaw 2006, p. 174 .
[11] L. Etel, Resolutions of the local government tax, Bialystok 2004, p. 30; także w stosunku prawnoopłatowym. Na temat władztwa opłatowego gminy zob. W. Miemiec, Tax power in the municipality levies a public character, in: The problems of the financial law evolution in Central and Eastern Europe within the integration processes, CD-rom, Wilno-Białystok 2004, p. 9.

be called a body, but these concepts are not identical. While competence is described as the ability of the body to the one made by law duty to act, the right and obligation to use certain forms of administrative action, this property is the realization of these powers, consisting of the diagnosis and resolution of matters in administrative proceedings, or the application of administrative law by specific acts for enacting its standards (administrative decisions)[12].

The above considerations also apply to the ***procedural aspect*** of administrative autonomy of local government tax authorities. Because it is undisputed that the property, indicating the type of tax matters for decision and setting the position of authority in two-tire administrative (tax) proceeding, is an institution of proceedings.

Original jurisdiction of the tax authorities in accordance with article 16 o.p. is determined according to the rules determining the scope of their activities. Thus, the legislature has not left free determining subject matter jurisdiction by referring tax authorities to relevant regulations defining their scope of action. Subject matter property was set primarily in the substantive law governing the various taxes. Article 1c u.p.o.l[13] explicitly states that the competent tax authority on taxes regulated in the Act - i.e., property tax on means of transport, the charges of possession of dogs, toll, local, spa, administrative - is mayor (town mayor), city president. These authorities are also competent in matters of agricultural tax (Article 6a u.p.r.[14]), forest tax (article 6, paragraph 1 u.p.l.[15]) and stamp duty (article 12, paragraph 1 u.opł.sk.[16]). However the art. 13a u.p.c.c.[17] establishes the head tax officer as a competent tax authority in matters of tax on civil law, although the tax goes to municipality. Identical to the above solution for the subject matter jurisdiction provides art. 17a u.p.sp.dar.[18] Specifying the property tax authority in the tax on inheritances and gifts, as well as the collection of income tax paid in the form of a tax card. These are unique situations in which the taxes are administered by the municipalities which form the state income tax authorities (broadly: the further below).

Municipal tax authorities are obliged to comply with the office and the local subject matter jurisdiction (article 15 o.pp). They should therefore control its jurisdiction to conduct the affairs of the tax law until its completion, and if they do not

[12] J. Zimmermann, Administrative law, Cracow 2005, p. 120.
[13] The Law of 12 January 1991 on Local Taxes and Fees (tekst jedn. Dz. U. z 2010 r. Nr 95, poz. 613) – further appointed as u.p.o.l.
[14] Act of 15 November 1984 on agricultural tax (Dz. U. z 2006 r. Nr 136, poz. 969 ze zm.) – further appointed as u.p.r.
[15] Act of 30 October 2002 on forest tax (Dz. U. z 2002 r. Nr 200, poz. 1682 ze zm.) – further appointed as u.p.l.
[16] Act of 16 November 2006 on Stamp Duty (Dz. U. Nr 225, poz. 1635 ze zm.) – further appointed as u.opł.sk.
[17] Act of 9 September 2000 on tax on civil transactions (t. jedn. Dz. U. z 2010 r Nr 101, poz. 649 ze zm.) – further appointed as u.p.c.c.
[18] Act of 28 July 1983 the tax on inheritance and donations (t.j. Dz. U. z 2009 r. Nr 93, poz. 768 ze zm.) – further appointed as u.p.sp.dar.

have the jurisdiction they must withdraw from the jurisdiction of its continuation and to refer the matter to the competent authority. This duty arises from the need to preserve the principle of two instances of proceeding and organization of the tax division of tasks between the tax authorities.

Autonomous powers of municipal tax authorities in the administration of taxes are related to the need to ensure the municipality the revenue needed to perform its tasks. Determining the amount of local taxes and charges can be implemented by the municipality by determining the structure of taxes. These is not just about deciding on the amount of taxes by setting up local laws and pass resolutions on the rates, but also making the individual decisions by municipal tax authorities on the granting of relief in repayment of taxes and local fees and on the remission of tax arrears[19]. Eligibility for the tax administration also express (or perhaps especially) in time and collecting local taxes and charges (as property), in prosecuting the tax, carrying out tax inspections and making the checks, in particular with respect to taxable persons self-calculations, and leads to declare the tax due for the relevant municipality.

Competence of mayor (president) as a municipal tax authorities having jurisdiction in the first instance are mainly due to provisions of the Tax Code (Tax Ordinance), and sometimes also with the provisions of the various tax laws (Law on Local Taxes and Fees, Law on agricultural tax). Shaping the directions of tax policy in the community they issue also interpretations of tax law provisions relating to taxes according to local government owned properties. In the following competencies of local tax authorities will be presented, which are the manifestation of local autonomy and conducted under the procedures, and also areas in which this autonomy is considerably limited will be indicated.

3. Powers to assess and collect local taxes and charges

The competence of the administration of taxes and government fees are associated primarily with their dimension and power consumption. The problem that the public authorities should make assesses and collect the various taxes are not new. The literature emphasizes that the size and power consumption of the main taxes of the financial system should belong to the state bodies, because of the need for uniform collection of these taxes by specialized tax services. Municipalities should be left to the administration of petty local taxes or taxes of simple construction, and also when it is justified to use the consumption tax from the organizational structure of local government, against poor government extended the tax apparatus. In consideration of these points the need for uniform interpretation of case law and tax law is also drawn. For this reason, it is pointed out that the size of taxes should be in units of a centralized state apparatus of the tax, and not many of the tax authorities of municipalities. On the

[19] L. Etel (op. cit.), The boundaries of the power …, p. 382.

other hand, taxes owed to municipalities, but meted out by state tax authorities, should be administered by municipal authorities in so far as reducing their impact on government revenue (cancellations, deferrals)[20].

In my view, granting powers to assess and collect municipal taxes due to the tax authorities have the constitutional regulation, giving the units of local government the right to set their own taxes in the statutorily defined (article 168 of the Constitution), and pointing to the bodies performing the tasks of the municipality, including the power of taxation (article 169 paragraph 1 of the Constitution). Concretization resulting of these competencies in the performance of the municipal tax authority is according to the provisions of the Tax Ordinance and various tax laws. The real estate tax, agricultural tax and tax forest where taxpayers are individuals, to a tax liability is necessary to service their decisions fixing the amount of this obligation (article 21 § 1 point 2 o.p.). Mayor, town mayor (city president) makes the tax for that year based on information submitted by taxpayers. The decision is a constituent. As a result of its delivery taxpayer is obliged to pay the tax in the amount resulting from the decision. Moreover, from the date of notification of the decision fixing the date of substantive counts is to pay the tax (14 days from the date of delivery), and the procedural deadline for filing an appeal against that decision[21]. Municipal tax authorities may also issue decisions on the amount of tax liability only in case of these taxes and fees, which tax liability arises under the law.

As a rule, the tax authorities, which effectively made the assessment, are also entitled to its collection and enforcement. It is the benefit on the full of the power of taxation. Special provisions[22] bring different rules for the collection and transfer of tax revenue when the tax revenues of municipalities forming - i.e. a tax on civil law transactions, tax on inheritance and gift tax personal income paid in the form of a tax card - administered by the heads of tax offices. In my opinion, these are not suitable solutions for municipalities. The dimension and local taxes are the decisions of the government agencies. Municipal tax authorities have been deprived of influence on the process of implementation of these taxes by the heads of tax offices. It is accepted that taxes are too complicated to municipality could cope with their dimension and consumption Power, and they need expertise and technical support. In practice, however, municipalities deal with the administration of much more complex real estate tax or agricultural tax.

[20] A. Borodo (op. cit), Competences … , p. 157.
[21] More in: M. Popławski (ed.), Establish and use tax law in the municipalities, Bialystok 2007, p. 69.
[22] Act of 13 November 2003 on revenues of local government units (t.j. Dz. U. z 2010 r. Nr 80, poz. 526 ze zm.) – further appointed as u.d.j.s.t.

Presented below are the rules for the collection and transfer to municipalities the revenue of these taxes by the heads of tax offices:

- the revenue of local governments, which on the basis of separate provisions are collected by tax offices, are discharged on account of the budget of the local government unit within 14 days from the date on which contributed to the account of the tax office (article 11, paragraph 1 u.d.jst.),
- the tax officer to local government units shall, at the request of Chairman of the Board or local authorities, quarterly report on the status and timing of revenue collected by the office (Article 12 u.d.jst),
- if the revenue collected by tax offices for local government units will not be passed within the statutory period, the unit of local government are entitled to interest at the rate determined as for tax arrears (article 13, paragraph 1 u.d.jst),
- the tax authority shall be deducted from current revenues owed to the municipality the amount given to the inheritance tax and gift tax or tax on civil law, taxpayers paid as reimbursement or reimbursement of overpayment of tax (article 17, paragraph 1 u.d.jst),
- if within 2 years from the end of the calendar year in which the return overpayment or refund the tax deduction was not the entire amount paid to the taxpayer, the municipality is obliged to return once the amount received unduly tax authority.

The accepted mechanism for the collection and transfer of taxes to municipalities made by the heads of tax offices significantly reduces the administrative autonomy of these bodies. It is important because, from a procedural standpoint and economically, that all taxes on income budgets of the municipalities forming were carried out directly by the municipal authorities.

4. Deciding on tax preferences

The provision of art. 18, paragraph 1 u.d.jst indicates that on the provision of tax relief, redemption, unfolding in instalments and deferred payment terms receivables from taxes and charges which constitute the revenue of local governments, as well as exemption from the obligation to collect or to restrict the collection of these receivables, the provisions of the Tax Ordinance is used. Municipal tax authorities have, in the first instance, therefore, in the administration of local government tax, authority to:

- the deferment of tax payment or distribution of the tax in instalments, or spread,
- deferral of instalment payment of tax arrears, including interest for late payment or interest referred to in the decision referred to in art. 53a o.p.,

- cancellation of all or part of tax arrears, interest charges for late payment or prolongation (Article 67a o.p.).

All the above-mentioned tax preferences are discretionary. This means that the tax authority, even in the event the conditions to the application of relief, that is an important interest of the taxpayer or the public interest may, but need not, rule on the application of relief. Rules for the so-called administrative discretion, with a choice of two or more solutions are legally permitted by law[23]. Deciding on discretionary mode does not mean that the tax authority's decision may be arbitrary in nature, without conducting proceedings concerning granting a tax relief proposal initiated by the taxpayer. On the contrary, the tax authority has a duty to conduct proceedings in a proper manner in accordance with the general principles of tax proceedings and the detailed rules of procedure. You should therefore carefully explain the facts, collect and exhaustively examine all the evidence especially in terms of evidence to justify making a discretionary decision. It is the formal correctness of the decision, the correctness to conduct evidential investigation and the resulting conclusions, and not the choice of settlement undertaken as part of administrative discretion is the subject of administrative courts[24].

Conditions for use of tax preferences for municipal tax authorities have been formulated blurred. The basis for the application of relief is the occurrence of an important interest of the taxpayer, the public interest, or both conditions together. The case law indicates that important interest of the taxpayer generally concerns the protection of socially approved values of human life and health, the possibility of earning understood as a means to keep the taxpayer and the family. It is about any unusual circumstances that occurred independently of the taxpayer, following which he/she fell into arrears in its tax claims. Public interest is the premise of respecting the ordering of values common to the whole society, as justice, public order, public confidence in public authorities, to promote the interests of the state[25].

Slightly different rules apply to the granting of relief in repayment of tax obligations of economic operators. Due to the current EC competition law, municipal tax authorities are obliged to apply additional procedures relating to the granting of state aid. The granting of relief is thus dependent on the amount of aid (aid, help "de minimis") and from its destination.

Regardless of the nature of the preferences granted, should be noted that the municipal tax authority ruling on the individual tax reliefs and exemptions in respect of taxes under their administration, decide independently and autonomously. It presents a completely different procedure for the use of tax credits for taxes already signalled in

[23] The NSA (Main Administrative Court) Judgement of 5 October 2010, sign. II FSK 915/09, LEX Nr 745950.
[24] The NSA Judgement of 20 August 2010 r., sign. II FSK 634/09, LEX Nr 745776.
[25] The WSA (Voivodship Administrative Court) Judgement of 15 September 2010 r., sign. I SA/Bd 502/10, LEX Nr 746970.

total revenues representing municipalities and collected by tax offices. The legislature anticipated in this case, the institution of cooperation (co-deciding), of the tax authorities. In accordance with article 18, paragraph 2 u.d.jst, if levied by the tax office taxes and charges which in total revenues of local governments, the head of that office can redeem, defer payment period or spread debts in instalments and release the payer from the obligation to restrict the collection or recovery of entitlements with the consent of local government chairman of the board government.

This design is based on the assumption that the tax authority, which administers public tribute set, takes the decision on the application of tax preferences, but because it is not the beneficiary of this tribute, must obtain the approval of another body representing the beneficiary's tax on the depletion of its rightful tax. This approach raises many practical problems concerning the interaction:

- range of activities undertaken within the framework of cooperation,
- the position of authority to bind the community,
- obligation to pay each time to the mayor, town mayor (city president), regardless of the positive arguments for sorting out issues,
- the obligation to conduct evidentiary action (which is cooperating with authorities),
- judicial chairman of the board of control provisions of the local government on the agreement to grant relief[26].

The construction of institutions of cooperation, undoubtedly important from the standpoint of ensuring local governments the right to decide on their own income (and their potential diminution) in the case of tax reliefs and exemptions for local taxes results in a number of important questions that could easily be eliminated. Fact, there are conditions to give local government the power to tax authorities the full tax on municipal taxes. The tax office should not decide on the use of tax reliefs and exemptions in those taxes. Taking this power from the heads will eliminate the controversial and contentious issues arise at the stage of cooperation of institutions. But it is a demand addressed to the legislature.

5. Control of tax obligations by taxpayers

Municipal tax authorities at first instance have been equipped with powers of control, used to verify the accuracy of fulfilment by taxpayers with tax liabilities in the implementation of local taxes and charges. To do this, they use the institution of the examination (article 272-article 280 o.p.), and maintain fiscal control (article 281 - article 292 o.p.). Conducting the examination and inspection is particularly important when the realization of tax liability is executed by way of a ***self-calculation***. When tax

[26] For more: the topic is presented in the paper by K. Teszner, Engage state and local tax authorities in the process of relief and tax exemptions, „Municipal Finance" 2010 Nr 11, p. 39-47.

liability arises under the law, its establishment and implementation is carried by the taxpayer - by self-calculation, declaration and payment of tax. In this situation, the taxpayer next may need to provide a series of instrumental duties as keeping the books and records, submission of declarations or statements, and the role of municipal tax is concentrated on controlling the regularity of operations of these entities.[27] This is especially true of tax returns for real estate tax, agricultural tax and forest tax by legal persons and organizational units without legal personality, and tax on means of transport. If the municipal tax authority finds that the taxpayer, despite its obligation, not by declaration, made a mistake, or that the amount of tax liability is different than that shown in the declaration, it shall issue a decision which determines the amount of tax liability (art. 21 § 3 o.p.). Such a decision may be taken only as a result of the initiation and conduct of proceedings by the competent authority of the tax.

Authority, which is often used by municipal tax authorities to verify the accounts of taxpayers' taxes and government fees, is inspection. The purpose of taking these steps by the mayor, town mayor (city president) is to:

- verify the timeliness of submission of the declaration,
- checking the timeliness of payment of declared taxes, including those levied by the payers and collectors;
- establish formal correctness of the declaration;
- establish the facts to the extent necessary to determine compliance with the submitted documents.

This institution also serves as validation trial testimony, lists, information to which taxpayers are required to submit under separate provisions, including when the data are the basis for issue by the tax authority decisions fixing the amount of tax liability. This is due to give a notion of "declaration" by the broad meaning of art. 3 paragraph 5 o.p.

Checking the operations popularity stems from the fact that the tax authority has the ability to verify the declarations made by taxpayers in formal-legal terms. It is not associated with the timing. If it is found that the declaration contains errors or other obvious errors, or when it is filled in breach of the tax authority stated requirements, depending on the nature and scope of infringements, the correct statement, by making appropriate amendments or additions, if the change in the amount of tax liability, the amount of overpayment, amount of the refund or the amount of loss caused by this correction does not exceed 1000 PLN. The tax authorities may also apply to the declaring of the correction, and making the necessary clarifications, indicating the reasons on which the dispute information contained in the declaration (article 274 § 1 o.p.). After receiving a copy of the revised declaration, the taxpayer may object to the authority which made the corrections within 14 days of its receipt. The result is the

[27] K. Teszner, Implementing tax liabilities, in: The System of Financial Law) T. III Tax Law (ed. L. Etel), Warsaw 2010.

cancellation of opposition correction. In the event of non-payment within a period, the correction statement legal effect as a correction of the declaration made by the taxpayer.

Municipal tax authorities are also able to determine the facts to the extent necessary to determine compliance with the submitted documents. As a result, leading the investigation, and even illegally - elements of evidence apply. This is important because according to article 181 o.p. materials, documents and information gathered in the course of the checks and tax audit are used as evidence in tax proceedings.

Local government tax authorities of first instance shall be entitled to carry out tax audit of taxpayers, payers and collectors, and successors. The purpose of this inspection is to verify whether the controlled discharge of obligations under tax law. The rule is that control is exercised on the basis of personal authorization granted by the mayor, the town mayor (city president), governor, or marshal of the region, or by replacing those authorities - the municipal employee (city), the county, or marshal's office (Article 283 § 1 point 2 o.p.). Checks are made in the presence of a controlled or a person designated by him, controlled the premises, place of business and the storage of documentation. The inspection shall have the right to make an inspection of the building, dwelling, and land belonging to the taxpayer if it is necessary to establish or determine the amount of tax liability or tax base. The need for a visual inspection is often associated with determining the tax base in the agricultural tax, forestry and property tax.

The course of the inspection is then noted in control document of the inspection, which includes legal assessment matters under control, a notice of right to submit objections or clarifications, and declarations of the right to submit corrections. The exercise by the taxpayer of the correction statement, if the tax liability created by law and the possible removal of anomalies, will that not be justified by the initiation and conduct of the tax authority of a costly procedure.

6. Providing individual interpretation by the local tax authorities

Centralization of issuing individual interpretations of tax law introduced on 1 July 2007 only covered the so-called state taxes for which the authorities competent to assess and collect are heads of tax offices and the heads of customs offices. Centralization did not cover the issue of individual interpretations of local government taxes, i.e., charged by the village leaders (mayors), although the number of the issuing authority is much greater. It was noted, however, that its implementation is not possible because of the different local laws in this respect, resolutions of municipal councils such as the tax rates and tax exemptions[28]. Individual interpretations of the issuing authorities of local government taxes and fees are therefore, according to its jurisdiction, local tax authorities of the first instance, i.e. the mayor, the town mayor

[28] Comment on Tax Ordinance changing Project (druk nr 731), publ. www.sejm.gov.pl

(city president), governor or marshal of the voivodship (art. 14j o.p.). In the case of governor and marshal is the illusory power until the county and voivodship will not achieve their own income taxes. Procedural autonomy of municipal tax authorities to issue interpretations of individual is substantially limited. They have been deprived of this property in relation to supply tax revenues realized by the heads of municipal tax offices.

The provisions of the Tax Ordinance shall prescribe (in case of the extent not applied), the provisions of Section II, Chapter 1a o.p. Consequently, the issue of standards for individual interpretation by the Minister of Finance shall apply (in the absence of specific regulations) to the interpretation issued by the mayor, the town mayor (city president). This means that the above mentioned authorities may, upon written request of the interested in the individual case (i.e. the taxpayer, payer, bill collector, a third party, successor in title, but also a non-taxable person, but planning for the future economic activities in certain municipalities) to give written interpretation of tax law. Depending on the nature of the proposal, the interpretation may describe the facts which have arisen or future events. The proposal - and consequently the scope of material published on the basis of interpretation of the individual - can relate to taxes and charges, to which the fixing or determining the appropriate tax authority is a municipality and in accordance with article 14p o.p. to the provisions of the Tax Ordinance in that the claims payers and collectors, third-party obligations, overpayments, refund or credit on the tax arrears, current or future tax liabilities, salary payers and collectors, the excess interest.

Of course it is impossible to interpret the issue presented by the taxpayer under the facts of the application on tax proceedings, whether or fiscal control on the already adjudicated decision or order of the mayor, the town mayor (city president). In contrast to the interpretations issued by the Minister of Finance issue here seems to be relatively simple because of the identity of the authority of interpreting and conducting tax control and tax proceedings.

The provisions of the Tax Ordinance governing the procedure of issuing personal interpretation, the necessary elements, release date, legal form, the rules change the interpretation of the municipality by the tax authority shall apply accordingly. Two things, however, require a clear highlight. First, as in the case concerning the interpretation of individual state taxes, including proceedings on the issue of interpretation by the mayor, town mayor (city president) is not concerned with determining the tax liabilities individually designated entity tax. Municipal tax authority (in terms of the properties assigned to it) after hearing the applicant submitted by actual or prospective event and the comments on, evaluates this position, and its legal justification. In the event of a negative assessment of the applicant’s interpretation of the position taken by the mayor, town mayor (city president) should include an indication of the correct position, with the legal justification (Article 14c § 1 and 2

o.p.). The tax authority presents its own view on that, and is not binding on the applicant, but shapes tax policy in the municipality. In a way it makes for an autonomous interpretation of tax laws in the context presented by the applicant of the facts. It does not decide, however, in the form of authoritative decision on the powers and duties of individually labelled entity.

Second, these arguments justify the change of legal form of provisions on the interpretation of the letter on the interpretation. As a result, it has also changed the way the individual contesting the interpretation of tax law was issued by local tax authorities. Before 1 July 2007 substantive control over the interpretations issued by the municipal government tax authorities held the appeal and force colleges in complaining mode of interpretation. In addition, individual interpretations issued by the mayor, town mayor (city president) ended up not published on the website of the competent local government appeals board. The provisions of the Tax Ordinance in an incomprehensible manner ordered to send the interpretation of competent directors of tax chambers to their publication on the website of the Chamber. Such a structure of individual interpretation of the institution was incomprehensible. For it is reasonably required to explain the interpretation of transfer issued in local taxes, state tax authority only in order to be issued, without SKO, authorized to check compliance with the law and interpret them to amend or repeal[29].

Since 1 July 2007, it is no longer possible to bring a complaint against a decision on the interpretation of that body, i.e. the local government appeals board, and a control mechanism for individual interpretation of tax law has been substantially revised. Addressee unhappy with the resulting interpretation of individual interpretations issued by the mayor, town mayor (city president) shall bring an action directly to the locally competent regional administrative court (Article 3 § 2 p.p.s.a.[30]). A complaint should be preceded by an invitation under article 52 § 3 p.p.s.a. to municipality to the authority which issued the interpretation with the infringement of the law. Introduced individual control mode of interpretation by administrative courts is clear and deserves approval.

Municipal tax authority may also from the office correct interpretation already issued of the individual in case of its failure. Changing it is obliged to take into account the jurisprudence of the courts, the Constitutional Court or the European Court of Justice. This authority is obliged to deliver to the subject, which in the case issued an interpretation, notice of the revised interpretation of the individual interpretation (article 14e o.p.).

[29] L. Etel, Control of constitution and execution of local tax law), in: L. Etel, C. Kosikowski, E. Ruśkowski, Control of constitution and execution of tax law under the Constitution (ed E. Ruśkowski), Warsaw 2006, p. 191.
[30] Act of 30 August 2002 on action taken before the administrative court (Dz. U. Nr 153, poz. 1270 ze zm.) –further appointed as p.p.s.a.

In cases involving the issue of individual interpretation, municipal tax authorities are obliged to correct application of general principles of tax proceedings, namely the rule of law (article 120 o.p.), rules of conduct in a way inspiring confidence in the tax authorities (article 121 § 1 o.p.), rules rates and simplicity of the procedure (article 125 o.p.), and the principles of disclosure of conduct for the parties (article 129 o.p.).

7. Conclusions

Local government in Poland participate in the exercise of public authority, which performs it in an autonomous and independent way. Condition for ensuring independence of local governments is to provide them with their own income and the real possibility of influencing their amount. The guarantee of this autonomy is also to create a clear mechanism to assess and collect local taxes and fees that directly go to public budgets (municipalities, districts (counties), provinces (voivodships)).

The current arrangements bring to conclusion that the financial autonomy of local government units is incomplete, yet incompatible with the solutions adopted in the European Charter of Local Government and questionable in terms of compliance with the Constitution of the Republic of Poland.

As shown above - the continuation of dichotomous structure of the tax authorities responsible for local government tax collection is not justified. It is necessary to extend the competence of the local tax authorities by giving them full of the power of the tax on income taxes, which constitute communities budgets. The participation of state bodies in time and collecting of tax revenue in the budget of municipalities causes higher costs of their consumption and extends the life of the transfer to municipalities of their duties. It is also not desirable to interfere in the autonomy of municipal administration of the tax by the tax office chief delegate authority to settle the authoritative use of tax reliefs and exemptions in certain local taxes.

From the standpoint of financial autonomy and procedural disadvantage is the continuation of a legal fiction as lame tax authorities of the district and local government region. Lack of spontaneous tax administration by the latter compensates for the provision of county legislature and the voivodship of shares in state taxes.

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The Budget of the European Union as the Basis of its Financial Autonomy

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Abstract: Financial means which supplying the general budget of the EU, should be characterized by stability and independence, so as to enable the functioning of the EU and achievement its objectives, including the period of economic recession. Taking into consideration these circumstances, the article tries to find answers the following crucial issues: to what extend the EU budget constitutes a basis of its financial autonomy, what important components create it and to what extend the EU budget allows to carry out its objectives in smooth and permanent way. In this article, autonomy of the general budget of the EU will be considered having regard to several elements: relationships to the budgets of the Member States, the procedure establishment of the budget and influence of the Member States on its shape, legal status of an act in which the budget is included, nature of budget revenue, enforcing claims to the budget.

Keywords: EU general budget, legal form of the general budget, special legislative act, financial autonomy, multiannual financial framework, own resources system.

1. Introduction

The objectives of the European Union (EU) as referred to in article 3 of the Treaty on European Union[1] have been quite widely defined and refer to various spheres of life. For their effective and efficient implementation, as well as contribute to sustainable and smooth development of whole EU and its Member States, there is a necessity of substantial financial resources collected within single public fund, which is the annual general budget of the EU. Means providing it, should be characterized by stability (steady revenue) and independence, so as to enable the functioning of the EU, including the period of economic recession. Therefore, aspect of financial independence has an influence on its real, not only formal, legal autonomy.

The issue of autonomy of the EU is all the more crucial because it is the political and economic organism assembling 27 Member States and mainly from them, there are collected resources for realization fixed objectives. Many times, these states present conflicting interests as well as among them there are appearing trends to reduce transferred revenue, particularly in richer countries, belonging to the so-called a group of *old members*.

In these circumstances, issues which seem to be crucial are: to what extend the EU budget constitutes a basis of its financial autonomy, what important components create it and to what extend the EU budget allows to carry out its objectives in smooth and permanent way. In this paper, autonomy of the general budget of the EU will be considered taking into account several elements: relationships to the budgets of the Member States, the procedure establishment of the budget and influence of the Member States on its shape, legal status of an act in which the budget is included, nature of budget revenue, enforcing claims to the budget.

2. The general budget of the EU and budgets of Member States

For analysis of relations that exist between the EU budget and budgets of Member States, first of all there must be determined a crucial issue - legal personality of the EU. Before the entry into force of the Lisbon Treaty, it brought about a number of doctrinal disputes[2], however currently treaty provisions do not leave any doubts. Firstly, there may by indicated art. 47 TEU, which clearly states that Union has legal personality. This fact does not remain without prejudice to the sphere of its distinctiveness in economic (financial) aspect as well. Emanation of its autonomy in financial sphere, which was already mentioned in the introduction, is own and separate from Member States annual budget, equipped with its own revenue.

Although, the EU budget and Member States' budgets do not operate in total isolation. Mutual correlations appear in many spheres. In revenue and expenditure sphere there are perform transfers of financial means, resulting in division of Member States into *net contributors* and *net beneficiaries*. On the one hand, they all are obliged to transfer due revenue to the general budget, on the other – they are its beneficiaries. In political and legal sphere, Member States have an impact on its shape, although it has not unlimited nature.

It is also important to note that the general budget, despite its separateness, within its scope, embraces no to only the EU, but also the European Atomic Energy Community and in this respect is the common budget. The provision of art. 4 para. 1 of the Financial Regulation[3]expressly provides for the principle of unity, in the light of which, the budget for each financial year, forecasts and authorises all revenue and expenditure considered necessary for the European Community and the European Atomic Energy Community. In passing, there may be mentioned that, there are exist EU institutions and financial means, which are outside the budget, e.g.: European Development Fund, European Investment Fund, European Central Bank.

3. The importance of the procedure of establishment of the EU annual budget to its autonomous nature

3.1. Impact of the Member States on the process of EU budget establishment

Despite the mentioned separateness of the general budget, Member States that transfer budget revenue, have influence on the basic financial figures contained therein. The largest impact occurs in the legislative sphere. During specific legislative procedures referring to the adoption of the budget, taking political decisions, Member States through their representatives in the various bodies, decide on the scale of financial means, which will be collected in the budget and thereby, on the quantity of expenditure allocated on defined targets[4]. However, the ability to take decisions in this scope and their extent depend on the stage of legislative process. The procedure of budget adoption is not only considered, but first and foremost establishment of multiannual financial framework of the EU, also called as financial perspectives. The financial perspectives are instruments of the multiannual financial planning of the EU, containing general objectives and the financial resources allocated to their implementation for a period of at least five years. Although nowadays perspectives are adopted for periods of seven years. The current financial perspective is binding for the period 2007-2013[5].

As indicated in art. 312 para. 1 of the Treaty on Functioning of the European Union[6] multiannual financial framework are intended to ensure that Union expenditure develops in an orderly manner and within the limits of its own resources. The significance of this document in the EU finances is considerable due to several reasons. Firstly, objectives included in it are going to be realized for next seven fiscal years. Secondly, it lays down the necessary measures to finance these objectives, thus they are expenditure ceilings, which not allowed to exceed. Despite the adoption of the financial framework does not relieve suitable bodies of the EU of annual establishment of the budget, however, it must be consistent with this framework (art. 312 para. 1 (3) TFUE). Thus, amounts included in the financial perspective may not be exceeded in the general budget, being non-exceedable limits. Thirdly, knowing the level of expenditure in perspective of seven years and bearing in mind the fact the principle of equilibrium is strictly observed in budgetary law of the EU, there is known the level of revenue as well. Simultaneously, these are financial means, which need to be transferred to the EU budget by Member States.

For these reasons, the possibility of taking the decision concerning the shape of the multiannual framework possesses crucial meaning. On the one hand, the richest Member States (so-called *net contributors*) are seeking possibility to reduce the scale of appropriations paid to the budget, on the other hand – poorer States (so-called *net beneficiaries*) try to receive the most financials means to themselves.

In compliance with article 312 para. 2 TFEU the adoption of a regulation containing the multiannual framework requires unanimity of the Council after obtaining the consent of the European Parliament (EP). However, reaching the agreement is often arduous. The political decision in this scope must be taken at the summits of the European Council, during of which the long-lasting negotiations are running that end with the lack of agreement very often.

The final adoption of the multiannual financial framework completes the crucial stage, in which in the medium term the shape of EU public finance is fixed, what also affects on the size of annual budgets. It should not be surprised the role of the Member States are considerable.

The participation of Member States in determining the shape of the annual budget occurs at the stage of the procedure of its establishment as well, but it has significantly smaller meaning than in case of the financial perspective. As mentioned above, amounts included in financial perspective are non-exceedable limits in annual budgets, therefore the legislative bodies involved in law-making processes must obey these limits, which signify the limitation of their legislative competences in favor of efficiency of budgetary procedure and financial stability of the EU. But there should be noted that expenditure cannot be spent on the basis of the multiannual framework, but only on annual budget, due to it has authorising power. Consequently, financial means predicted in the multiannual framework and not entered into the budget may not be executed.

3.2. The special nature of the procedure of EU budget establishment

Procedure of establishment of the EU annual budget in many aspects has a special value, what proves, at the same time, the remarkable – constitutional position of the budget being its *result*. First of all, it has treaty grounds, as has been clearly separated by provisions of the TFUE. The Lisbon Treaty has made a clear dichotomy of legislative procedures by distinguishing the ordinary and special legislative procedures (art. 289 para. 1 and 2 TFEU). The procedure of EU budget establishment has been recognized as a special legislative procedure (art. 314 (1) TFEU). It has not a supplementary nature, i.e. its provisions do not apply as a *lex specialis* in relation to other legislative procedures. The annual budget is adopted on the basis of the budgetary procedure without any references to other legislative proceedings. Thereby, there can be stated that it is characterized by complexity and covers all work stages on the budget, until the definitive adoption. The main roles during this procedure are played by the EP and the Council called as *budget authority*, what does not mean a consolidation themselves into one body[7]. They have the same decision competences in establishing the budgetary act within each of two readings, which means their roles are in balance. Since the late 1970s, there has been a process of gradual strengthening position of the PE in the entire proceedings and the result is, both before the entry into force of the

Lisbon Treaty and now, the prerogative to reject the whole draft budget in second reading[8].

The effect of the procedure of the EU budget establishment is the budgetary act (act including the annual budget) – joint act of the EP and the Council[9]. The Court of Justice of the European Union (ECJ) stressed that it has a mixed nature (there was used phrase *a combined act*), which has no equivalent in any other acts passed by Community institutions[10]. In one of the judgment, the Court concluded that natural or legal person cannot under any circumstances be directly concerned by the steps in budgetary procedure. Such a person may be directly concerned only by the measures taken to implement the budget[11].

4. Legal form of the general budget of the EU

Establishing the legal form of the general budget is also important in the context of its autonomy. Legal framework of this financial plan determines its position in whole legal order of the EU, relationships to other forms of legislative activities, its binding content (possibilities for collection and spending financial means on its basis), control of the legality by the ECJ etc. Before going into a detailed analysis, the author puts the general hypothesis that term *the budget of the EU* has a double meaning, what results from art. 4 FR.

Treaty law does not enumerate the act authorizing of the budget among the sources of the secondary law as referred to in art. 288 TFUE. A similar situation appears in other parts of the Treaty devoted to the financial provisions (art. 310-325 TFUE) as well. The legislator consistently uses the term *a budget* and expressions in which this term is included: *all revenue and expenditure of the Union shall (...) be shown in the budget*, *(...) the budget shall be in balance*, *the draft budget*, *the budget has been definitively adopted*. The same situation occurs in FR. In this connection it should be noted the term *budget* refers to features of the financial plan (two-sides of the budget, balance of revenue and expenditure), as well as to the typical legal aspects, i.e. establishment (authorization) procedures, implementation, legal nature of its content (e.g. art. 4 FR: *The budget is the instrument which, (...), authorises all revenue and expenditure…*).

In case-law of the ECJ regarding the legal form of the annual budget, there may be noticed similar standpoints, which is a consequence of the provisions of EU budgetary law. However, in some cases, the Court clearly stressed, the nature of the budget not only as a financial plan, but also as a legal act. In one of the disputes between the Council and the EP concerning budgetary procedure[12], the representative of the Parliament argued that the budget cannot be the subject of the ECJ jurisdiction on the basis of art. 230 of the Treaty establishing the European Community (now article 263 TFUE). However, the Court stated that the roles of the Council and the Parliament in the procedure of budget adoption are complementary and decisions of these two

institutions leads to its establishment. In this connection the budget is a *combined act* that has no equivalent in any other acts passed by Community institutions. Of course, the use of the term *combined act* did not mean that the ECJ by way of a judgment defined the legal form of the budget, but it indicated its complexity and terminological indeterminacy in the light of existing legal instruments in whole legal order of the European Communities.

With reference to the form of the EU budget, there can be distinguished some groups of standpoints in the European doctrine. However, the standpoints which are prevailing – mainly in English and French literature[13] – do not assign to the budget any named legal forms within the catalogue of sources of secondary law and *sui generis* acts. Authors do not make differences between terms a *budget* and a *budgetary act* in terminological and legal contexts. In these cases, there are no even attempts to give it wide name a *budgetary act*. D. Strasser, referring to the definition of the budget contained in art. 1 para. 1 of the Financial Regulation of 1977 uses the phrase: ... *a single document generally known as its budget*[14] and afterwards he examines the role of the budget as a legal basis for expenditure spending[15]. H. G. Schermers and D. F. Waelbroeck place the budget in the part entitled *Binding acts contemplated by the Treaties*[16]. A similar situation may be encountered in Polish literature[17].

There are also views according to which, the act containing the budget of the UE is generally deprived of legal nature. C. Mik, taking into consideration the form of termination of the procedure of the budget establishment – definitive adoption – affirms that it the resolution (budgetary resolution). Admittedly, he maintains that it has not the status of a legal (normative) act, however it is politically binding[18].

The third group of standpoints emphasizes the distinctness of the budgetary act in relation to the budget itself, e.g. M. Cieślukowski claims on the basis of the budget definition contained in art. 4 para. 1 FR, that it is an act with the *indefinite* form[19].

Considering these issues it is difficult to not refer to individual Official Journals of the EU, in which are published annual budgets. On the first page of each Official Journal including the heading of legal act, which informs about its type in principle, there is the following phrase: Definitive adoption of the European Union's general budget for the financial year…[20]. The phrase *definitive adoption* derives from art. 314 para. 9 TFUE, according to which, if the procedure of passing of the budget has been completed, the President of the EP declares that the budget has been definitively adopted. On the basis of this provision and the budgetary act, it must be concluded that the *definitive adoption* is nothing else as the statement of the President of the EP about the termination of all legal steps headed to passing the budget.

With regard to formal aspect the *definitive adoption* is the resolution, what is proved by art. 75e of the Rules of Procedure of the EP[21], but it does not constitute a legal form for the budget itself. The statement of the President of the EP should be recognized only as a declarative (not constitutive) act, however it is a necessary formal

component for validity of whole procedure. *Definitive adoption* informs the whole legal procedure concerning the budget establishment with the participation of the Council and EP has been completed and both these bodies reached to an agreement on the shape of the budget. Absence of such agreement may be reason of invalidity of the budgetary act and the resolution, as the ECJ stated in one of the judgments[22].

At the beginning of this analysis author has put hypothesis on the basis of art. 4 para. 1 FR. This provision constitutes two institutions. First one – budget as a financial plan: *The budget is the instrument which, (...), forecasts (...) all revenue and expenditure*. The second one – budget as a legal act: *The budget is the instrument which, (...) authorises all revenue and expenditure*. In budgetary law authorisation of revenue and expenditure means their confirmation, i.e. validation (granting) the legal power. In practical dimension this means right as well as obligation to execution of the budget, but this obligation must be understood in a specific manner.

Having regard above considerations as well as provisions of Union budgetary law, doctrine and case-law of the ECJ, the author proves that the institution of the EU budget has double meaning. Firstly, it is public financial plan with economic and managerial content. It is also the instrument of financial policy of the EU. Secondly, the EU budget is a legal act with the same name, which includes the annual budget as a financial plan. Budget in this meaning is a legal form (category of legal act), excluding issues of the nature of its content right now. Although, the TFUE does not determine its legal form literally, but in compliance with art. 314 (1) and 288 para. 3, it has been classify as a *legislative act* alongside regulations, directives and decisions. There may be said that it belongs to the specific group of *sui generis* acts with its own name *budgets*. Headings of Official Journals containing individual annual budgets of the Union are source of this claim[23].

Category of act, taking into consideration organs that adopt it, appears to be so crucial due to possibility of judicial control of its legality. Pursuant to art. 263 (1) TFEU, ECJ reviews the legality of:

1) legislative acts;
2) acts of the Council, of the Commission and of the European Central Bank;
3) acts of the EP and of the European Council intended to produce legal effects vis-à-vis third parties;
4) acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

Before reforms of the EU legal system, introduced by the Lisbon Treaty, possibility of the ECJ's legal control of the budgetary act was called into question due to it came only from the EP with regard for its President, who made a statements on definitive adoption. Mentioned art. 263 in previous meaning (as art. 230 TEC[24]) did not provide for that type of acts. However the ECJ recognized itself as entitled to examine legality of the annual budget, furthermore it adjudicated on its annulment and whole

budgetary procedure in many cases[25]. Currently, in the light of the art. 263 TFEU, this issue should not bring about any doubts, because the annual budget belongs to group of legislative acts.

5. Autonomous nature of revenue of the EU general budget

The most crucial component of the general budget of the EU, proving its financial autonomy, is budget revenue. The basic sources of revenue, supplying the budget, compose so-called *own resources system*. Admittedly, there may be indicated other categories of means, but they are of less importance, taking into account their amounts in relation to total revenue. Pointing at two groups of sources of revenue derives from the art. 311 (2) TFEU, which provides that the budget is financed wholly from own resources without prejudice to other revenue. The provision also proves that collected appropriations should be sufficient to achieve the objectives of the EU. Apart from art. 311 TFEU, subject matter of budget revenue has been regulated in decision on the system of the European Communities' own resources[26]. Those provisions provide the EU with financial autonomy. With good reason those funds are defined as *own*. Their collection is centralized, non-returnable and legally secured. Any failures of Member States in transferring financial means are recognized as infringement of obligation under the Treaties. Own resources are characterized in literature as *revenue allocated irrevocably to the Union to finance its budget and accruing to it automatically without the need for any subsequent decision by the national authorities*.[27]

Nature of the own resources system can be considered in three dimensions:

1) financial,
2) economic,
3) legal.

Repeatedly, it is affirmed they determine the essence of whole system[28].

Financial dimension of the system is based on two assumptions. Firstly, the size of collected funds into the general budget should ensure security and financial stability of the EU. In connection with integration processes both in subjective (accession of new members) and objective (unifying or harmonising provisions of following areas of life) aspects, functioning expenses still growing annually. Therefore, the system should guarantee the possibilities for execution of foreseen targets. Secondly, it should characterized by flexibility and correlation between established a maximum ceiling of own resources and the real tasks being carried out within one financial year. Moreover, having regard to the negative effects of fiscalism, system is aimed at protection against too much demand on funds acquired from Member States. For this reason, art. 3 para. 1 of the decision 2007/436/EC provides that the total amount of own resources to cover appropriations for payments may not exceed 1.23% of Gross National Income (GNI)[29]. This amount constitutes a maximum level of allocated financial means, of which must

not exceed by the Commission during budget execution. However, it does not mean that quantity of money on maximum level is flowing into the EU budget every year. The system should ensure appropriate funds in relation to real needs. In Financial Perspective for 2007-2013 they shall be from 1.00% (2007) to 1.07% (2013) of GNI[30]. Left difference to the amount of 1.23% represents the available margin, covering demand for additional means, if such demand occurs.

Economic dimension of the system assumes a more equitable financing of the EU. Estimation of amounts of two last sources of income – VAT resource and GNI resource – is based on GNI of all Member States. GNI is aggregated value estimated on the basis of many macroeconomic factors (production activity, revenue of entities of economic activity)[31] reported by Member States, which reflect condition of their economies. In the report on the functioning of own resources system, the Commission concludes that, it meets set its tasks with regard to sufficiency and stability, but it is complicated and does not contribute significantly to a more efficient allocation of economic resources in the EU[32]. In connection with conclusions of the EU summit in Brussels in December 2005, during the debate on the current Financial Perspective, the Council adopted new decision on own resources system, in which there was simplified a methodology for estimation of revenue based on VAT by introducing a uniform rate at 0,30%.

Legal dimension of the system consists of several elements: centralized and Treaty nature, non-returnable and mandatory character of revenue.

The Treaty nature of the own resources system mainly justified the way and priority of provisions. As a matter of fact, detailed regulations are included in decision 2007/436/EC, Euroatom and implementing regulation[33], but the basic framework of the system, as mentioned above, has been regulated in art. 311 TFEU, thus in the act with the higher priority in entire hierarchy of legal sources of the EU, which makes its constitutional law[34]. A centralized dimension of the system is proved by the fact according to which, financial means are transferred from 27 Member States into one public fund – budget of the EU. In every financial year, its revenue is assessed approximately at the level of over 120 billion euro[35].

Non-returnable character of EU budget revenue is based on the recognition, that the transfer of budgetary payments of Member States are treated as *a definitive transfer to the EU*[36].

Allocation payments of financial means to EU budget are recognized as obligations of Member States under the Treaties, what was stated by the ECJ in his judgments repeatedly[37]. Ensuring the due application of these obligations as well as consequences of their failure, has been regulated in many aspects.

Firstly, Member States are obliged to notify on collected revenue for the benefit of the annual budget as well as to report on cases of fraud and detected irregularities

involving entitlements of over 10 000 euro (art. 6 para. 4 and 5 of the regulation 1150/2000).

Secondly, any delays in making the entry in the account set for the collection of own resources by Member States, cause a rising the duty of payment of interest by them (art. 11 of regulation 1150/2000). As the ECJ noted: *(...) there is an inseparable link between the obligation to establish the Communities' own resources, the obligation to credit them to the Commission's account within the prescribed time-limit and the obligation to pay default interest.* They are payable regardless of the reason for the delay, resulting either from the mistakes of officials, or error in law. Even the unintentional nature of the delay in making the entry cannot eliminate the obligation to pay default interest[38].

Thirdly, infringement of obligations in transferring amount dues into the general budget, including interest, is recognized as a failure the obligations under the Treaties. In compliance with art. 260 TFEU, the Commission may bring the case before the Court against the Member State[39].

Fourthly, decreasing of due revenue constitutes a violation of the financial interests of the EU. Mostly irregularities[40] refer to *traditional own resources* (agricultural levies, customs duties)due to the Member States are committed to their collection from third parties (entrepreneurs). Although, they accountable for negligence or lowering of payments, but consequences may be borne by Member States as well[41].In one case, the ECJ affirmed that Greece failed to pay to the Community own resources from agricultural levies. Because Greece has not taken appropriate legal steps against the perpetrators of fraud engaged in export of agricultural goods, in effect there has been a reduction of contributions to the annual budget of the EU[42].

6. Enforcing claims to the amounts contained in the general budget of the EU

Financial autonomy of the EU may be considered in another aspect – enforcing claims to the amounts of revenue and expenditure contained in the general budget. This issue should be examined separately in referring to natural persons and to Member States.

Having regard to the principle of legality, amounts contained in the EU budget will not be the subject of claims from the beneficiaries. This rule will also apply to Member States, if they possess such status. This is justified by the fact that beneficiaries do not belong to the category of addressees of the budgetary act and any financial means are transferred to them on the basis of separate legal acts, including individual decisions. As a matter of fact, non-claiming rule has not been regulated in budgetary law of the EU, but it stems from the ECJ case-law. In one of the judgments the Court stated that: *An action for the annulment of measures entering into commitments of expenditure and validating, authorizing and implementing the payment of expenditure*

is inadmissible. Such measures have only internal legal effects within the administration and give rise to no rights or obligations on the part of third parties; they therefore do not constitute decisions adversely affecting any person[43].

On the other hand, there is legally admissible a presentation of claims by the Commission to Member States concerning duties on advance payments in referring to VAT resources and GNI resources, transferred during the financial year. Their basics are amounts included in part A of the annual budget *Introduction and financing of the general budget*[44]. Failure or delay in transferring of advanced payments causes default on duties arising from EU law on the basis of art. 260 TFEU.

7. Conclusions

Bearing in mind the considerations made above, the financial autonomy of the general budget and thereby whole EU in legal sphere is quite broad. Because of this, it has a possibility to implement established objectives in the Treaties. On the other hand, Member States are not excluded completely from the processes of decision making on the shape of the EU budget, including amounts of revenue and expenditure. However, their impact has more political nature. It may be affirmed, there is a specific balance between total financial autonomy of the general budget and influence of Member States on it.

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Public Financing: Local Autonomy and Need for Alternative Control

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1. Case study: need for control

One of the common European beliefs is that no power can be exercised without control. The two main roots of control are represented by the principles of *democracy* (and political control based on participation) and of *rule of law* (also known as constitutionalism, rechtstaat, legality and expressed by legal control). On national (state) and sub-national (territorial and local self-governments in Hungary) level democratic representation and its political instruments of control can be considered to be stable[1]. Without under-estimation of importance of democratic control I will focus on alternative instruments of legal control of exercise of public powers. We do it because problematic situations of everyday life have more and more been handled as legal questions; consequently their solutions need easily accessible legal instruments. This consideration is based on the permanently growing number and extent of statutory and not statutory regulations[2].

There is no doubt that judicial review plays a crucial role in legal control of executive power either regarding rule making (controlled by constitutional courts or institutions with the same competence) or concerning effective administration (controlled by regular or administrative courts). Role of courts can be underpinned by certain supervision tools (apply, other forms of internal remedy) within the system of administrative bodies[3]. Even if jurisdiction of the European Court of Human Rights has important and substantive effect on judicial procedures and jurisdiction of European

[1] See: CHRONOWSKI NÓRA – DRINÓCZI TÍMEA (ed.): *Európai kormányformák rendszertana* ('System of the European Forms of Government'), Budapest, HVGORAC, 2007.
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states[4], judicial review and inner administrative supervision have still been too rigid and formal.

One is not far from the truth when thinking that traditional instruments of legal remedy should be completed for some situations with less formal, for other aims with special institutions and procedures. Ombudspersons[5], public prosecutors[6] and ordinary civil proceedings of courts[7] could have important role in effective legal control of administration and could lead to a better government.

Our case-study concerns regulation and practice of city-parking and the inefficiency of formal legal control

There is a permanent need in cities of the 21th Century to have a well organized system of public parking. As consequence of the (mainstream model of) outsourcing of public duties long lasting and unsolved harms were caused in the Hungarian Capital by administration of city-parking delegated to private companies[8]. The regulation supervised by the Constitutional Court[9], was amended for several times[10], and one of the last re-regulations made exclusive the role of private companies in maintenance of parking places[11]. The maintainer companies started an enormous number of civil lawsuits against persons considered to park without paying, most of them years after the real parking events. The first court-decisions were uncertain regarding the nature of legal relations in case. Some courts considered that fee-pretensions can be sequestrated as taxes (*public law execution*), others considered the civil law procedure inevitable (*civil law execution*). Finally the Supreme Court decided in 2005, that civil law execution is the acceptable way since the fact of parking is an implied creation of civil law relationship.

However, some questions remained open, like the gap between the accountability of the owner and that of the real driver of the car in case[12]. Amalgamation of elements of public law and civil law relations lead to the defenselessness of the private person who lowers oneself by parking in a city and

[4] See: RENÉ SEERDEN – FRITS STROINK: *Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis* Antwerpen – Groningen, Intersentia Uitgevers, 2002 and MARIOLINA ELIANTONIO: *Europeanisation of Administrative Justice? The Influence o f the ECJ 's Case Law in Italy, Germany and England* Groningen, Europa Law Publishing, 2009.

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[12] See the Civil Law Resolution for Uniformity of Jurisdiction No.2/2006. on parking and parking fee.

commits any minor fault (exceeds with minutes the paid time, looses the bill, etc.). Due to the outsourcing of the basically public duty the private persons loose the protection granted by public law but they are not put in the equal position of a civil law contractor.

This anomaly was managed by the Constitutional Court which annulled the decree on cit-parking[13] that lead to a new – at this time statutory – regulation by the Parliament[14]. This new act does not change the previous situation: due to the amalgamation of public and private law relationships, no formal revision by administrative law courts could apply against the administration of city-parking, in essence against a duty of public bodies outsourced to private companies.

Need for alternative form of control had occurred, and the need was fulfilled by the ombudsman.

2. Control forms over the public administration

The control of the public administration is understood as a procedure with the scope of examining, evaluating and under certain conditions, influencing the activity of an administrative body. In order to refine this – intentionally – broad definition different mechanisms of control can be grouped conform to their fundamental perspective. Since all activities of state institutions are usually evaluated from a *political* or *legal* point of view, this separation can also be adapted to mechanisms of control. Consequently, the control of public administration can take political or legal shape[15].

Every procedure of control bearing the opportunity of governmental decision-making concerning the main direction, system of institutions, methods of procedure of administrative bodies should be considered to be of *political* nature. Some consequences emerge from this definition. Firstly, the political control is inevitable since it is a specific manifestation of governmental activity. Secondly, forms of political control are determined by the Constitution since governmental activity itself is subject to the constitutional rules. Thirdly, political control is exercised by non-administrative (external) bodies. Fourthly, political control usually does not concern juridical decision-making instruments. And fifthly, the different ways of political control are specific (dependent) to individual states and their constitutional system, since the institutions and instruments of political control are developed without almost any restriction emerging from international cooperation.

Performers of legal control of administration do not have the abovementioned powers of fundamental decision-making, their task – supervision, evaluation and review – is concerning the legality of certain administrative acts. This notion, which is also too broad, can be specified if the two main forms are distinguished based on the possible

[13] Decision 109/2009. (XI. 18.) AB (ABK XVIII. 11. szám)
[14] Acts XLVI and XLVII of 2010 on amendment of acts regarnig parking
[15] See: CRAIG cit, 753-756.

consequences of the control. Using one of the different instruments of legal remedy an administrative act is supervised in another administrative or judicial procedure, and – as an effect – the supervised act may be annulled or revised (changed, amended). The other (alternative) forms of legal control do not have such an effect: applying these non-remedy instruments the possible outcome is only an evaluation (criticism) of the administrative act in case, without the opportunity of annulment or amendment. One of the traditions of the Hungarian public law is the closed and multi-instrumented system of legal remedy (internal administrative supervision, judicial review, claim to the Constitutional Court, request for protest by the public prosecutor) completed by other forums of legal control of non-remedy nature (investigation by the ombudsmen, investigation by a parliamentary commission). The main feature – among the immanent nature of supervision: legal remedy/alternative – is the position of the body performing control: internal (the supervising body also belongs to the administrative system) or external (judicial, parliamentarian).

3. Ombudsmen as alternative forms of control

Alternative forms of control can be reasoned in a simple way by the role of ombudsmen. Dissolution of boundaries between the fields of public and civil law, public services taking the traditional place of public administration rolls back the role of classical tools of legal redress since these tools do not apply in corporate and private sphere. On the other hand the traditional civil lawsuits are long and expensive, thus it is not a perfect instrument for quick elimination of the faults and maladministrative acts of the executive. Thus legal protection by ombudsman-like institutions is getting more and more importance, and its focus is moving from the formal administrative decision-making to the less controlled activity of private companies working in the sphere of public services.

Ombudsmen by their *flexible proceedings* may concentrate on the relation between an individual and public or private body being effectively in a powerful position, leaving out of interest the origin of this power. Ombudsmen are helped by the stabilization of the substantial content of rights by international documents.

If we complete our starting point with the indeterminate scope of courts whether their duty is to protect individual rights against the power of state or 'only' to rectify particular encroachments of rights[16], we have a clear role of ombudsmen. In all those situations when an individual – standing in a public-law-relation directly with a body of the executive branch or indirectly with a private body ensuring public services and getting its power from the executive – has his/her rights hurt, and legal redress could be excluded or accessible only with unreasonable costs or efforts, the individual has a sole support: the ombudsman. Consequently, although the institution of

[16] JOANA MILES: *Standing in a Multi-Layerd Constitution*, in: BAMFORTH – LEYLAND cit. pp. 407-412.

ombudsmen is not considered to be an avoidable function of the constitutional state (by theoretical thinking)[17], do is necessary in the lacy public law relations of the 21st century.

The European legal literature defines ombudsman-like institutions by their basic peculiarities (irrespective of the special forms of their legal regulations in the different countries). The first group of peculiarities consists of *independence* and *mandate from the Parliament.* The second group regards the criteria of proceeding: *control* of public bodies and those affording public service the aim of the institution in order *to protect* personal right of individuals. Fulfilling its duties the ombudsmen cannot avoid a glance to legality, reasonableness and due process of the controlled activity and they are empowered with a large scale of inquiry-instruments and rights. Finally the special measures give the third group of characteristics. Ombudsmen cannot emit legally biding decisions, their 'way of speak' is criticism and recommendation (in special cases ombudsmen also may initiate criminal, disciplinary, administrative and law-making proceedings of the competent authorities).

4. Ombudsmen in Hungary under the Constitution

The institution of ombudsmen in Hungary is based on the political consensus of the National Round Table (1989). The institution has been incorporated in the Constitution[18] since 1989 and an Act was adopted on the rules concerning the activities of the Parliamentary Commissioners in 1993. The first Commissioners were elected in 1995.

Tracing the role of ombudsmen and efficiency of their actions in the context of the provisions of the Constitution and that of the political reality it should be based on the overview of legal rules, the decisions of the Constitutional Court, and the analysis of the abstract characteristics of the institution.

The basic legal background for the Hungarian Parliamentary Commissioners is the 5th Chapter of the Constitution, which mentions two Commissioners: the Parliamentary Commissioner for the Citizens' Rights and the Parliamentary Commissioners for the National and Ethnic Minorities' Rights. The two Commissioners should be elected by majority of two-third of the votes of the Members of the Parliament, and the Parliament may also elect special Ombudsmen for the protection of individual constitutional rights.

Two other ombudsmen were elected in 1995. Their position is legitimated not directly by the Constitution but by special acts: the Commissioner for Protection of Personal Data and Freedom of Information was elected as prescribed in Act LXIII of 1992 on the Protection of Personal Data and Disclosure of Data of Public Interest; the

[17] See: *Principles* cit., p. 34.
[18] See: ANDRÁS JAKAB: "The Republic of Hungary" in: RÜDIGER WOLFRUM – RAINER GROTE (ed.): *Constitutions of the Countries of the World* [issue 2-2008.] (Oxford: OUP 2008) 46.

General Deputy Ombudsman was elected in conformity with Act LIX of 1993 on the Parliamentary Commissioner of Human Rights (hereinafter: Ombudsmen-act). By an amendment of the Ombudsmen-act the position of the General Deputy was abolished in 2007, and a new ombudsman with special competence – protection of rights of the next generations – was elected.

In the context of the Constitution the role of the Parliamentary Commissioners is to investigate or to have investigated infringements of constitutional rights (in general or in conformity with their special competence) if they have knowledge about them, and to initiate special or general measures for their remedy. The role of the informal procedure of the Parliamentary Commissioners to protect human rights is different from the role of the Constitutional Court in controlling legal acts, thus the primary character of the procedure of the Parliamentary Commissioners is not the formal protection of the Constitution. Since the duty of protecting the fundamental rights prescribed in the Constitution is primary for every institution of the state, the role of the Parliamentary Commissioners is to complete and control the activity – including protection of rights – of other institutions.

The Hungarian Ombudsmen (there were four elected officials for civil rights, for national and ethnic minorities rights, for data protection and ensuring freedom of information and for rights of the next generations until the end of 2011) are elected for six years, may control all the public and public-service bodies. The instruments of investigation – based on a claim or initiated ex officio – are extremely wide, any file may be inspected, and any officer may be questioned. Their proceeding is guided by very few rules – their investigation is not a formal but a 'personal' one.

5. Ombudsman in Hungary under the Basic Act

In 2011 the Hungarian Parliament had adopted a new Basic Act (in force from 1st of January 2012) restoring the former *interim* Constitution.

At a first glance the New Basic Act of Hungary did not affect functions, powers, and rights of the Ombudsman while the organisation (number of ombudsmen), the level of legal regulation and guarantees of independence were reconsidered. The Commissioner henceforward has the duty to examine or to have examinated abuses of fundamental rights of which he/she becomes aware and to propose general or special measures for their remedy.

The most noticeable change is the reducing of the ombudsmen: the former position of the specialized autonomous commissioners is transformed as deputies of the single Ombudsman, the Commissioner for Fundamental Rights with general competence; while the position of Ombudsman for Data Protection will be abolished and a new, independent administrative body will be entrusted with majority of its functions.

Neither the text of the Fundamental Act nor the ministerial explanatory memorandum of its former draft gives the reasons of changes. It indicates that within the new approach of the Fundamental Act there are no specialized ombudsmen, only one commissioner is elected, who fulfils his goals in cooperation with his/her deputies also elected by the Parliament. Less arguments are given by the explanatory memorandum regarding data protection: control of the enforcement of the right to protection of personal date and of freedom of information is the duty of an independent authority instead of the former Data Commissioner.

Fortunately, the new Act CXI of 2011 on the Commissioner of Fundamental Rights adopted by the Parliament in July, 15th – in conformity with the Fundamental Act prescribing that detailed regulations shall be given by a special act – refines the position of the deputies. Article 3 of the new Act clarifies that the deputies of the Commissioner are not simply his/her vicars, but they have their own competencies biding the Commissioner. The Commissioner has to pay special attention to interests of next generations, rights of nationalities living in Hungary, rights of vulnerable social groups and those of children. The first two designed competencies are performed in cooperation with the two deputies who can be entrusted with right to sign the official documents and who have to inform the Commissioner about their findings, or to initiate ex officio proceedings or motion to the Constitutional Court by the Commissioner. In the last two situations the Commissioner has to carry out the suggestions of the deputies or to explain to the Parliament in his/her yearly report the reasons of ignoration. Efficiency of the deputies is guaranteed by their own staff granted within the new Act.

Although the deputies as civil servants will wear the rank of state secretary instead of the former rank of minister, their position is mostly changeless. Election from specialist for a six year term, rules of incompatibility with other official functions or labour relations (with the exception of teaching, performing arts, scientific or literary activity) gives them a certain degree of independence limited but not annulled even in their relation with the Commissioner. A transitional rule of the new Act assures the position of the acting special Commissioners: they are keeping their mandate as deputies.

The situation is less simple in the case of the former Data Commissioner. Although the institution of Data Commissioner was established as a special ombudsmen in the Act LXIII of 1992 on the Protection of Personal Data and Disclosure of Data of Public Interest, more and more powers were given by several amendments during the years. The original powers to control the fulfilment of law regardind data protection an freedom of information; examination of complaints and keeping the registry of data protection, the Data Commissioner was empowered to block, erase or destroy any illegal management of data since January 1st, 2004. Since 1999 he/she had a similar right to initiate annulment of special data-qualifications as state secret or official secret. Disposition of the data Commissioner could be challenged in Court Proceeding (like

any supervision of administrative acts). The last amendment of the Act came into effect on 1st of January 2011, ruled that the Data Commissioner has to apply prescriptions of the Administrative Procedure Act when decides on illegal data management.

Amendments to the Act on Data Commissioner had transformed step by step the initial ombudsman-like institution to a specialised administrative body ('state authority'). The new Fundamental Act has been completed this process when abolished the institution of data Commissioner and entrusted a new administrative body with the tasks of data protection.

A new cardinal Act CXII of 2011 on the right to information-autonomy and freedom of information adopted by the Parliament in July, 15th – in conformity with the Fundamental Act prescribing that a cardinal Act should regulate the right to data protection and freedom of information creates the National Authority for Data Protection ad Freedom of Information (hereafter: NADI). NADI lead by the chairman is independent, subjected only to the law, may not be instructed by any other public body and may be given with new tasks or function anly by an act of the Parliament. The Chairman of NADI, who as civil servant wears the rank of minister, should be appointed by the president of Hungary on the proposal of the Prime Minister for a 9 year term. Rules of appointment and those of incompatibility are fixed not similarly but likewise the former Data Commissioner, and NADI practically inherits all his/her tasks and procedural guarantees.

On the other hand NADI is a public body which is part of the Executive. Consequently its activity is not exempt from the jurisdiction of the Commissioner for Fundamental Rights. Thus the level of protection could be higher than in the previous years.

The list of novelties of the Fundamental Act can be commenced with the firs clause of the text regarding the Commissioner for Fundamental Rights who *"shall protect fundamental rights and shall act at the request of any person"*. The translation – used by the Venice Commission and in this volume – does not reflect perfectly the official (Hungarian) rule. A more precise translation could be *"fulfils activity of protection of rights". This latest translation doesn't seem to be correct in English, however, the Hungarian clause is similarly strange and not only in grammatical approach.*

One novelty of the Fundamental Act is the use of general introductory clauses in connection with several institutions[19] (in the interim Constitution such general clauses were applied more rarely[20]). Certain ambiguities are risen due to this new "style" of coding. There is no doubt that in the case of public law institutions the rules

[19] Article 1: "In Hungary the supreme body of popular representation shall be the Parliament."
Article 15: "The Government shall be the general body of executive power..."
Article 24: "The Constitutional Court shall be the supreme body for the protection of the Fundamental Law."
Article 25: "Courts shall administer justice"
Article 40: "The National Bank of Hungary shall be the central bank..."
[20] E. g. in the case of the President.

of behaviour are those fixing the certain competences or jurisdiction, determining the organization and legal position of the head of office (election or appointment etc.) and regulating the special relations to other public law bodies (supervision, cooperation, etc.). Based on these effective legal rules theoretical conclusions may be drawn, some of them may lead to scientific identify of an institution (e. g. the public law body which is independent and empowered to make final decisions in legal quarrels or regarding the responsibility of a person charged with a crime- commitment is identified in theoretical legal thinking as the judicial branch of state power). It is important to underline that theoretical conclusions are based on legal rules and not the conclusion-type identity clauses are the sources of legal regulations. If the genuine legal rules are mixed with theoretical dogma, difficulties may occur during the interpretation of the text.

This ambiguity can be recognized regarding the Commissioner for Fundamental Rights. The official wording of Fundamental Act identifies him/her as *fulfilling "activity of protection of rights"*followed by a genuine rule of competence (power): *"examine or cause to examine abuses of fundamental rights"* and a genuine rule of action *"propose general or special measures for their remedy"*. The emerging question is regarding the extra-regulation given by the introductory clause ('protection of rights') to the rule of competence ('examination of abuses of rights and proposals for remedy'). One is not far from truth if being convinced that hardly any extra-regulation is given by the introductory clause. However it is incorporated in the text, consequently in the future can occur situations when unexpected extra-regulations can be rendered from the general clause.

In the same time an important element of denomination is abandoned in the text of the Fundamental Act. The former ombudsmen – with the exception of the Data Commissioner – were officially called Parliamentary Commissioners. The new Commissioner for Fundamental Rights is not entitled any more with 'Parliamentary' epithet. Since the Commissioner and his/her deputies are henceforward elected with a qualified majority of the Parliament and has to submit an annual report, the change is rather formal than substantial.

Within the new structure of state institutions importance of the Commissioner is expected to crescend due to the changes of the procedural rules of the Constitutional Court. The main form of proceeding of the Court since 2012 will be the constitutional complaint submitted by persons affected by law supposed to be unconstitutional ('on the case proceeding'). Contrary to the situation under the interim Constitution where the popularis actio was the most frequent causa of proceeding, in the framework of the new Fundamental Act the 'absract' motion is reserved for very few promoters: the Cabinet, one fourth (perhaps about 50) Members of the Parliament and the Commissioner, who will be be the only dignity of state entrusted personally with this right. During the effect of the interim Constitution any natural or legal person had the same opportunity.

6. ...et altera pars: public prosecution as protector of public interest

While personal human rights of individuals is protected by the ombudsmen, public interest seems to be out of protection. Fortunately in Hungary prosecutors have certain tasks regarding administrative proceedings. If legality of a decision of an administrative body *not supervised by administrative courts* is questioned, prosecutors may investigate it and take certain measures.

Position of a prosecutor when controlling legality of an administrative act is external, he or she doesn't enter into the legal (administrative) relationship between the individual party and the public body (authority). If the prosecutor formulates an objection against an administrative act the public body has a single duty: to answer the objection. In other words, objection is not legally binding. If the public body agrees with the prosecutor's position and decides to amend or cancel its former administrative act, it is its own decision. If not, the prosecutor has the opportunity to ask the Court to rule on the objection and its refusal. On the other hand if the objection of the prosecutor is initiated by the individual party he or she has the only right to get answer from the prosecutor, but there is no legal pretension to enforce a positive act of the prosecutor.

Besides the formal measures of control (starting civil or public lawsuits) prosecutors may initiate criminal, disciplinary or special administrative proceedings. Another important power of prosecutors is that any warrant of apprehension and irregular perquisitions (during night or without presence of the affected person) in an administrative procedure is executable only with the consent of the competent prosecutor.

Although jurists think that prosecutors have almost only criminal law tasks, administrative and civil law competencies are not unknown in Europe[21]. The Committee of Ministers of the Council of Europe on 6 October 2000 has adopted Recommendation toMember States - Rec (2000)19 - on the Role of Public Prosecution in the Criminal Justice System. This Recommendation specifies the situation of the public prosecutors and public prosecution services in the criminal justice system and their basic principles of operation as well, but it does not deal with the role of the prosecutors beyond the criminal justice system. In several European countries public prosecution services' tasksoutside the criminal field are similarly of fundamental importance.

If we have a look at tasks outside the criminal field in the Member States, it can be seen that tasks of the prosecutor could basically be classified in two main groups. *Civil law tasks* – including commercial and labor law competencies as well – belong to the first group, while the second group consists of *administrative law tasks*. The second main group of prosecutorial tasks outside the criminal field includes different measures of the prosecutor which serve a special control on the legality of the administration's operation from a constitutional point of view. A lot of possible measures could be taken by the prosecutor in connection with this area: in some countries the supervision of decisions of

[21] See: VARGA, *Reflection document* cit. and VARGA,*Report*, cit.

several administrative authorities, appeals, and other forms of legal remedy could be used. Moreover such important powers are provided for prosecutors as the supervision of constitutional requirements of domestic law and of course the power of initiating constitutional court's procedure. In other countries there are prosecutorial competencies connected to disciplinary measures against the members of administrative authorities, judges, prosecutors, police officers and other persons working in public service.

The reference to the *state interest* is the most obvious among the legal bases (causa). This appears when the prosecution of the member state has expressed competence for enforcement of (defending) the claim of the state – first of all its claims relating to property. The protection of *public interest* is another characteristic referential base for prosecutors in the cases of competences outside the criminal sector. It has more meanings relating to the regulations for prosecutors. It is the synonym of the legality in some cases and according to it the prosecutor should intervene in some procedure of administrative or civil law if the laws of the given country were injured importantly, e.g. if an unlawful administrative decision is made, an invalid contraction is bound by the otherwise private parties or if a court decision violates the law in a way that cannot be remained without (legal) remedy. In other cases the protection of public interest is close to the protection of human rights and this serves as legal base for explication of prosecutorial intervention in the case of certain separated social groups.

In case we make an overview on prosecutors' activities, their main types, *possible measures*, competencies and tasks outside the criminal field in the different member states of the Council of Europe, we can give an answer to the question whether it is inevitable and correct that prosecutors - in addition to their outstanding role in criminal jurisdiction - have also tasks in the civil and administrative law area. Comparing the two groups of member states and the requirements on the prosecutors' activities, it can be stated that prosecutors' non-criminal tasks are not inevitable, but in case it exist it is useful and reasonable.

If prosecutors are provided with such competencies outside the criminal area, states have to ensure the rule of law and within that framework, the respect of other *basic principles* and human rights governing all democratic societies. Some of these are applications of the principles regarding organizational structure of a modern and constitutional state under the rule of law (separation of branches of power, sovereignty of the legislature, accountability of the executive and independence of the judiciary); others concern legal grounds and extent of the prosecutors competencies (exceptionality, subsidiarity, specialty, legality, public interest, interests of state, protection of human rights and consultative co-operation); finally some principles are of procedural nature (equality of arms, non-discrimination and impartiality)[22].

[22] Unfortunately the list of principles are only reflected in the official opinion of the competent consultative body of the Council of Europe, see: *Opinion Nº (2008) 3 of the Consultative Council of European*

7. What conclusions can be drawn?

If we look at actuality of governments, we may see that democratic decision making is less and less autonomous. Political decision making is non-transparently 'polygonal' in the local-regional-national-(federal-)European-international fields of force and its efficiency is influenced by bureaucratic administration outspreading like a spider's web. As consequence liberty of action guaranteed by law, moreover even fundamental rights of the individual (even if not considered to be a human being 'only' subject of legal regulations) cannot be applied.

Complexity and meticulosity of regulations, proliferation of administrative procedures make classical ways of remedy deficient. Law assures judicial control of administrative acts in vein if harm to the individual party is not caused by manifest substantive illegality or procedural fault, but rigidity of administrative structures, non-perspicuity of legal regulations or their consequence, bypass of proper carrying out of governmental decisions. It cannot be left out of consideration that formal judicial review is an exceptional remedy and the inevitable minuteness makes it efficient only if do is exceptional. If it is used as a daily, general and ordinary instrument of remedy, it will brake the administrative decision-making, consequently it will brake the effectiveness of the government.

An important conclusion can be observed: the more and more mechanistic administrative procedures require alternative forms of control. The improper situation of public administration can be corrected by Parliamentary Commissioners who have the duty to give effective protection to the individual against the depersonalized administrative structures. Parliamentary Commissioners could be effective, if they abandon the often-found ambition to have more legal power, to become a super-authority, and they focus on solution of problems not perceptible for formal legal remedies. On the other hand prosecutors controlling on the ground of common weal and by public law instrument exercising of public powers by administrative bodies may help in bringing down the improper behavior of authorities[23].

A legal system using some or many alternative forms of control will not make government fail-safe, but it could be considered great achievement if the number of formal judicial reviews and those of civil law trials against public bodies is sensibly decreasing. Leastwise it would make government and its control more equilibrated.

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*Prosecutors on "Role of Public Prosecutors outside the Criminal Law Field",*adopted by the CCPE at its 3rd plenary meeting, CCPE(2008)3, Strasbourg, CoE, 2008.

[23] The binarity of roles of the ombudsmen and public prosecutors as protction of individual rights on one hand and protection of public interest on the other was observed by the second ombudsman of Poland, see: TADEUSZ ZIELINSKY: *The Ombudsman — Possibilities and Delimitations for Action* (Warsaw: Biuro Rzecznika Praw Obywatelskich, 1994.)

Публичный интерес как фактор правового регулирования финансовых правоотношений

(Public Interest as a Factor in the Legal Regulation of Financial Relations)

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Статья посвящена определению правовой сущности публичного интереса как фактора правообразования. Автором затронуты проблемы достижения консенсуса публичного и частного интересов в обществе, дана оценка публичному интересу как принципу финансовой деятельности государства, высказаны предположения относительно новой тенденции к нивелированию приоритета публичных интересов и задач перед частными имущественными интересами и правами субъектов финансовых правоотношений.

Ключевые слова (keywords): финансовое право (financial law), публичные финансы (public finance), публичный интерес (public interest), финансово-правовое регулирование (financial-legal regulation), законодательство (legislation), рыночная экономика (marketeconomies), обязательство (obligation).

«Смутное ощущение некой недосказанности или незавершенности в научном познании,а возможно даже ощущение близости раскрытиянаучной тайны ведет к переосмыслениюистоков финансового права…»
(Запольский С.В.)

Существенные изменения в системе общественных отношений в последние годы привели к тому, что отчетливо наметились тенденции повышении роли публично-правовых начал в жизни общества, государства и человека.

Речь идет о специфических способах правового воздействия на общественные отношения, специфическом правопонимании, которому присущи признание и обеспечение приоритета публичных интересов, и целая система собственных и общих институтов, которые проникают в любой правовой массив и служат его опорной конструкцией (правовое обеспечение публичного интереса,

структурно оформленные властные институты, императивные методы публично-правового регулирования).

В условиях глобализации и более тесной связи и сближения национального и международного правапонятия «публичное», «публичность» наполняются новым емким содержанием. Предпосылками тому служат: увеличение радиуса национально-государственных действий, большая частота возникновения и потребности в реализации общих межгосударственных интересов, объективные глобальные процессы взаимозависимости «миров» в сферах окружающей среды, энергетики, транспорта, финансовых потоков, совместных производственных и инфраструктурных объектов, безопасности, научных и культурных обменов, большая степень информационной доступности и открытости «миров», взаимные перемещения предметов регулирования и т.д.

Процесс выявления и закрепления публичного интереса приобретает особое значение, поскольку многообразие интересов в обществе предполагает официальное признание публичного интереса как приоритетного и общеобязательного для деятельности всех субъектов права, так как защита интересов, не соответствующих объективным интересам общества, влечет нарушение баланса интересов. Задача любого культурного общества заключается в согласовании противоборствующих интересов, способствовании достижению компромисса, обеспечению общественного согласия и партнерств.

Право фокусирует в своих нормах публичный интерес как общественно-значимое, общеобязательное мерило, с которым соизмеряются другие виды интересов. В частности, через законы государство стимулирует осознание интересов, которые признаны им общественно важными, устанавливает механизм их удовлетворения, и вводит пределы для такого удовлетворения, а также для проявления субъективных интересов, которые противоречат объективным интересам общества.

Особая роль данной регулятивной функции права проявляется тогда, когда отношения не могут существовать иначе, как будучи предметом, целью и результатом их правового регулирования. Примером служат финансовые отношения, складывающиеся в современном экономически развитом обществе, где публичный интерес определяет наличие специфического предмета и методов правового воздействия.

Финансовое право отражает не все публичные интересы, а преимущественно те из них, которые выявляются в рамках предмета его регулирования. В финансовом праве публичные интересы закрепляются, обеспечиваются и реализуются с помощью различных правовых средств, таких как: нормативное фиксирование публичного интереса и его признаков; закрепление видов публичных интересов; признание приоритета публичных интересов; установление порядка и гарантий обеспечения публичных интересов;

определение способов защиты публичных интересов и мер ответственности за их нарушение. Тем самым, публичные интересы, обеспеченные финансовым правом, приобретают значение нормативных ориентиров деятельности и критериями принятия правовых актов.

В настоящее работе нас в большей степени интересует публичный интерес как фактор правового регулирования финансовых правоотношений.

В научном ключе это предполагает определение сущности явления, выявление критериев отнесения того или иного интереса в качестве объективированной в праве воли к общественно-значимому (публичному), а также установления его пределов – так называемой меры публичного интереса при регулировании финансовых правоотношений.

Что же такое публичный интерес?

«Публичный интерес» относится к категории законодательно не закрепленных и теоретически недостаточно определенных понятий, сущность которого невозможно раскрыть без обращения к философскому пониманию данной категории.

Анализ взглядов классиков буржуазной политической экономии Т. Гоббса, Ж.Ж. Руссо, К.А. Гельвеция, П.А. Гольбаха, Д. Дидро, Г. Гегеля свидетельствует о многогранности понятия «интереса» и отнесении его к разряду социологических понятий. В философском понимании интерес характеризуется как имеющая значение причина действий людей и их групп, причина общественного поведения, предопределенная объективными условиями – видами собственности, характером распределения, природой и устройством власти, типом культуры, укладом жизни.

При этом в зависимости от того, чьи потребности выражает интерес, в работах названных философов он подразделяется на личный (частный) и социальный (общенациональный)[1]. Первая разновидность интересов связывается с сугубо индивидуальными потребностями, установками, планами и конкретными условиями бытия человека, вторая – касается таких сфер как политика, законодательство, торговли, науки, искусства и т.д.

Особого внимания заслуживает поставленный в ранних трудах К. Маркса и основанный на взглядах Г.Гегеля вопрос об общем интересе как отношении, проникнутом разумом, и частном интересе как отношении, проникнутом духом своекорыстия[2]. У Г.Гегеля носителем общего интереса является государство[3].

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[1] См.: Гольбах П. Избранные произведения в 2-х т., т.1, М., 1963, С.311-315; Гельвецкий К.А. Сочинения в 2-х т., т.1, М., 1974. С.260-276; Дидро Д. Избранные произведения. М-Л., 1951. С.352-380; Гольбах П. Система природы или о законах мира физического и мира духовного. М., 1940. С.185-207

[2] См.: Маркс К., Энгельс Ф. Соч. т.1. С.160

[3] См.: Гегель Г.В.Ф. Соч. т.3. М., 1956. С.228

Степень соответствия частного и общественного (государственного) интересов выступает высшим критерием правильности человеческого поведения в обществе, а совпадение частного и общественного (государственного) интересов одновременно выступает высшим доказательством и основным показателем совершенства общества и государства как общественной организации.

При этом в философском понимании синхронность интересов должна базироваться на частном интересе[4].

Данное утверждение представляется не вполне определенным, поскольку, с одной стороны, интересы только и существуют у отдельных людей, так как только люди есть суть действительные реальные элементы общежития. Общий интерес – это ни что иное как та или другая совокупность частных интересов. В этом смысле можно утверждать, что все право базируется на охране интересов отдельных лиц, то есть частных интересов. С другой стороны, правовая охрана дается только тем интересам отдельных лиц, которые имеют более или менее общее значение или потому, что они общи целой группе лиц, либо потому, что данный интерес есть интерес хотя и одного отдельного лица, но занимающего в обществе такое положение, что его интерес получает общее значение. В таком смысле, наоборот можно сказать, что всякое право охраняет общие интересы.

Думается, что отдача предпочтения одному из этих аспектов была бы неверной. В праве всегда представлены обе грани интереса, и приоритет определяется исключительно посредством выделения задачи, решение которой дает возможность удовлетворить в первую очередь наиважнейшие интересы как человека, так и общества в целом.

Главным средством решения задачи гармоничного сочетания личных и общественных интересов является разумное законодательство, признанное стать подлинным воплощением всеобщей воли. Неслучайно панацеей от всех зол классики буржуазной политической экономии видели законы, составленные с учетом и в строгом соответствии с естественной сущностью человека, а корень зла – в недостатке мудрости и гуманности государя, в темноте и невежестве законодателей, которые всегда частный интерес противопоставляют общему.

Ретроспективный анализ вопроса разграничения категорий государственного и публичного интересов позволяет отразить видовую принадлежность первого по отношению ко второму.

В конце XIX столетия, изучая государственные финансы и устанавливая первичные категории русского финансового права, ученые-юристы использовали категорию «государственные финансы»[5], подразумевая под ними и финансовые ресурсы государства, и финансовые ресурсы иных государственно-

[4] См.: Гельвеций К.А. Об уме. М., 1938. С.47
[5] См.: Бельский К.С. Финансовое право. М.: Юристь, 1994. С.29

территориальных образований (в первую очередь, таких как общины, земства, округа).

Таким образом, можно утверждать, что на заре формирования русского финансового права термины «публичные» и «государственные» использовались как синонимы.

После 1917 года попытки разграничения данных понятий не осуществлялись, вследствие чего термин «государственное» полностью вытеснил термин «публичное», в то время как зарубежные авторы, например, Годме П.М.[6], все чаще прибегали к употреблению именно последнего термина при характеристике финансовой деятельности государства.

В современный период указанные выше обстоятельства явились причиной возникновения научной дискуссии об отнесении ряда фондов денежных средств, в том числе, негосударственных фондов органов местного самоуправления к предмету финансового права.

По мнению Нечай А.А. основными факторами, вызвавшими к жизни данную дискуссию следует считать: развитие демократических тенденций, проявившихся в становлении института местного самоуправления, органы которого не входят в систему органов государственной власти согласно Конституций Российской Федерации; появление муниципальной собственности (в том числе, денежных фондов местного самоуправления), которую нельзя отнести к государственным ресурсам; тенденция к размежеванию функций государства и местного самоуправления, вызывающая вопрос о правомерности отнесения финансирования функций местного самоуправления к понятию «финансирование государственных функций»; активное развитие нового метода организации исполнения государственных функций посредством передачи их части (вместе с соответствующими денежными фондами) различным негосударственным институтам[7].

Данные обстоятельства явились предпосылкой для переосмысления категорий «публичные финансы» и «публичные интересы».

Вызывает интерес и этимологический аспект понятия.

Давая определение термину «публичный», как производному от латинского «pablicus» и английского «publicity» автор известного толкового словаря Ожегов С.И. акцентирует внимание на философском понимании данного термина как «общественный, не частный»[8].

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[6] См.: Годме П.М. Финансовое право / перевод и вступ. Статья Халфиной Р.О. М.: Прогресс, 1978. С. 10

[7] См.: Нечай А.А. Публичные фонды как категория современного финансового права // Журнал российского права. 2004, №18. С.66

[8] См.: Ожегов С.И., Шведова Н.Ю. Толковый словарь русского языка. М., Изд-во «Азъ», 1992.

В.И. Даль токует понятие публичный как всенародный, оглашенный, явный, известный[9].

Новое осмысление понятия публичности Тихомиров Ю.А. видит в уходе от сведения его к обеспечению государственных интересов и трактовке публичного интереса как интереса отдельных индивидов, разного рода сообществ, объединений (в том числе, территориальных)[10].

При этом автор вводит понятие «меры публичного интереса»[11] как условия соизмерения публичного интереса с личными и корпоративными интересами и гарантии реализации публичного интереса без подавления и ограничения последних.

Представляется, что применительно к финансовому праву публичный интерес являет собой выражение суммарного, усредненного социального интереса в какой-либо сфере общественной жизни – экономической, социальной и т.д.[12]

Для финансового права как отрасли публичного права такое понимание публичности означало необходимость замены категорий «государственный интерес», «государственные фонды» при определении финансовой деятельности государства и денежных фондов, которые охватываются предметом финансового права, на более широкие категории «публичный интерес», «публичные фонды».

Публичный интерес включает в себя не только исключительно государственный интерес, носителем которого является государство, в лице системы соответствующих государственных органов, но и другие виды интересов, в том числе, общественный и территориальный, носителем которого являются органы местного самоуправления[13].

Под общественным интересом современные авторы в строгом смысле слова понимают своего рода усреднение интересов частных, групповых, без удовлетворения которых невозможно обеспечить нормальное развитие общества в целом[14].

Признание и защита общественных интересов как главной составляющей публичных интересов сегодня последовательно обеспечивается законами и подзаконными нормативными актами. Примером может служить Конституция Российской Федерации, закрепляющая базовые общественные интересы, такие как охрана государственных границ и оборона страны (статья 4), устойчивость

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[9] См.: Даль В.И. Толковый словарь русского языка. Современная версия. М., 2003. С.546; Мюллер в.К. большой англо-русский словарь. Екатеринбург, 2007. С.964

[10] См.: Тихомиров Ю.А. Публичное право: Учебник. М.: БЕК, 1995. С.3-33

[11] См.: Тихомиров Ю.А. Современное публичное право: учебник. М.: Эксмо, 2008. С.448-450

[12] См.: Нечай А.А. Публичные фонды как категория современного финансового права // Журнал российского права. 2004, №18. С.68

[13] См.: Нечай А.А. Публичные фонды как категория современного финансового права // Журнал российского права. 2004, №18. С.69

[14] См.: Тихомиров Ю.А. Публичное право: Учебник. М., 1995. С.54-55

институтов власти (статья 11), социальная защита и социальное обеспечение граждан (статьи 7, 39). То есть, не будучи по своей природе конституционно-нормативным, понятие публичного интереса по своему содержанию отражено в основном законе страны. Принимаемые в развитие указанных положений Конституции Российской Федерации федеральные законы создают режим обеспечения публичных интересов в различных сферах жизнедеятельности. В сфере финансовых отношений объектом охраны, в первую очередь, выступают: интересы национальной экономики; государственные нужды; экономические интересы территориальных образований; требования к видам деятельности, качеству товаров и услуг; интересы объединений групп собственников или собственников вообще; интересы потребителей.

Реализация данных интересов происходит в рамках осуществления государственной финансовой политики, то есть целенаправленных действий государства в лице публичной власти, направленных на достижение целей и решение задач публично-правовых образований при помощи различных инструментов[15].

При этом приоритет публичных интересов, соизмеряемых между собой, не служит подавлению или ограничению личных и корпоративных интересов. Напротив, обоснованная правовая мера выражения публичного интереса является способом их концентрированного отражения и гарантией реализации. Естественно, это не должно приводить к преувеличенному значению публичного интереса в разных сферах общественной жизни или к его подавлению и умалению. Главное требование – строго соблюдать правовую меру публичного интереса, поскольку любое нарушение баланса публичных и частных интересов чревато «правовыми угрозами» и ослаблением государства и экономики, гарантий прав и законных интересов граждан и юридических лиц. Одновременно возникает проблема определения данной меры, возможности ее научного определения и практической реализации.

Поиск правового опосредования «меры публичного интереса» лежит на границе частных и публичных интересов, на полюсах которой сосредоточены два главных действующих лица – государство и гражданин.

Границы частного и публичного интересов одновременно и стабильны, и подвижны, выявлять и преступать их поспешно не следует. Субъекты права, играя разные социальные роли, всегда выражают свои притязания на принятие, изменение и отмену законов и иных правовых актов. Их побудительной основой могут быть как правильно понятые социальные интересы, так и подмена интересов, своего рода замена узкогрупповыми или эгоистическими интересами. Гипертрофия частных интересов, давление, лоббизм в законотворческом

[15] См.: Сабитова Н.М. Государственная финансовая политика: проблемы целей // Финансы и кредит. 2010. №27 (411). С.8

процессе ведут к умалению публичных интересов. Справедливости ради стоит заметить, что в процессе правотворчества то, каким содержанием будет наполнена правовая норма, зависит и от ряда объективных факторов: доминирования в сознании субъектов правотворчества той или иной идеологии, различное представление об иерархии ценностей, реального расклада политических сил в обществе и проч. В конечном счете содержание права неизбежно будет являться результатом борьбы и некого компромисса.

Результатом верно определенного баланса между публичным и частными интересами должно явиться то, что общественные ожидания, обращенные к власти и государственному управлению, будут адекватны собственному правовому поведению гражданина и пониманию того, каким образом удовлетворять частные и общественные потребности.

Вероятны и случаи чрезмерно широкого понимания публичного интереса и подавления частных интересов. Примером может служить долгие годы превалирующие в России процессы централизации управления и зарегламентированности деятельности коммерческих юридических лиц. Последующая же линия на формирование рыночной экономики, напротив, сопровождалась нигилистским отношением к государственному управлению и стихийной саморегуляцией.

Здесь следует оговориться об известной подвижности границ между публичным и частным интересами, что также не способствует определенности в данном вопросе. Некоторые явления перестают иметь общественный и государственный интерес и сохраняют смысл интересов частного характера. Возможно и иное, когда некоторые частные интересы ввиду их общей значимости признаются правом в качестве публичных интересов. Подобные «рокировки интересов» нужно иметь ввиду применительно к современной действительности при определении предметов и методов правового регулирования.

Современное финансовое право, пусть пока доктринально, также находится в процессе «переполюсовки». Вопреки наметившейся тенденции повышения роли публично-правовых начал в жизни общества, стоявшие на защите прав государства и обеспечивающие приоритет публичных интересов перед интересами частными институты финансового права все более ориентируются на защиту прав и интересов юридического и физического лица. И здесь нельзя не заметить громадные перспективы тенденции к защите «слабой» стороны в ее отношениях с «сильной» стороной, давно превалирующей в других отраслях права.

Связано это, в первую очередь, с критическим подходом к пониманию существа финансовой деятельности государства, которое ему придавалось в

советской правовой литературе, к объявлению финансов сферой исключительно властно-имущественных отношений.

Понимая под результатом финансовой деятельности государства те или иные юридические механизмы и органы, их применяющие, следует признать, что ни налогообложение, ни бюджетный процесс, ни валютный контроль, ни таможенное регулирование, ни банковское дело сами по себе финансовой деятельностью государства не являются. Утверждение обратного ведет к отождествлению государства с субъектом конкретных финансовых правоотношений. Тогда как очевидным является то, что в финансовых правоотношениях юридическому или физическому лицу противопоставлено не государство, но государственные органы соответствующей компетенции или иные субъекты с делегированными государством полномочиями.

Более того, административно-распорядительные полномочия не всегда выступают характерной чертой субъекта, представляющего сторону государства, равно как и не всегда другая сторона выступает носителем обязанности. Волевой императив, исходящий от государства, не в состоянии с тем качеством и с теми гарантиями, которые предопределяются современным гражданским обществом, обеспечить правовое регулирование налоговых, бюджетных и других финансовых правоотношений[16].

Все более прочное место в финансовых отношениях отводиться обязательствам. Ныне в правовом режиме обязательства реализуется большинство представительно-обязывающих правоотношений, в их числе: взимание налога, бюджетное финансирование, предоставление и возврат публичного долга, расходование внебюджетных фондов, выдача кредитов и проч. Обязательства нашли официальное признание в качестве основного способа регулирования финансовых отношений. И в тех случаях, когда носитель государственного интереса обладает правом, обязанность другой стороны обусловлена именно этим правом, а не непосредственно властью государства. В связи с чем не вызывают сомнения утверждения ряда авторов о том, что категория обязательства необоснованно монополизирована «цивилистами». В финансовых правоотношениях нивелирована роль сильной стороны публичной власти по причине заинтересованности последнего в обеспечении юридической автономии участников хозяйственного оборота от государства, в уходе от юридического алгоритма долженствования во взаимоотношениях с государством, во внедрении новых организационных форм их взаимодействия.

Указанная тенденция повлекла существенные изменения в регулировании отдельных институтов права. В частности в налоговом законодательстве существенно повышены гарантии прав налогоплательщиков от незаконно вводимых налогов, неправомерного налогового администрирования; в области

[16] Запольский С.В.Теория финансового права: научные очерки. – М.: РАП, 2010. С. 278.

бюджетных правоотношений получили определенность межбюджетные отношения и ответственность за нецелевое использование бюджетных средств, координально пересмотрены отношения по бюджетному финансированию – отношения между получателем бюджетных средств и государством-должником признаны обязательственными; прогресс наметился в правовом регулировании публичного долга; правовым феноменом стало формирование подотрасли эмиссионного права в качестве центральной несущей конструкции всего финансового механизма и основного элемента системы финансового права.

В связи с изложенным, возьмем на себя смелость предположить, что сегодня устранен ранее существовавший недостаток финансового права – приоритет публичных интересов и задач перед частными имущественными интересами и субъективными правами отдельных лиц.

Это, в свою очередь означает возникновение все большего количества ситуаций, когда государству, преследующему фискальные и распорядительные цели, как юридически равный субъект противостоит юридическое или физическое лицо – носитель собственного правового финансового интереса.

Сказанное позволяет начать дискуссию о том, что границы финансового права ныне не определяются границами публичных интересов.

German Experience of Building Fiscal Federalism: Lessons for Russia

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Abstract: The two-layered system of government in a federal state determines particular fiscal relations between the center and the states. Each layer must obtain fiscal autonomy, which includes the assignment of functions to different levels of government and appropriate fiscal instruments for carrying out these functions. The basic provisions for fiscal federalism in Germany are determined in the Basic Law. This country has an outstanding experience of building fiscal relations using horizontal and vertical alignment which could be taken into consideration when deciding what the Russian model of fiscal federalism should be in the future.

Keywords: fiscal federalism, fiscal system, financial autonomy.

1. Introduction

True federation can only be realized provided that its subjects have financial (i.e., budgetary) autonomy. The extent of such autonomy may be different, and center's intervention into the financial sector of the region rather contributes to its formation and consolidation than is non-hostile to the principles of federalism. It is important to know when to stop, as well as time and specific ways of central government's influencing the financial position of regions, to form inter-governmental relations, adequate to economic and social order in the state.

It is not right, thus, to make united rules for intergovernmental relations of any federal state. There are a lot of factors that stipulate a particular form of financial relations between center and regions in a separate country: historical and cultural peculiarities, economic and social order etc. Even common principles have different methods of realization. That is why any country's experience of building fiscal federalism, even German, in not universal for all countries.

The federation in Germany was created by the lands from below, and the authorities here gained as much powers, as the parties of the unification treaty gave them. So-called financial constitution of Germany establishes clear distribution of financial powers between federation (center) and lands. This is one of the factors influencing the material well-being of particular regions. Another and even more essential one is vertical and horizontal financial alignment between the lands which was subject to recent reforms in Germany. The tendency of transformations is raising the

self-dependence level of federal lands when taking decisions on income and expenditures.

As to Russia, the federation building experience rather differs from that of western federative states. It has arose and developed here as a process of decentralization of the unitary state. This partly explains why most sources of revenue are concentrated in the federal budget (for instance, now there are only two taxes that go into regional budgets entirely – organizations' property tax and transport tax). The system of horizontal alignment of the subjects of federation is not effective since it is based on straight financial grants from the federal center. It changes from year to year, since there are no specific provisions in the Constitution of Russian Federation on this matter. That is why the experience of building fiscal federalism of other countries, especially of Germany that uses mixed cooperative model, would be useful and important for Russia while reforming its own system.

The traditional theory of fiscal federalism, as Wallace Oates (1999) notes, lays out a general normative framework for the assignment of functions to different levels of government and the appropriate fiscal instruments for carrying out these functions. Thus, there are three points in building fiscal federalism that can be compared: legal provision (normative framework); vertical alignment (distribution of budgetary resources between center and regions); horizontal alignment of the subjects of federation (intergovernmental transfers).

2. Legal provision

The normative framework of building fiscal federalism in a state includes, basically, the constitution as a law of a higher force, and other laws as well. Constitutions of many countries contain provisions on finance. G. A. Gadjiev, one of the Constitutional Court of Russia judges, defines these articles as "economic constitution" (1995) which reflects the essence of this notion.

The Constitution of Russian Federation (1993) has several provisions devoted to budget system, taxes, and other financial institutions. These provisions are separate, not connected to each other and underdraw fiscal relationship between the central and regional governments. Meanwhile, the constitutions and charters of some subjects of Russian Federation which are acts of a superior force for the particular region, include special articles devoted to regional finances (for instance, the Constitution of the Republic of Tyva, the Charter of Tomskaya oblast and others). Nevertheless, the basics of fiscal federalism are provided neither in the constitution of Russia, nor in the constitutions and charters of its subjects but in the Budget Code of Russian Federation, Tax Code of Russian Federation and other federal laws which have already been subject to changes for several times.

The Constitution of Germany (1949) has section X "Finance" which contains almost 13 articles that set guidelines and rules for the delimitation of financial powers

between federal center and the lands. Particularly, they set tax assignment and expenditure assignment between the center and the lands, delimit the financial administration powers between governments, and provide the self-dependence of the lands at maintaining the budget management. The most important task of regional policy proclaimed is to ensure a uniform standard of living throughout the country, and in order to achieve this goal the state redistributes resources and revenues, as well as provides public good equally to all territories.

The point is that establishing the basics of fiscal federalism in a constitution of a state (not of a subject of the federation) provides stability in this sphere. As a result of non-observance of this requirement in Russia, regional fiscal instruments are subject to constant change of the legislation. The result is financial instability, and inability of the subjects of federation to carry out public functions entrusted to them. The way out of this situation would be to amend the constitution of Russia, particularly, bringing in it the section on the basics of economic system, financial policy and fiscal federalism, guided by the experience of Germany in this sphere.

3. Vertical alignment (Expenditure assignment)

One of the key issues in building fiscal federalism is the question of how subnational authorities must best be financed. This issue is intimately related to the question of expenditure assignments across different levels of government. Usually regional governments should fulfill mainly allocational functions by providing services that would relate to the local population. In order to fulfill these functions, they are provided with revenue sources that include taxes, dues, tallages and other. The tax assignment deals not only with a problem of a specific tax place under the responsibility of either central or regional government, but with a spectrum of different designs of the tax sharing.

As it has already been mentioned, the Constitution of Germany (1949) provides in article 106 the revenue assignment. Tax legislation is fully centralized. Major revisions of federal financial arrangements can be made only through an amendment of the Constitution. The main federal taxes are excises, especially on mineral oil, tobacco, and alcohol. Among other income sources of less importance are custom duties, tax on freight transport, taxes on capital turnover, insurance and bill tax and other. The main lands' taxes are the motor vehicle tax and the beer tax, as well as fees from the proceeds of gambling houses. The joint taxes are personal income tax, corporate income tax, value-added tax and local business tax which are distributed (except the last one) in equal proportions between the federal and lands' governments. The federal government also has the right under the Constitution to levy a surcharge on income taxes.

Recent reforms of intergovernmental relations were more conducive to the concentration of the most significant in a fiscal sense taxes at the federal level and the final consolidation of the system of regional budgets' income formation through

deductions from federal taxes. By some estimates, more than 85 percent of tax revenue of consolidated budgets of subjects of the federation is formed by these deductions (from personal income tax, number of excises, fees for the usage of wildlife and water resources and other). The most important federal taxes are value-added tax, and severance tax. Regions have only two own taxes - organizations' property tax and transport tax (there is also gambling tax which is important only for the 6 regions which are part of gambling areas under federal law). There are no joint taxes at the moment under the provisions of the Budget Code of Russian Federation, though they remained in practice (for instance, 70% of the personal income tax goes to regional budgets, and 30% - to local budgets though legally this is federation's own tax).

Concerning the financial federalism principles, the subjects of Russian Federation should obtain sufficient revenue sources in order to fulfill their functions. One of possible ways is establishing joint tax design in the Constitution, another way deals with fixing under the regional governments the personal income tax on an ongoing basis.

4. Horizontal alignment

The important feature of all federations are intergovernmental transfers or grants since they form part of the system of federal-state fiscal arrangements that are in place to coordinate fiscal decision making at the federal and state levels of government. Federal fiscal relations consist primarily of a set of financial transfers from the federal government to the state and a set of arrangements for coordinating and sharing particular tax bases (last was the point of discussion in a previous part). The point is that federal government usually collects more tax revenues than it needs for its purposes and transfers some of the excess to the states as grants or by the explicit sharing of tax revenues (Broadway, Shah (2009)). The grants are used mostly for the financial equalization of "poor" and "rich" regions, in order to reduce the gap between them.

In Germany there are vertical grants that imply federal cofinancing of specific state projects. These grants are conditional, and operate within a complex network of interstate cooperation. This cooperation is governed by a great number of treaties and agreements among authorities. Constitution of Germany provides joint decision making and responsibility sharing, in combination with joint planning and financing as well as specific grants-in-aid. These are the features of cooperative fiscal federalism model, as many authors point out. Joint tasks are determined for five policy areas (university construction, regional policy, agricultural structural policy and coast preservation, planning education, and fostering research). Grants-in aid are given to the states for regional and local investments within certain policy areas to be defined by federal law or by federal-state agreement. The Constitution stipulates that such grants should be used only for equalizing regional disparities, for stabilization, and for stimulating growth.

The system of intergovernmental transfers that is established in the norms of the Budget Code of Russian Federation deals mostly with straight financial help rather than with interstate cooperation. There are several types of these transfers: grants-in-aid (equalizing budgetary provision), subsidies (cofinancing of regional expenditures of certain kind) and subventions (covering delegated powers). Of course, there are legal provisions for the transfers' assignment, but the requirements are easily met by most of needy regions. This results in a situation when rich regions have to feed poorer regions through the system of grants' distribution. A lot of regions are waiting for the financial help from the federal center and do not take any attempts of improving their financial policy (for instance, 90% of the budget of the Republic of Tyva is formed by federal grants).

So, the future Russian budget reforms should be directed at introducing the grants' assignment on the cooperative basis for equalizing regional disparities.

5. Conclusion

The experience of building fiscal federalism in Germany must be taken into account along with current modernization of financial relations between federal center and the lands. Basically, the reform is aimed at the transfer from cooperative model to competitive federalism. There have been several reasons for changing the fiscal scheme, and all of them must be analyzed when making a suggestion for the future development of Russian fiscal federalism. Should Russian reforms be directed at bringing in the cooperative model of fiscal federalism or the competitive one is to be decided in the future. But the normative framework for it should be provided in the Constitution, and this brings in the point of amendments.

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Transmission of Tax Policy Targets to Economy. Towards Risk-orientated Tax Policy

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Abstract: The crucial task of tax policy is to levy taxes according to expected by public authorities social and economic goals of taxation. Sure enough, in practice, tax policy should be implemented being associated with special transmission mechanism of purposes defined by tax policymakers, both elected politicians and non-elected executives. Well-done tax policy should take into account both rational and expected reaction of taxpayers as well as emotional driven decision taken by them. Such a differentiation of taxpayers' behavior will allow to discussed direct and indirect as well as rational and behavioral mechanism of transmission of the tax policy targets.

Keywords: taxation, tax policy, transmission of tax policy goals.

1. Introduction

Nowadays provided tax policy should fit contemporary economic and social aspects of taxpayers situation. The increasing role of non-economic and non-financial attributes of firms as well as households influences rationality and effectiveness of decision taken by tax authorities. Hence, effective tax policy depends mostly on the possibility of prediction taxpayers' behavior. The greater risk of unexpected decision influenced by tax burdens reduces the effectiveness of taxes treated as the means to achieve goals of both economic and social policies.

The implementation of tax policy assumptions influences a public authority to identify potential reaction of taxpayers. The aim of discussion is the identification - of the points of view, the relationship between fiscal authorities and taxpayers - the possible transmission mechanisms of tax policy goals for the economic system. In advance, it requires determining the essence of modern tax policy, on the other hand systematizing the reaction of taxpayers. Consequently, it will be possible to discuss directly and indirectly driven economic and social reactions of taxpayers. At the end, rational and emotional aspects of tax policy implementation could be reviewed.

2. The essence of tax policy

At present two basic premises of the organization of the state are assessing the democratization of political life and the degree of marketization. Both features of the modern state of development reflected in the implementation of tax policy, which is one of the main manifestations of activity of public authority. The democratization of political life means that the criterion for assessing the assumptions of tax policy, manifested in the existing tax system, should be a similarity to the socially accepted values. The market economy, ensuring freedom - within the limits of constitutional order - to implementation by economic operators sovereignly determined objectives, makes it necessary to take into account in the transmission of tax policy assumptions for the economic apparatus, the possibility of disturbances in the process of socially acceptable objectives. Consequently, it is assumed that the basis for assessing the rationality of contemporary tax policy is the efficient transmission of the policy objectives to economy. Ensuring the efficiency of transmission in question requires public authorities to take account of private decision-making process.

Tax policy is understood in the literature as the use of fiscal instruments to achieve social and economic defined goals. Strictly stated, the core of tax policy is related not to fiscal or financial but social and economic background. Equally, it shows that measures of tax policy are determined directly by nothing but social and economic policy goals, especially to promote social welfare[1]. It is widely known that social welfare is consequence both revenue and expenditure side of public finance[2].

Tax policy could be treated as the crucial part of fiscal policy. The definition of fiscal policy suggested by S. Owsiak[3] focuses on tasks which implementation is the use of different instruments, notably tax instruments. Such tasks include:

a) meet the demand of the state (government) for money,

b) the performance of statutory duties by public authorities,

c) implementation of the non-fiscal objectives.

Tax policy may refer to principles of taxation, among which the main ones are: equity, efficiency and economy[4]. It is possible to distinguish two concepts of equity: horizontal and vertical. Horizontal equity accepts that taxes should treat taxpayers in similar position in the same way. Due to vertical equity it is widely accepted that individuals with better position should pay higher tax liabilities than those with worse position. Efficiency principle indicates that taxes should be levied according to both the least possible allocative distortions (so called negative externalities) and the lowest possible deadweight cost of taxation. Economy principle of taxation means that the

[1] Tresch, Richard W. (2008, 243)
[2] Barr, Nicholas (2004, 155 *et passim*)
[3] Owsiak, Stanisław (2005, 360)
[4] Bailey, Stephen J. (1995, 186-187)

structure of taxation should be designed to reduce the costs of collecting taxes and administering the tax system. The problem in question faces primarily efficiency principle of taxation, equity and economy ones are less important in relation to the transmission of tax policy goals to economy and society.

The very problem of the efficiency of contemporary tax policy is to face two increasingly important processes, which take place: globalization (i.e. tax competition among state-level jurisdictions) and decentralization (i.e. tax competition among local-level jurisdiction). Both processes are in relation to crucial problems of fiscal externalities[5].

The concept of tax policy, commonly presented in contemporary literature on economic policy, public finance and financial law, stresses the role of tax means and tax system (so called an instrumental approach to tax policy). There is worthy to conclud that the tax policy process consists of rational choice of tax instruments that make up a functioning tax system as well as its implementation in the current tax law. At the same time, the criterion of rationality is the pursuit of efficiency by a public authority defined, socially and economically desirable objectives, through appropriate shaping of social and economic processes.

Assuming that both economic and management processes are in direct connection with decisions taken by firms and households, it can be concluded that the correct and efficient use of tax policy instruments requires an examination of relations between the sphere of financial and legal decisions of public authority and economic and social decisions taken by private entities. The tax decisions of public authorities should be accepted by society. The goals of tax policy are transferred to creation of the technical elements of taxes due to achieve the goals in question. The independent from the public authorities private firms as well as households acts separately, hence the scope of decisions in the sphere of both economic and social action is determined not only by the public authority but also by independent economic entities, especially enterprises. In essence, the elements connecting the spheres of tax policy and economy are tax policy instruments, which on the one hand reflect a commitment of public authority to perform the tasks of a public nature and to achieve socially desirable goals, the other factor affecting the behavior of private actors. Hence, transmission of the ends of tax policy to the economic system is based on achieving, defined by the competent authority of the legislature, the socially desired goals. Stated goals are achieving as a consequence of the sovereign decision of public authority, uses the attributes of tax power to choose and implementation tax instruments in the legal system, which allow to affect economic decisions undertaken by taxpayers.

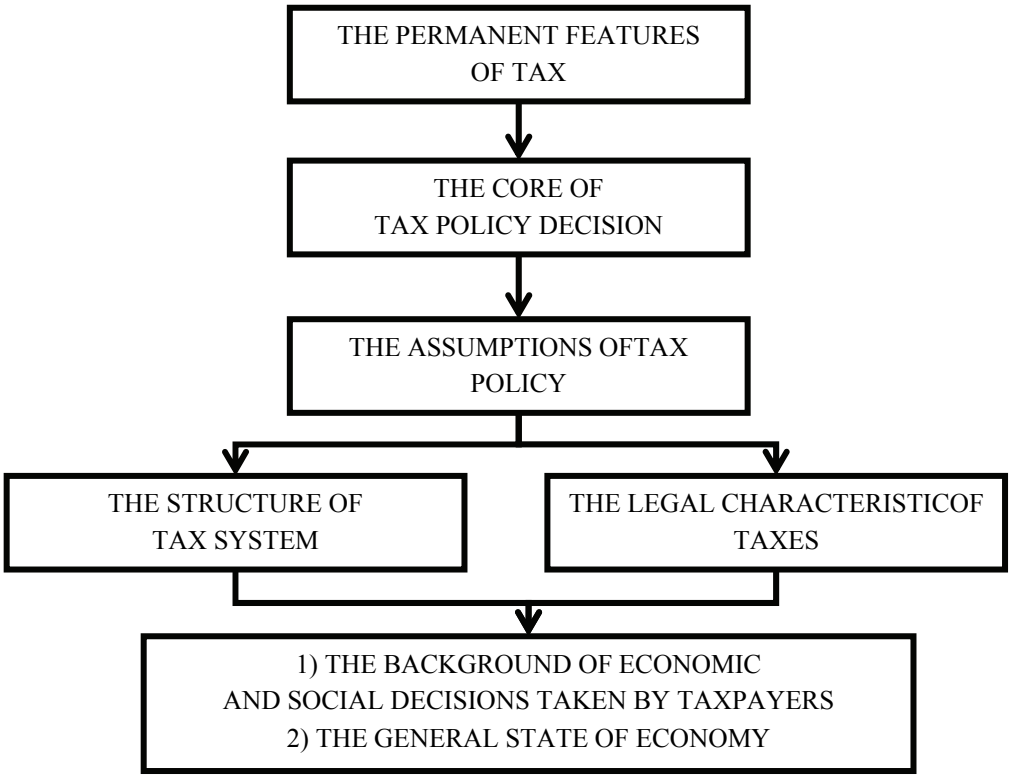
The specified guidelines of the transmission tax policy to the economic system is useful to distinguish the following phases of decision making on the process in discussion:

[5] Particulars see: Haufler, Andreas (2001, 31-33)

a) the selection of socially or economic desirable objectives,
b) the sovereign decisions regarding the shaping of the tax system and structure each of the tax instruments,
c) fiscally induced social or economic decisions of firms and households.

The examination of the process of tax policy assumption transmission to the economic apparatus requires taking into consideration of tax attributes *in abstracto.* In fact public authorities use tax policy to achieving goals both economic and social policy. Using tax policy by the public authorities to realize such targets obligatory influences taking into account fixed and unchanged, definitional elements of tax. These features of taxes define the issues because as a consequence of fiscal matters, against each of fiscal authority will have to respond, wanting to use taxes to achieve social or economic goals. Strictly saying, the characteristics of contemporary tax policy institutions determine permanent fiscal dilemmas area, which emerging at the interface between the tax law and economy (see Figure 1).

Figure 1. The attributes of the tax in relation to the objectives of tax policy



Source: own edition

The targets of tax policy will be consequence used by a public authority arrangements indicated fiscal dilemmas. The implementation of tax policy objectives in the form of a tax system *in globo* as well as both the set of various types of taxes (tax

classifications) and the technical elements of the tax, will have an impact both on the decisions of individual economic actors and on the overall economic situation, which shapes decision-making by taxpayers. One can therefore conclude that the characteristics ascribed to the institution of tax *in abstracto* set of the rational decision-making core of tax policy. Put simply: the fact that tax is attributed to certain features, makes policy, which it uses as an instrument, need solution determined by the nature of tax problems. Hence, a policy that is not take into account dilemmas in question could not be coined by "tax", because *in fact* would use a financial instrument that would have not had the *sine qua non* features of tax. The proposed method of linking necessary to formulate the objectives of the tax policies with fixed characteristics of tax *in abstracto*, allows to identify problems that require solutions in the process of public choice.

The literature of public finance and financial law points to the six basic characteristics that constitute the modern tax institution:

a) the compulsory of paying tax,

b) the general nature of the tax burden;

c) the non-repayable aspect of the tax burden;

d) the lack of authorities' obligation to provide service;

e) the cash nature of tax[6];

f) one-sidedness determination.

One-sidedness determination as well as the obligation of paying tax constraint definitions of tax and provide elements that distinguish all public levies. While the form of cash, the lack of paying tax back as well as the lack of obligation to provide service and generality are the formal and legal features of tax. B. Brzezinski[7] also indicates the transfer of title, as a feature of the tax. It means that the tax payment changes the owner of the cash, which, being firstly pre-loaded with the taxpayer, therefore become the property of public law, authorized to collect taxes.

The rational use of tax as an instrument to impact economic apparatus requires the public authority in solving a number of different fiscal dilemmas due to subjective as well as objective aspects of taxation. Both dimensions of solving the fiscal dilemmas in the implementation of the purposes of the tax system and tax policy, are in the need to take account of the distinguished public finance theory postulates the real functioning of tax systems. Subjective dimension, for example, is associated with the need to determine the scope of taxpayers subject to the obligation of tax benefits and how to take into account the individual situations of different taxpayers (the vertical equity principle of taxation). Objective dimension in question is manifested in the need to take into account the risks of unexpected reactions of taxpayers and non-taxpayers,

[6] Stiglitz, Joseph E. (2000, 452) announced fact that modern taxes are monetized – individuals are compelled to provide not services but money.
[7] Brzeziński, Bogumił (1997)

describing in fact the conditions and willingness to take action by taxpayers to avoid or evade tax.

3. Direct and indirect transmission mechanism of tax policy goals

The general concept of transfer of tax policy objectives can be clarified through the identification of specific mechanisms of action. The mechanism in question indicate coincidence of the objectives of tax policy and economic processes, which are derived from the independent decisions of firm and households..

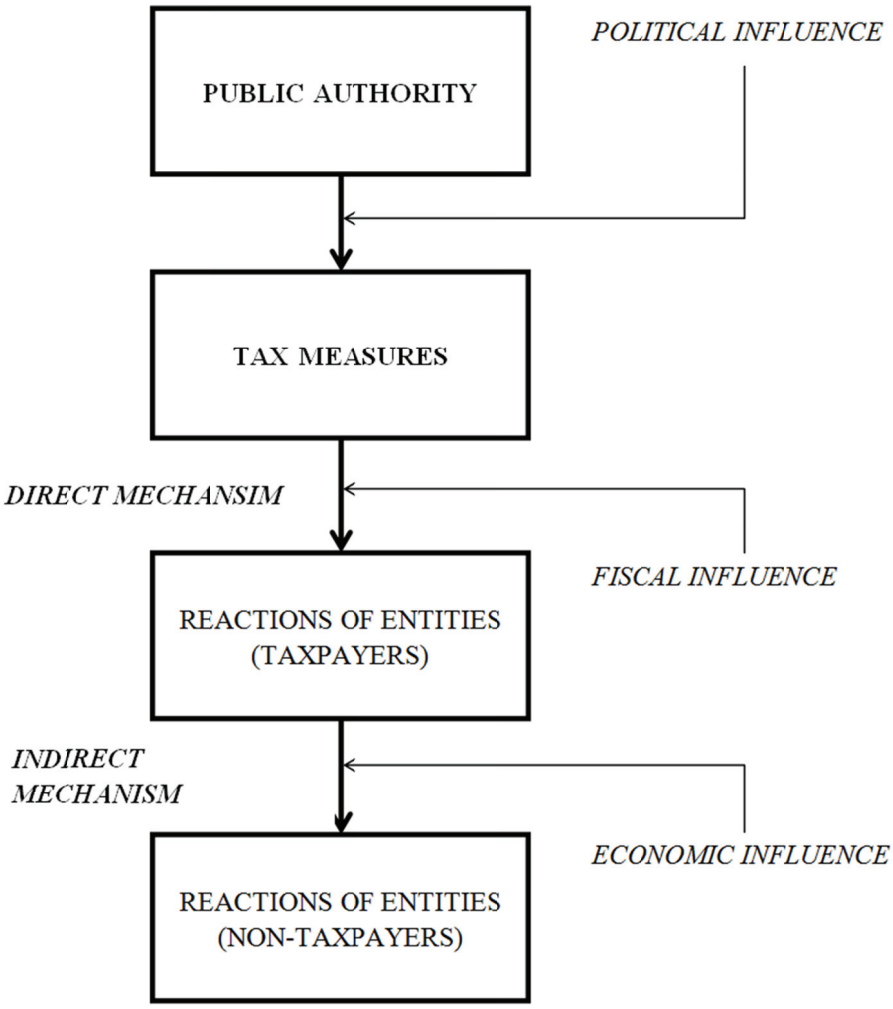
Mention the various categories of transfer mechanisms may be based on a synthetic approach to relationships between the actions of the firms or households and the assumptions of the tax decisions of public authority. It is also possible to take into account an analytical determination of the tax consequences of the use of instruments in question in the economic process, shape the economic system or specific decisions by private actors[8].

Synthetically defined transfer mechanisms of tax policy objectives, expressed through the impact on the decisions of economic and social actors may be based on two different types of existing linkage between the active subject of tax policy (the public authority) and a passive tax policy actors (firms and households). The first type of interaction can be defined as a **direct transmission mechanism of tax policy assumptions,** characterized in that the technical elements of the tax directly determine the economic situation of taxpayers.

The second **indirect transmission mechanismtax policyassumptions** is implemented on reaction that occurs between taxpayers, induced by the direct impact of the tax instrument to one of the entities not faced with tax burdens[9]. In literature it is generally accepted that the distinctive contribution of economic analysis to the study of tax incidence has been the recognition that burden of taxes is not necessarily borne by those upon whom they are levied[10]. Of course, the decisions of taxpayers directly subjected to the impact of tax instruments could further influence the subsequent behavior of private actors, as a result of the decisions taken firstly. Indicated impact of tax policy category for the economic system can be defined as an indirect transfer mechanism, due to the lack of a direct relationship between public authority action and at least one of those reactions occurring between the actors of economic and social spheres (see Figure 2).

[8] Especially, most taxes generate distortions in market system by forcing suppliers and demanders to face different prices, as stated by Tresch, Richard W. (2002, 23).
[9] For instance H. S. Rosen differentiates statutory and economic incidence of taxation. See: Rosen, Harvey S. (2005, 274).
[10] Kotlikoff Laurence J., Summers, Lawrence H. (1987, 1043).

Figure 2. The determinants of response of taxpayers



Source: own edition

The weight of the tax factors causing change in the situation of the subject and to take specific action is the distinguishing feature of the economic and social behavior of taxpayers, resulting from the direct action of the transmission mechanism of tax policy assumptions and behavior of actors (not necessarily taxpayers), whose decisions are the consequence of an indirect transmission mechanism of tax policy assumptions. In the case of a direct transfer mechanism, induced behavior depends largely on fiscal factors, which are an expression of the objectives of public authority.

With respect to the intermediate transfer mechanism increases the importance of economic factors related to the achievement of the objectives defined by sovereign entities and social-economic spheres. The greater importance of economic factors is, the smaller the impact of the fiscal factors, so the farther in the chain reaction to the direct

impact of the tax instrument, the less tax policy arguments are. Consequently, it should be noted that the implementation of a rational tax policy, taking into account the sequence of reactions of socio-economic actors induced indirectly, requires the public authority take into account the fact that the actual response is dependent on the economic system (including the purpose of private parties) in addition to the purposes of public authority. The significance of tax adjustment to the decision of taxpayers as well as other entities which decisions are consequence of taxpayers responses to taxation is greater, the greater is the importance of indirectly induced behavior. In other words, the relevance of the objectives of economic and social actors for the structure of the tax system is greater, the more important are the social and economic consequences of induced behavior indirectly such entities.

4. Rational and behavioral assumptions of the transmission mechanism of tax policy

Direct and indirect mechanism of tax goals transmission allow to find differences among the causes of taxpayers decisions. But it is not enough to complete recognizing of effectiveness of taxes. Hence, next to the direct and indirect transmission mechanism of assumptions, it should be important to highlight the objectives of fiscal policy, based on the criterion of awareness of the relationship between decisions taken by public authorities and used tax instruments and rational or behavioral approach to the transmission mechanism of tax policy.

Rational transmission mechanism is based on the assumptions that the entity for which tax impact, making decisions is first aware of the tax burden and, secondly, has enough ability to make rational economic decisions that take account of the relationship occurring between the technical design of tax and the pursued objectives. Consequently, it is worth to differentiate objective and subjective aspects of transmission mechanism in question. The objective one is related to the legal construction of taxes levied on taxpayer, the subjective one occurs in relation to individual identification of goals and possible means to achieving them by each of taxpayer.

Behavioral (emotional) transmission mechanism of tax policy describes situations in which induced entity is not aware of the tax burden, or is unable to identify a rational connection between the current tax laws and the possibility of its use to attain their objectives. This means that a person subjected to the impact of fiscal instruments, will take decisions which result will be *de facto* distortion of the sovereign process of achieving certain goals. In fact, discussed mechanism is destructive for both taxpayers' and public authorities' decisions. Firstly, because taxpayers will be constrained in effective achieving their goals (due to lack of enough information about relations between tax policy and their decisions); secondly, because tax authorities will face the

problems to recognize the consequences of levied taxes (due to lack of certain information about taxpayers' activity induced by taxation).

Table 1 Determinants of rational and behavioral transmission mechanism of tax policy

FACTOR DETERMINING THE BEHAVIOUR OF TAXPAYERS		TYPE OF TRANSMISSION MECHANISM OF TAX POLICY ASSUMPTIONS
AWERNESS OF TAX BURDEN	POSSIBILITY TO DETERMINE THE RELATIONSHIP BETWEEN TAXES AND THEIR OWN SITUATION	
OCCURS	OCCURS	RATIONAL
OCCURS	NOT OCCURS	BEHAVIORAL
NOT OCCURS	OCCURS	
NOT OCCURS	NOT OCCURS	

Source: own edition

Nevertheless, in practice the behavioral transmission mechanism can take one of three variants (see Table 1). The first variant of the behavioral transmission mechanism of fiscal policy assumptions implies that the taxpayer is aware of the tax obligation, while objective factors prevent him from making rational decisions in relation to the fiscal decisions of public authority. An example illustrating this kind of behavioral transmission mechanism is characteristic of modern systems of taxation, inflation of tax law provisions. Increasing the number of legal acts regulating the use of a particular tax instrument, it will induce that taxpayers will not be able to rationally exploit the most preferred embodiment of taxation of the known possibility of reducing the tax burden or implemented tax policy objectives, because of either ignorance or inability of all the rules for choosing. In this case, the taxpayer is not willing to bear too high costs of obtaining information about their tax position, thereby agreeing to take sub-optimal economic decisions.

The essence of the second variant of the behavioral transmission mechanism of fiscal policy assumptions to economy remains the assumption of lack of awareness of the tax burden and the ability to make rational economic decisions in relation to the unconscious of the tax burden. This situation is characterized by an entity which for him felt by the direct tax take rational economic decisions, but is unable to proceed in this way, the taxes to which the load is not felt by him. An example of this is the growing importance of indirect taxes in modern tax systems, the so-called amplifying effect "tax anesthesia", i.e. a situation in which the taxpayer is not aware of fiscal responsibilities. The public authority using consumption taxes, particularly value added tax and excise duties, is forced to take into account the irrationality of taxpayers'

economic as well as social decisions. The increase in fiscal illusion associated with the consumption tax is greater, the longer consumption taxes exist in the tax system.

The last type of behavioral assumptions of the transmission mechanism of fiscal policy to economic apparatus based on the assumption that the firm or household is not aware of the existence of the tax burden and is not capable of making rational decisions in relation to unconscious tax burdens. The occurrence of this type of situation is a combination of both phenomena highlighted earlier: legislation inflation and actions of tax anesthesia.

The possibility of such mechanism of transmission of tax assumptions implies that the decisions of a group of firms or households:

a) in part be determined by economic factors (lack of awareness of tax) and
b) will be undertaken in the absence of full information about the tax system (the inability to determine the relationship between taxes to unconscious and their own situation).

The distinction between emotional and rational transmission mechanism of tax policy goals allows to draw attention to the fact that a public authority, applying specific solutions in terms of fiscal policy, should take not only - assumed in the theory of classical political economy - the rationality of taxpayers equipped with full information about his own situation and that of other entities, but also take into account the presence of two other ways of dealing with tax instruments.

The first procedure is characterized by a unit that behaves irrationally, or made inconsistent choices and behaviors which public authority is not able to predict (a factor identified as "the ability to determine the relationship between taxes and to unconscious own situation).

The second type of conduct is characterized by an entity subject to fiscal illusion, which is a unit that behaves consistently and maintain a public authority which in theory can predict (a factor defined as awareness of the tax burdens).

Summary

Considering that one of the basic assumptions of tax policy is effective influence on decisions and behavior of entities operating within the economic system, it should be - summing up the deliberations carried out - to emphasize the relationship occurring between the ability of rational and objective design of tax system specific and subjective characteristics of socio-economic actors.

Consequently, increasing the likelihood of determining the applicable tax instruments requires consideration not only directly induced behavior of taxpayers, but also a series, depending on the specific purposes of individual private actors, behaviors indirectly induced as a result of tax policy implemented.

Reducing the risk of unexpected effects of tax policy in economic and social relations dependent on the ability to assess the impact of taxes on irrational - from the

standpoint of the taxpayer and the public authority - behavior of economic agents. Taking into account the indirect and behavioral, in addition to the direct and rational types of transmission mechanism of fiscal policy objectives should be the basis of the construction of the tax system and to determine the technical elements of individual taxes. Nowadays implemented tax policy if it should be effective should be coined as "risk-orientated tax policy". It stresses the main problem public authorities faced in providing tax policy.

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The Effects of the Economic Crises on Public Finance on the Example of the Experiences of Chosen Countries

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Abstract: The article aims at a comparative analysis of the fiscal consequences of economic crises in the short and long term. The research has included selected economic crises that occurred in years 1990-2007 in seventeen countries. The paper has been based on the source materials included in the statistical databases of OECD, the International Monetary Fund and Eurostat. The study has been divided into three parts. The first one presents the range of short-term impact of economic crises on the state of public finance in the chosen countries, as well as attempts at diagnosing the main factors that have determined the extent of this impact. The second part of the article is devoted to the presentation of long-term fiscal implications of recession phenomena. The third part is a closer characterization of the efforts to restore fiscal balance that have been taken after the resolution of crises in the selected countries.

Keywords: economic crisis, fiscal consolidation, public revenues and public expenditure.

1. Introduction

The economic recession causes a number of negative fiscal implications, and the range and direction of the impact of the crises on the public finance system is usually different in the short and long term.

From the model perspective, it is indicated that, in a short-time perspective, the cooling of the economic situation usually negatively affects the balance of public finances, which results from both the so-called automatic stabilisers as well as anti-cyclical stabilisation packages. In the long-time perspective the excessive public debt should be gradually reduced, among other things through budget surpluses generated during the phases of economic expansion.

As shown in the practice of modern states, the real fiscal effects of the crisis phenomena often differ from the model assumptions. In view of the escalation of the economic recession periods of various origins in the late 20th and the early 21st century, both those of global nature (the global financial crisis of 2008) and those regional (the debt crises of the states of Latin America of the eighties of the 20th century, the crises of system transformation countries, the financial crises in Southeast Asia and the crises of

the states of Latin America of the late nineties of the 20th century), the hopes of autoreduction of the imbalance of public finance proved vain. Particularly alarming, in this respect, are the experiences of years 2009-2010, indicating that an uncontrolled growth of public debt may even increase – after a short-term stimulation of demand by public expenditure – the risk of another wave of economic collapse[1].

The article aims at a comparative analysis of the fiscal consequences of economic crises in the short and long term. The research have included selected economic crises[2] that occurred in years 1990-2007 in seventeen countries[3] (mostly in OECD member countries, or those involved in cooperation with this organization, for which there are comparable statistical data). The paper has been based on the source materials included in the statistical databases of OECD[4], the International Monetary Fund[5] and Eurostat[6] (for the member states of the EU). The ongoing recession has been intentionally passed over due to the relatively short research period, which makes it impossible to carry out a reliable assessment.

The study has been divided into three parts. The first one presents the range of short-term impact of economic crises on the state of public finance in the chosen countries, as well as attempts at diagnosing the main factors that determined the extent of this impact. The second part of the article is devoted to the presentation of long-term fiscal implications of the recession phenomena. The third part is a closer characterization of the efforts to restore fiscal balance that have been taken after the resolution of crises in the selected countries.

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[1] K. Rogoff, *Jak długo rządy mogą chronić system,* „Gazeta Prawna", September 11th, 2009 (nr 178)

[2] One of the simplest definitions of economic recession has been assumed in the research, in which recession is defined as a decline in GDP for at least two consecutive quarters of a year, but because of the availability of statistical data, on which the research is based (most of them being annual), and in order to identify economic recessions, it was assumed that it is manifested by at least one-year decline in the rate of economic growth. At the same time, the concepts of "economic recession" and "economic crisis" are treated as synonyms, although the macroeconomic literature clearly indicates that the term "economic crisis" has been used to isolate one of the four phases of the traditional business cycle, the remaining being: depression, recovery and prosperity. The term "recession" is reserved for determination of one of the two phases (in addition to the expansion phase) of modern business cycles,which course, in relation to the traditional approach, has been somewhat moderated, inter alia, as a result of contemporary globalization of economies, technological progress, and state interventionism. cf. O. Blanchard*., Macroeconomics,* 4th Edition, Upper Saddle River, NJ, Pearson Prentice Hall, cop. 2006, D. Begg., S. Fischer, R. Dornbusch, *Ekonomia. Makroekonomia,* 3rd Edition, PWE, Warsaw 2003, R. Hall, J. Taylor B., *Makroekonomia*. *Teoria, funkcjonowanie i polityka,* PWN, Warsaw 2001, M. Nasiłowski., *System rynkowy*, *Podstawy mikro- i makroekonomii,* Wydawnictwo Key Tex, Warsaw 2003.

[3] The choice of countries was due to the availability of data concerning the formation of structural balance of the public finance sector which were used in order to identify the periods of fiscal adaptation. In this group are: Australia, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Iceland, Italy, Japan, New Zealand, Portugal, Spain, Sweden, Great Britain, the USA.

[4] *OECD Economic Outlook No. 89*, (database), OECD, August 2011.

[5] *IMF Government Finance Statistics* (database),IMF, August 2011.

[6] *Government Finance Statistic* (database),Eurostat, August 2011.

2. The short-term fiscal implications of the economic recessions

In short period of time, the economic crises result in negative consequences for public finance, causing effects on both public revenues and public expenditure, while, according to the theory of so-called automatic stabilisers, the range of this impact is usually greater in the case of revenues[7].

It is obvious that changes in economic activity, including the decline in production, consumption and employment, have to be translated into a reduction in tax revenues, which plays a dominant role in the structure of budgetary revenues of the modern states. The scope of this impact is different for different categories of income, and depends on the structure of systems of public tribute functioning in various countries. The business income taxes will respond most strongly to the recession phenomena, as the profits being the tax basis are more than proportionately susceptible to changes in production[8]. In turn, the sensitivity of the personal income tax to economy fluctuations is dependent on whether the tax is progressive or linear, with the tax progression functioning as an automatic stabilizer, that in case of a crisis will result in a stronger decline in revenues. In case of the indirect taxes, it is assumed that they react in direct proportion to changes in the size of GDP. As for the revenues from social contributions, they are usually the least sensitive to the crisis phenomena, though, obviously, it depends on the individual solutions in the field of schemes functioning in separate countries. It is worth mentioning that the discretionary reductions in the tax burden introduced in some countries in order to stimulate economic activity may also contribute to reducing budget revenues.

The decline in budget revenues requires an adjustment of public expenditure, which is a very difficult task in the conditions of recession. Functions and tasks of the modern states require the continuity of funding, and the scale of social problems that usually accompany the periods of economic recessions make the expenditure needs continually grow, rather than decrease[9]. Moreover, also the so-called stimulus packages, adopted by some countries in accordance with the theory of state intervention in order to stimulate demand, are in favour of the expansion of expenditure. These circumstances affect the fact that in the short term the effect of crises is usually a deterioration of public finance, which is expressed in increasing budget deficits and, consequently, increasing public debt.

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[7] A. Wernik ., *Równowaga finansów publicznych a euro*, „Bank i Kredyt" 2009 No. 3.

[8] *New and updated budgetary sensitivities for the EU budgetary surveillance*. Information note for the Economic Policy Committee, European Commission, Directorate General Economic and financial Affairs, Brussels Sptember 30th 2005, ECFIN/b/6 (2005)REP54508, p. 2 after: A. Możdzierz, *Wrażliwość dochodów budżetowych na zmiany luki produkcyjnej* (in:) Finanse publiczne a kryzys ekonomiczny, edited by A. Alińska, B. Pietrzak, CeDeWu, Warsaw 2011.

[9] S. Owsiak, *Wpływ kryzysu finansowego na wydatki publiczne* (in:) Finanse publiczne a kryzys ekonomiczny, edited by A. Alińska, B. Pietrzak, CeDeWu, Warsaw 2011.

These theoretical conclusions should be confronted with practical experiences of the examined countries. Nineteen periods of economic recession, manifesting itself by at least one year of decrease in the rate of economic growth, occurring in the period between 1990 and 2007 in the seventeen countries, has been analyzed. The analysis has focused mainly on the years 1991-1993 and 1998-1999, i.e. the crisis of the early nineties caused by complex reasons (among which are the fall of communism, the destabilization of the European Monetary System, or the increase in petroleum prices[10]), the Japanese financial crisis of the late nineties, and the period of recession in Estonia in 1999 (which was a consequence of the Russian crisis) and the economic collapse of 2003, observed in Portugal and Germany (cf. Tab. 1).

Table 1. Economic recessions and the countries hit by recessions – included in the research

Years in which the crises occurred	**Countries**
1991-1993	Australia, Belgium, Canada, Denmark, Finland, France, Germany, Island, Italy, New Zealand, Portugal, Spain, Sweden, Great Britan, the USA
1998-1999	Japan, Estonia
2003	Germany, Portugal

Source: Individual research.

On the grounds of the analysis of changes in the formation of revenues, public expenditure, budget balance and public debt in relation to GDP ratio, in the period immediately before the outbreak of the crisis and in its duration[11], four types of basic reactions of fiscal indicators to the phenomenon of recession in the examined countries have been distinguished (cf. Tab. 2).

The first one has consisted in the fact that the cooling of the economic situation has resulted in an increase in public expenditure and simultaneously there have been a decline in public revenues. Such a situation has occurred in countries with relatively good condition of public finance in the period just before the outbreak of the crisis, for which the average level of the deficit of the general government sector[12] has been

[10] More on the causes of the crises: W. Morawski, *Historia finansów współczesnego świata od 1900roku*, Difin, Warsaw 2008, p. 105 and following

[11] In cases when the recession persisted longer than one year, in order to estimate its impact on situation of public finances, the difference between the average of the selected budget indicators in the period of economic collapse and in the year preceding the crisis has been taken into account.

[12] For the purpose of the publication, the terms "budget deficit", "public finance sector deficit", "budgetary imbalance", or "public finance sector imbalances" are treated interchangeably and mean the negative difference between public revenues and public expenditure of the general government sector. In order to define the general government sector, the methodology of the System of National Accounts 1993 (SNA), developed jointly by the UN, IMF, OECD, the World Bank and the European Commission, has been used. Under this definition, the GG sector includes: the state budget, budgets of local governments, the national

running at -1.0% of GDP (with a balanced structural primary balance), while the share of public debt has constituted, on average, in more than 45.4% of GDP. It is characteristic that in this case, the range of the increase in public expenditure (in percents of GDP) has considerably exceeded the scope of the decline of income, which means that public expenditure has demonstrated a substantially greater sensitivity to economic fluctuations.

Table 2. Impact of the economic crises on the condition of public finance in the examined countries

Specification:	The reaction of public finance to the recession phenomena consisting in:			
	an increase in public expenditure and a decline in public revenues	an increase in public expenditure and an increase in public revenues	a decrease in public expenditure and a decrease in public revenues	a decrease in public expenditure and an increase in public revenues
Number of episodes	5	13	1	1
The average change in the size of the following budget quantities in comparison with the year preceding the recession (in percents of GDP):				
public revenues	-1,4	1,0	-2,0	0,1
public expenditure	3,5	2,2	-3,0	-0,3
budget balance	-5,0	-1,2	1,0	0,4
public debt	9,0	6,7	0,1	10,5
The average initial fiscal position (in percents of GDP):				
public income	41,0	43,7	48,1	45,0
public expenditure	42,0	48,2	52,7	55,4
budget balance	-1,0	-4,5	-4,5	-10,4
public debt	45,4	61,5	67,0	105,2
structural primary budget balance	0,0	-1,0	-1,7	-3,1

Source: Individual calculations based on the statistic data of OECD, IMF and Eurostat.

insurance sector, as well as the institutions funded and controlled by public authorities. At the same time, with certain exceptions, some economic subjects (such as banks or companies) that are publicly owned has been excluded from this sector. The revenues of the public finance sector, in accordance with this method, are all the non-returnable incomes, both of equivalent and non-equivalent nature (current and capital), including revenues from taxes, scial security contributions and subsidies, and so-called other income, within which there are, inter alia: the received dividends, income from property, donations to the state budget or local budgets, etc., *System of National Accounts, 1993 – Glossary,* OECD publishing , 2000.

The reason for this have primarily been a substantial increase in social transfers, which in the examined group of countries, on average, has amounted to 2.1% of GDP[13], as well as an increase in handling costs of rising public debt. Furthermore, the increased expenditure has also been caused by the involvement of public funds in the form of various subsidies for businesses, and implementation of a series of anti-crisis packages (which included also revenues and consisted primarily in lowering rates of the income taxes, and sometimes social security contributions). The result of these phenomena has been the highest, compared to other categories of countries, increase of budget deficits in the examined group of countries, on average, of 5.0% of GDP, and as a consequence, the increase of public debt (on average by 9.0 %).

The second type of a reaction to crisis has manifested itself in the growth of public expenditure, which has been accompanied by a simultaneous increase in public revenues. These countries, probably because of the significantly worse initial situation of public finance system (as it has been proved by a higher base level of the deficit, in relation to, on average, GDP of 4.5 %, and the accompanying share of the debt reaching an average of 61.5% of GDP, as well as the negative value of the structural primary balance), have decided on some anticipatory elimination of the negative effects of rising public expenditure by increases in revenues (which primarily have mainly consisted in the increase of the indirect taxes rates – such as in Portugal in 2003, and in the United Kingdom in 1991 – and sometimes of the direct taxes or social contributions). The effect of this proceedings has been significantly lower, compared to the first group of countries, average increases in the deficit and debt during a recession. It is worth mentioning that in this group of countries, as opposed to the first category, there have also been cases of countries, where there have been – despite the ongoing crises – reductions of the scale of fiscal imbalances (e.g. in Belgium in 1993, in Iceland in 1991-1992 and in Italy in 1993).

The last two types of reactions of public finance to cooling of the economic situation may not be representative due to the fact that there have appeared only in case of two examined episodes. They have been of a nature different from the others, primarily because they have been followed by an improvement in the budgetary balance. They have concerned the countries for which the average initial fiscal situation has been the worst and, in large measure, they have been the effect of efforts made in these countries in order to strengthen fiscal policy. The first of these could have been observed in New Zealand in 1991 and consisted in a decline of public revenues parallel to a decline in public expenditure, but due to the fact that the range of cutbacks in expenditure exceeded the decline of income, which has resulted in the limitation of the budget deficit by 1% of GDP . In the second case (observed in Italy in 1993) it has been decided that expenditure would be slightly reduced and thereby public revenues would

[13] Individual calculations on the basis of OECD and IMF databases.

increase, which has contributed to the reduction of the scale of imbalances in public finances by 0.4% of GDP.

In conclusion, it should be stated that the strength of the short-term impact of the recession on public finance has been primarily determined by how the fiscal position before the crisis has developed. If, prior to the economic collapse, a significant level of deficit and public debt has been noticed in a country, it is due to a weaker influence of automatic stabilizers of economic situation (and sometimes discretionary instruments undertaken in order to strengthen fiscal policy) that the impact of economic collapse on public finances has been less severe. Nevertheless, in all the examined episodes, the effect of the recession phenomena has been an increase in public debt.

3. The long-term fiscal implications of the economic recessions

Due to the fact that the economic collapses in all the analyzed cases have affected the growth of public debt, in the long term, in order to maintain fiscal stability and to reduce the risk of financial crisis, it have became indispensable to take actions to reduce the scale of fiscal imbalances (known as fiscal consolidations, or fiscal adjustments). In order to characterise it closer, a definition of fiscal consolidation proposed by the OECD experts, using the rate of share of the cyclically adjusted primary budget balance (CAPB) in percents of GDP, has been used[14]. From the above mentioned perspective a period of fiscal consolidation: begins when the cyclically adjusted primary budget balance (CAPB), increases during the examined period of at least 1% of GDP in relation to the previous year (or in two consecutive years, and at least about 0, 5% of GDP in the first year), and lasts as long as this indicator improves, and a temporary decrease is acceptable, provided that it does not exceed 0.3% of GDP and will be compensated for in the next budget year[15]. The use of this formation of the above mentioned indicator has made it possible to isolate twenty episodes of fiscal consolidation which have taken place in response to the increase in deficits accompanying economic recessions in the thirteen examined countries (cf. Tab. 3).

[14] The purpose of adopting this measure, taking into account the structural component of the balance of public finance sector adjusted for the impact of cyclical fluctuations, is to seek the fullest possible assessment of the discretionary effects of the actions taken by individual countries to reduce budget deficits, without considering the effects of automatic stabilizers (which operate automatically without active state intervention). Basing on the primary component of the balance allows to ignore the impact of debt handling costs, of the debts from the previous periods, on the current imbalance in public finances.

[15] More on the subject: R. Ahrend, P. Catte and R. Price, *Interactions Between Monetary and Fiscal Policy: How Monetary Conditions Affect Fiscal Consolidation,* OECD Economic Department Working Papers, No. 521/2006. It is worth mentioning that in the specialist literature other definitions of fiscal consolidation referring to the formation of the actual budget balance are still used (cf. E. Baldacci, S. Gupta, B.Clements and C. Mulas-Grandos, *Expenditure Composition, Fiscal Adjustment and Growth in Low-income countries,* IMF Working Paper No. 052/77, 2002), as well as the definitions concerning budgetary balance assuming no changes in the unemployment rate – the, so-called, measure., Blacharda (cf. A. Alesina, R. Perotti, *Fiscal expansions and adjustments in OECD countries*, "Economic Policy ", vol. 21/1995).

Table 3. The periods of fiscal consolidations that took place in the examined countries in reaction to recession phenomena

The country and the years of fiscal consolidation	The length of the period between the beginning of fiscal consolidation and the end of economic recession*)	The length of duration of fiscal consolidations	The initial share of budget deficit in GDP (in percents)	The change of CAPB in the period of fiscal consolidation (in percents of GDP)	The change of the actual budget balance during the period of fiscal consolidation (in percents of GDP)
Belgium 1994-1996	1	3	-8,2	3,4	3,7
Canada 1994-1997	3	4	-8,5	7,3	8,8
Estonia 2000-2003	1	4	-3,5	2,8	5,1
Finland 1994	1	1	-8,3	1,9	1,5
Finland 1996-1998	3	3	-6,2	5,9	7,7
France 1994-1999	1	6	-6,4	3,9	4
Germany 1993-1994	0	2	-3	1,4	0,1
Germany 1996	3	1	-9,7	6,6	6,4
Germany 2005-2007	3	2	-3,8	2,3	4
Italy 1993	0	1	-10,4	2	0,3
Italy 1995-1996	2	2	-9,1	1,7	4,2
Japan 1999	0	1	-11,2	4,2	3,5
Japan 2001	2	1	-7,6	1,4	1,3
New Zealand 1993-1994	2	2	-3,1	3,8	5,8
Portugal 1995	2	1	-7,1	1,4	0,4
Portugal 2003	0	1	-2,9	0,7	-0,2
Portugal 2006-2007	3	2	-5,9	2,6	3,4
Spain 1994-1996	1	3	-7,3	3,1	1,4
Sweden 1994-1998	2	5	-11,2	9,7	5,3
the USA 1993-1998	2	6	-5,7	4,8	6

*) *The figure 0 indicates that the actions aimed at limiting budget deficit hat been undertaken before the crisis ended.Source: Ibidem.*

The research shows that the efforts to reduce the imbalance of public finance following the recession phenomena have been taken by the vast majority of the examined countries (13 out of 17). In most episodes that have been studied, fiscal adjustments have been made only after the period of economic crises and if they have exceeded a period of one year, lasting for about three years on average. Moreover, in several cases, namely in Finland, Germany, Italy, Japan and Portugal, attempts to introduce fiscal reforms have been made after the periods of economic collapse more than once, usually when the initial effects of tightening of fiscal policy, for various reasons, have proved to be unstable.

For the assessment of long-term effects of the undertaken actions it has become necessary to take into consideration whether, as a result of undertaking them, a lasting stabilization of public finances has taken place, and whether it has simultaneously ensured sustainable economic growth.. Therefore, two additional criteria have been taken into account, namely the criterion of formation of public debt and the criterion of pace of economic growth, but only those adjustments, which have resulted in a decrease (or at least stabilization) of public debt share in GDP in the period of three years from the end of the consolidation processes,[16] at the same time maintaining positive GDP growth, have been recognized as effective. This has allowed to divide them into "effective" and "ineffective".

The data presented in Table 4 shows that among all the attempts to reduce budget deficits, only nine can be considered effective in the sense that they have contributed to a lasting reduction of public debt share in GDP (an average of 12.3% of GDP) while maintaining a relatively high economic growth rate[17].

Table 4. The characteristics of the long-term effects of fiscal consolidation in the examined countries

Specification:	The consolidation processes recognised as:	
	effective	ineffective
The number of the chosen episodes	9	11
The average number of years between the beginning of consolidation and the end of economic recession	2,0	1,3
The average length of duration of the consolidation processes	3,3	1,3
The average initial share of budget deficit in GDP (in percents)	-7,1	-6,8
The average initial share of public debt in GDP (in percents)	74,8	74,0
The average change of budget balance (in percents of GDP), including those being the result of:	5,3	2,2
the change of the share of public revenues in percents GDP	0,5	1,2
the change of the share of public expenditure in percents GDP	-4,8	-1,0
The average change of the share of public debt in percents of GDP three years after the end of the consolidation processes	-12,3	13,6
The average GDP growth during the period of fiscal consolidation	4,0	1,2

Source: Ibidem.

[16] Cf., inter alia, Alesina, R. Perotti, *Fiscal expansions and adjustments ...,* op. cit.

[17] They consist in the fiscal consolidations introduced in the following countries: Belgium (1994-1996), Estonia (2000-2003), Finland (1994 and 1996-1998), Italy (1995-19960), Sweden (1994-19980), Canada (1994-1997), New Zealand (1993-1994), the USA (1993-1998)

Further comparative analysis of the consolidation processes recognized as effective, with those that have proven ineffective, has allowed to identify some general characteristics of these first. First of all, they have relied mostly on cutbacks on the level of public spending, which have reached an average of 4.8% of GDP, while in the second group of activities, there have dominated increases in revenues and simultaneously a relatively small spending savings. The introduced public finance reforms which have been considered effective, have been characterized also by the fact that they usually have continued over time (on average for more than three years, in contrast to the ineffective episodes which lasted, on average, for about one year), which probably has allowed also to weaken their possible pro-cyclical effects. Another characteristic feature is that the countries have usually waited with introducing them until the upturn in the economy, and the average delay between the end of the period of economic recession and the beginning of consolidation activities have reached about two years.

4. The characteristics of the methods for reducing public debt after the economic crises

As it has been already mentioned, the primary objective of the long-term fiscal reforms introduced after the economic crises has become a limitation or at least stabilization of public debt, and simultaneously supporting sustainable economic growth. The research shows that this objective has been achieved in only nine out of all the twenty episodes of consolidation which have been analyzed. Therefore, a closer characterization of these reform efforts has been presented below, but, due to the different range of available data concerning the structure of budget income and expenditure, in some cases the situation of the EU member states and other countries has been analyzed separately.

First of all, the attention has been paid to activities aimed at savings in public expenditure, since it is them that constituted the primary means of improving the budget balance. The fact of giving the utmost importance to spending cutbacks results from the need to stimulate the economic growth, which stands in contradiction with the increase in the tax burden. This direction of reforms is supported by most advocates of the doctrine[18]. From the data in the Table 5, presenting the range of changes in public

[18] More on the subject, inter alia, in works: R. Ahrend, P. Catte and R. Price, *Interactions between monetary and fiscal policy: How monetary conditions affect fiscal consolidation,* OECD Economics Department Working Papers, No. 52, 2006. S. Guichard, M. Kennedy, E. Wurzel and C. André, *What Promotes Fiscal Consolidation: OECD Country Experiences*, OECD Economics Department Working Papers, No. 553, 2007

expenditure according to COFOG[19] functions and to their economic nature, it follows that the savings concerned mainly the administrative and the social expenditure.

The most common source of savings in public expenditure have been reductions in the level of expenditure on wages in the public sector. In Table 5 it is shown that, in the examined countries, the share of the costs connected with employment in periods of the fiscal consolidation have decreased by 1.3% of GDP on average.The biggest cutbacks in this category of spending have been made, inter alia, in: Belgium, Canada and the USA. They have usually taken several forms, namely direct salary reductions, elimination of bonuses and other premiums, cessation or change of the used valorisation mechanisms. The savings have also consisted in reducing the number of employees by job cuts.

Another method for budget savings has been limiting (and sometimes better orienting) social benefits. This method of reducing budget deficits has been used, inter alia, by Finland, Estonia, Canada and Sweden, while in the case of the first of these countries the range of cuts made in 1996-1998 was as high as 3.5% of GDP. In some countries the above method has been used, however, it has been limited primarily because of the possible social resistance, the potential negative consequences in the form of weakening of the economic growth, as well as frequent "toughening" of this category of expenditure. On account of the increasing spending pressures associated with aging society, the biggest challenge have undoubtedly been the reforms of social security systems. Stimulation of the activity in the labour market, in addition to fiscal considerations, have become the aim of the introduced changes. In the face of strong spending pressures and the limited amount of public means, the solutions helping to enhance the efficiency of public spending in the most expensive social services, such as health care or education, have come into prominence.

Limiting subsidies granted by public entities has also become a way of reducing public expenditure. As the data in Table 5 shows, the share of subsidies and other current transfers in GDP decreased during the period by nearly 1% of GDP on average, while, for example, in Sweden in years 1994-1998 this decline exceeded by 2% of GDP. Also a reduction of the interests (on average by 0.9% of GDP) have had impact on limitation of the public debt increase.

[19] Abbreviation of: *classification of the functions of government* . That classification consists in income and expenditure of the government and the local governments divided according to ten functions. More on the subject: *System of National Accounts... ,* op. cit.

Table 5. The change of public expenditure from the perspective of COFOG functions and according to their economic nature (in percents of GDP)

The country and the years of fiscal consolidation	The change of public expenditure in the period of fiscal consolidation according to the COFOG functions (in percents of GDP)											
	Total general government expenditure	General public services	Defence	Public order and safety	Economic affairs	Transport	Environment protection	Housing and community amenities	Health	Recreation, culture and religion	Education	Social protection
Belgium 1994-1996	-4,0	-2,4	-0,3	0,1	-0,4	-0,1	0,0	0,0	0,3	-0,1	-0,2	-0,9
Estonia 2000-2003	-5,3	-0,6	0,5	-0,5	-0,9	0,0	0,0	0,0	-0,7	-0,1	-1,0	-2,0
Finland 1994	-1,2	-0,3	-0,1	0,0	0,4	0,6	0,0	0,2	0,0	0,1	0,3	-2,4
Finland 1996-1998	-8,5	0,0	-0,2	-0,1	-3,6	0,3	0,0	-0,3	-0,4	0,0	-0,8	-3,4
Italy 1995-1996	-1,0	0,0	-0,3	0,0	0,0	0,0	0,1	0,0	-0,3	0,1	-0,2	-0,4
Sweden 1994-1998	-6,1	-0,5	-0,1	0,0	-1,4	-0,1	0,0	-1,1	0,0	0,0	0,3	-3,2
Canada 1994-1997	-7,4	-1,4	-0,3	-0,3	-0,5	-0,3	0,0	-0,2	-2,5	-0,2	-0,9	-0,8
New Zeland 1993-1994	-6,1	-0,5	-0,2	-0,3	-1,0	-0,2	0,0	-0,1	-2,2	0,1	-0,7	-1,0
the USA 1993-1998	-3,9	-0,9	-1,8	0,1	-0,4	0,0	0,0	-0,1	0,2	0,0	0,0	-1,0

	The change of public expenditure in the period of fiscal consolidation according to the economic nature (in percents of GDP)							
	Total general government expenditure	Compensation of employees	Intermediate consumption	Subsidies	Social benefits	Interest	Other current transfer	Capital expenditures
Belgium 1994-1996	-4,0	-0,3	0,1	-0,1	-0,5	-2,6	-0,4	-0,2
Estonia 2000-2003	-5,3	-1,6	-1,2	-0,3	-2,2	-0,1	0,1	0,0
Finland 1994	-1,2	-0,8	0,0	-0,2	0,1	-0,3	-0,1	0,1
Finland 1996-1998	-8,5	-2,3	-0,3	-1,0	-3,5	-0,9	-0,1	-0,4
Italy 1995-1996	-1,0	-0,3	-0,4	-0,2	-0,5	0,1	0,1	0,2
Sweden 1994-1998	-6,1	-0,5	-0,2	-1,5	-1,9	-0,8	-0,8	-0,4
Canada 1994-1997	-7,4	-3,3	-0,5	-0,3	-2,1	-1,0	-0,6	0,4
New Zeland1993-1994								
the USA 1993-1998	-3,9	-1,4	-0,4	-0,1	0,0	-1,1	-0,9	0,0

Source: Ibidem.

Characterizing the structure of budgetary savings in the examined countries it is not possible to ignore the fact that in most cases they have not concerned at all (or only to a very limited extent) the capital expenditure. On the contrary, in countries such as Canada, Italy and Finland there has been even – despite the ongoing tightening of fiscal policy – an increase in the share of capital investments in GDP.

In addition to cutbacks in public spending, in four out of the nine examined episodes, actions have been taken to increase public revenues, focusing primarily on changes in the level of the tax burdens and social security contributions. The largest increases in the income in years 1995-1996 occurred in Italy (as high as 3.2% of GDP), in the USA in 1993-1998 (by 2.1% of GDP) and in Canada in 1994-1997 by (1.4% of GDP). Usually they have been only of supplementary nature, constituting only a temporary correction, not a comprehensive reform aimed at improvement of the functioning of the tax systems. It is worth noting that in other analyzed cases (i.e. in five of them) the effectiveness of austerity measures in the spending side have helped to avoid increases in income, and even have allowed to reduce them slightly (ranging from 0.2% of GDP in Estonia in 2000-2003 to 0.8% of GDP in Finland in the period 1996-1998).

A closer analysis of the cases of countries that have decided to increase public revenues (Table 6 and Table 7) indicates that it concerned primarily the income taxes, usually those personal, to a lesser degree the corporate income taxes, and sometimes social contributions.

Table 6. The change of selected categories of public income (in percents of GDP) in the examined European countries and in the periods of fiscal consolidation

The country and the period of fiscal consolidation	The change of selected categories of public income (in percents of GDP) including:					
	Taxes:					social contributions
	indirect taxes including:		direct taxes including:			
	VAT	excise	personal income tax	corporate income tax	capital transactions tax	
Belgium 1994-1996	0,0	0,0	-0,3	0,7	0,0	-0,9
Estonia 2000-2003	0,4	-0,1	-1,0	-0,7	0,1	-0,5
Finland 1994	0,1	0,1	0,9	0,4	0,0	0,8
Finland 1996-1998	0,4	0,1	0,8	0,9	0,0	-1,6
Italy 1995-1996	0,3	-0,1	0,5	0,6	0,6	1,8
Sweden 1994-1998	-1,2	-0,2	0,7	0,8	0,0	0,8

Source: Ibidem.

Table 7. The change of the selected categories of public income in the periods of fiscal consolidation (in percents of GDP) in the examined non-European countries

The country and the period of fiscal consolidation	The change of the selected categories of public incomein GDP (in percents)		
	Taxes on production and imports	Current taxes on income, wealth	Social contributions,
Canada 1994-1997	-0,9	2,0	-0,3
New Zealand 1993-1994	-0,5	1,0	0,0
USA 1993-1998	-0,3	2,5	-0,1

Source: Ibidem.

In this way, the rates of the personal income tax for most individuals with the highest incomes have increased. The rates for certain categories of income, such as income from savings and capital investments (e.g. in Italy), have also raised. Similarly, some tax benefits and exemptions have been eliminated. In turn, in the corporate taxes, due to the negative impact on economic activity, increases in the rates have been replaced by the actions aimed at increasing the taxable amount by: limiting the catalogue of costs of tax deductible expenses, as well as elimination of certain exemptions. Also the rates of social contributions have been increased (cf. Italy and Finland), although this solution has been used quite rarely, because by influencing the labour costs it might have increased the recession phenomena. On the other hand, they have been justified by the strong pressure to increase social benefits and the need to guarantee the liquidity of pension systems in conditions of aging societies. It is characteristic that increases in the tax burdens have hardly affected the turnover taxes.

As far as the countries that have decided on slight reductions of the level of public revenues are concerned, the reductions have also concerned, above all, those of their categories which have had the greatest influence on wage levels (being an expense for employers), namely the income taxes and social contributions. Relatively rarely the countries have decided on the significant reductions in the indirect taxes (except for Sweden in the years 1994-1998), which even have underwent a small increase in order to compensate for loss of income caused by a reduction in the income taxes.

5. Summary

In a short period of time, the economic crises usually cause negative effects for the public finance system, leading to an increase in the scale of the budgetary imbalances and the growth of public debt. The range of this impact varies across countries and depends, above all, on individual structural solutions of the tax system, or national social security systems, as well as on the initial fiscal position before the outbreak of the recession.

In a long period of time, the negative effects accompanying the increase in debt, such as so-called “crowding out” effect, inflation, increasing number of areas of uncertainty, and risks leading to a weakening of the overall management effectiveness, force the countries to take specific adjustment actions in order to reduce budget deficits. The difficulty of selecting appropriate methods of restoring fiscal balance in crisis conditions lies in the fact that too drastic cutbacks in public spending in some categories, or significant tax increases, may be pro-cyclical and may even contribute to a greater downturn in the economy. This in turn may lead to an increase in public debt in the future, resulting in the need for increasing budgetary savings, as in a "vicious circle".

The analysis has indicated that, in practice, only a small part of the efforts made to restore stability in the public finance system proves to be effective in the long run, contributing to a long-lasting reduction of the level of public debt and assuring a stable economic growth.

Good examples of the fiscal consolidation processes, characterized by the fact that they were mostly based on substantial cutbacks in the level of public spending (by relatively small increases in the system of public revenues), are usually spread over a longer time horizon, and carried out with a few years of delay in relation to the end of periods of economic collapse.

The introduced spending reforms have focused primarily on reducing the expenditure of an administrative nature, including public sector wages, and better orienting of social transfers. It is characteristic that in most cases cutbacks have not concerned at all (or only to a very limited extent) the capital expenditures. In turn, the income side has not undergone major changes, and the necessary increases in public tribute have concerned primarily the income taxes, generally personal ones, to a lesser extent the corporate income taxes, and only sometimes social contributions.

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The Polish Financial Supervision Authority as an Independent Entity of the Public Finance Sector

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Abstract: It is currently common knowledge that ***effective supervision of the financial system*** is one of the most important factors which has an impact on maintaining the stability and safety of the modern financial system. There are different areas in which lawyers and law reform institutions are looking for solutions which should increase this effectiveness. One of these areas is the architecture of supervision. The creation of an optimal internal structure of supervision, and the decision as to where the supervision agency should be located among private and public entities, are of fundamental importance for the financial services regulator's independence, and thus for the proper fulfillment of its functions. The analysis of another states' national regulation shows that the design of regulatory model supervision has in many cases been driven by history and country-specific conditions or roles to which it responds. There does not exist one best model structure of financial market supervision. In this paper the provisions which regulate the organisation of the Polish supervisory authority (Komisja Nadzoru Finansowego, Polish Financial Supervision Authority) have been analysed. Its position in the European System of Financial Supervisors has also been considered. The main aim of this analysis is to find the range of political and industrial independence of the Polish Financial Supervision Authority as a public finance sector entity in the institutional, functional, supervisory, regulatory and financial aspects.

Keywords: financial supervision, public finance sector.

1. Introduction

In the modern, globalised world, in which a so-far-unparalleled flow of funds exists, one of the most important safety and stability factors of financial markets is the proper supervision of the financial market. Efficient supervision is determined by many factors[1], among others: well-qualified people to perform certain supervisory tasks, an adequate range to the supervisor's competency, and above all, the independence of the financial services regulator. Despite the different types of design of regulatory model

[1] See: J. Głuchowski, *Komisja Nadzoru Finansowego oraz Urząd Komisji Nadzoru Finansowego,* In: *System prawa finansowego*, vol. 4. *Prawo walutowe. Prawo dewizowe. Prawo rynku finansowego*, Editor: J. Głuchowski, Wolters Kluwer Polska - OFICYNA, Warszawa 2010, p. 153.

supervision in particular countries[2], independence is one of the fundamental features in all of them. Thus, in the literature various aspects of independence are pointed out. It is emphasized that this is both political independence and independence from other pressure groups, in particular, entities under the authority's control[3]. Therefore, autonomy itself is not absolute, and should be understood as the lack of other authorities' submission, and independence in the decision process. However, external inspection is needed and the Polish Financial Supervision Authority (KNF)[4]s hall collaborate with competent authorities which consist of a network of national and the European Union (EU, Union) supervisory authoritiesand international financial market stability-care institutions. Consequently, in deliberations over the independence of the KNF as a public entity, it is necessary to analyse legal regulations from the point of view of domestic and international law.

Owing to the KNF's legal status not being precisely regulated, it is very important to decide at first what status it has in Polish law and its national legal range of autonomy. Subsequently, the legitimate questionis: What is the range of the KNF's independence in the context of the changes to the European Union's supervision structure, which came into force on 1st January 2011. In general, one financial supervision regulatory model does not exist; however, the establishment of the European System of Financial Supervisors (ESFS) has serious consequences for the functions fulfilled by the national supervisory authorities. The European Union integrated network of supervisors, leaving day-to-day supervision to the national level, needs to introduce an effective instrument and delegate new competences which allow to achieve greater harmonization and coherent application of rules for financial institutions and markets across the EU. These are the reasons why the boundary of national supervisors' autonomy has to be laid down.

It should have been stated that the supervisor's independence is not of value itself. This independence should allow the achievement of efficient and effective supervisory functions and should be linked to the regulator's accountability. Furthermore, there is agreement between academics on "achievement of both political

[2] See, among others: Z. Ofiarski, Prawo bankowe, 4th ed. Wolters Kluwer Polska - OFICYNA, Warszawa 2011, pp.499-500.

[3] K.K. Mweda,*Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator*, The World Bank, Washington, D.C. 2006, at 31-35, M. Quintyn and M.W. Taylor, *Regulatory and Supervisory Independence and Financial Stability*, IMF Working Paper, 02/46 (2002), p. 9, http://www.imf.org/external/pubs/ft/wp/2002/wp0246.pdf [last visited 26th July 2011].
As in the literature observes: "The independent is granted with respect both to private parties and political majority: to private parties, to order to avoid a risk of capture regulator by regulatees; to political majority, in order to guarantee specific regulatory policies stability and credibility that the policy cycle connected with electoral timing does not necessarily ensure.", E. Chitchi, *An important part of the EU's machinery: features, problems and perspectives of European Agencies,* Common Market Law Review 46, No 5 (2009), p. 139.

[4] In Polish: Komisja Nadzoru Finansowego (KNF).

independence and independence from industry regulation is as important as ensuring that the independent regulator is accountable"[5].

The legal status of the Polish Financial Supervision Authority (KNF)

The KNF commenced its activities on 19thSeptember 2006[6], on the day on which the Act on Financial Market Supervision came into force. Unfortunately, the abovementioned act was hurriedly passed and there has been doubtful stipulation as to the KNF's legal status. Therefore, in legal doctrine and practice, doubts have arisen as to the nature of the KNF.

Pursuant to Article 3 paragraph2 of the abovementioned act, the KNF is the financial market's supervisory authority. The KNF's competencies include ensuring regular operation of the market; its stability, security and transparency; confidence in the financial market; as well as ensuring that the interests of market participants are protected through the realisation of the aims defined in the acts which regulate particular financial market sectors[7]. Pursuant to the Act on Financial Market Supervision, the tasks of the KNF include the following:

- providing supervision over the financial market;
- undertaking measures aimed at ensuring the regular operation of the financial market;
- undertaking measures aimed at the development of the financial market and its competitiveness;
- undertaking educational and information measures related to the financial market's operation;
- participation in the drafting of legal acts related to the financial market's supervision;
- creation of opportunities for amicable and conciliatory settlement of disputes which may arise between financial market participants; in particular, disputes resulting from contractual relations between entities covered by KNF supervision and recipients of services provided by those entities;

[5] K.K. Mweda, *supra* n. 3, p. 2.

[6] This new supervision body has replaced the Insurance Funds Supervision Commission, the Securities and Exchange Commission and Commission for Banking Supervision, which were abolished pursuant to the provisions of the Act on Financial Market Supervision [The Act on Financial Market Supervision of 21 July 2006 (Dz.U. (Journal of Laws) 2006, No. 157, item 1119, as amended), hereinafter referred to as: The Act on Financial Market Supervision or u.n.r.f.]. Thus, the integrated financial market supervision's model has been established in Poland.

[7]See, among others: the Banking Act of 29 August 1997 (Journal of Laws 2002, No. 72, item 665, as amended; hereinafter referred to as: Banking Act), Act on Insurance and Pension Funds Supervision and on Insurance Ombudsman of 22 May 2003 (Journal of Laws 2003, No 124, item 1153, as amended; hereinafter referred to as: Act on Insurance and Pension Funds Supervision and on Insurance Ombudsman), the Capital Market Supervision Act of 29 July 2005 (Journal of Laws 2005 No. 183, item 1537 as amended), the Electronic Payment Instruments Act of 12 September 2002 (Journal of Laws 2002, No.169, item 1385, as amended), Act on Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms in a Financial Conglomerate of 15 April 2005 (Journal of Laws 2005, No. 83, item 719, as amended).

– carrying out other activities provided for by acts of law[8].

Thus, the KNF carries out public functions as a body set up by the State to realise supervisory tasks in the State's name. Therefore, the legislator did not forego whether the KNF is a government administrationor another of the State administration's organs.

Although first of all the State shall undertake its measures by government administration, as is said in the literature; the undertaking of supervisory measures by other bodies is not ruled out[9]. The manifold doubts which appeared[10] were actually judged by the Polish Constitutional Tribunal. This Tribunal univocally adjudicated that it could be inferred from the act that the KNF is a specific public authority **which has a wide range of independency and is situated outside of the governmental administration's structure**[11]**.**

Regardless of the abovementioned judgement of the Constitutional Tribunal, it is beyond dispute that the KNF has been an entity of the public finance sector from the time when it was established by the Act on Financial Market Supervision, so under ***Article 9*** paragraph 1 point 1 of The Public Finance Act[12],the public finance sector covers, among others: public authority and governmental administration agencies, state control and law protection agencies, courts and tribunals[13].

Its legal status is also defined by legal norms referring to finances management[14] and to competences to issue legal regulation to ensure the proper operation, stability and security of the financial market.

The Polish Financial Supervision Authority as an independent public entity – national level regulation

When the KNF was being established, it was assumed that the KNF would be an independent body, which would autonomously supervise the financial market[15]. However this has not been *expressis verbis* expressed by the establishing regulations.

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[8] The KNF and the KNF's Chairperson shall be assisted in the performance of their responsibilities by the KNF Office.

[9]. M. Szewczyk, *Nadzór w materialnym prawie administracyjnym*, Wydawnictwo Naukowe UAM, Poznań 1995, p. 84.

[10] See, among others: P. Stanisławiszyn, *Pozycja Komisji Nadzoru Finansowego w polskim prawie publicznym*, In: *Komisja Nadzoru Finansowego – status prawny i zadania nadzoru finansowego w Polsce*, Editor: D. Nowicki, P. Stanisławiszyn, Wolters Kluwer - OFICYNA, Warszawa 2011.

[11] Judgment of the Polish Constitutional Tribunal of 15 June 2011, the reference number of the case: K 2/09, Journal of Laws 2011, No 134, item 788, the full text of judgment is available at: http://www.trybunal.gov.pl/OTK/teksty/otk/2011/K_02_09.doc[last visited 26th July 2011].

[12] The Public Finance Act of 27 August 2009 (Journal of Laws 2009, No. 157, item 1240, as amended), hereinafter referred to as: the Public Finance Act.

[13] The Article in the same text was in the Public Finance Act of 30 June 2005 (Journal of Laws 2005, No. 249, item 2104, as amended).

[14] Wider analysis in a further part of this paper.

[15]*The justification of the bill of The Act on Financial Market Supervision,* druk sejmowy (the Parliament's form) No 654 dated 7 June 2006, Sejm (Parliament) of V tenure, http://orka.sejm.gov.pl/Druki5ka.nsf/0/86174E62FCBBFD0CC1257187004C4DC0/$file/654-uzasadnienie.doc

An analysed issue of the independent supervision's body pursuant to the relevant provisions of the law should be considered in its institutional, functional, supervisory, regulatory and financial aspects. First of all, it is necessary to examine whether the KNF shall be subordinate to any public authority or government administration agencies.

The Act on Financial Market Supervision stipulates that the KNF's activity shall be supervised by the President of the Council of Ministers (Prime Minister). The KNF shall submit an annual report on its activity to him (***Article 4*** paragraph 2 u.n.r.f.). The relations between them are also influenced by the President of the Council of Ministers' competencies, such as: appointing posts of authority in the Polish Financial Supervision Authority (the Chairperson of the KNF and the Vice Chairpersons of the KNF shall be appointed and dismissed by the Prime Minister), resolving the KNF Office organisational structure (define the by-laws of the KNF Office, stipulating its internal organisation rules), and regulating the conditions of the remuneration of the KNF's members and staff of the KNF Office (legal competency to issue a regulation on the manner of establishing the amount of funds to be appropriated for payment of remuneration and bonus awards to the KNF's Chairperson, Vice-Chairpersons of the KNF and employees of the KNF Office). It should be emphasised that although the President of the Council of Ministers enjoys considerable discretion in appointing the Chairperson of the KNF, dismissal is possible only in the event of the Chairperson of the KNF's resignation and in other circumstances specified by law[16]. As a rule, the Chairperson of the KNF is appointed for a term of office and is, in principle, irremovable during this term. However, the Vice Chairpersons of the KNF shall be appointed and dismissed by the President of the Council of Ministers, at the request of the Chairperson of the KNF.

It is important that the KNF is a collegial body. It shall be composed of seven members. Three members only shall be appointed by the President of the Council of Ministers. The other members shall be:

- the minister competent for financial institutions; or a representative as assigned by this minister,
- the minister competent for the social security sector; or a representative as assigned by this minister,
- the President of the National Bank of Poland (NBP); or the Vice President of the NBP as assigned by the President of the NBP,
- a representative of the President of the Republic of Poland.

[16] In accordance with the ***Article*** 8 u.n.r.f. President of the Council of Ministers shall dismiss the Chairperson of the KNF before the expiry of his/her term of office only if:
1) he/she has been convicted of an intentional offence or a fiscal offence under a final and non -appealable court judgement, or
2) he/she has resigned from office or
3) he/she has***lost Polish citizenship, or***
4) he/she has been unable to fulfill his/her duties due to prolonged illness, lasting more then three months.

Therefore, this group of members are, in theory, appointed independently, *ex officio*. However, it has to be remembered that two of them are members of the Council of Ministers. In accordance with Article 154 paragraph 1 of the Constitution[17], the Prime Minister shall propose the composition of the Council of Ministers. It could well be supposed that these members would also support the government's policies.

The analysis of the aforementioned relationship between the KNF and the President of the Council of Ministers leads to the conclusion that, in fact, the KNF is neither "managed"[18] nor "coordinated and controlled"[19] under Article 146 par. 3 and Article 146 par. 4 p. 3 Constitution[20]. In the context thus determined, the scope of the competenceit is all the more difficult to say regarding the Prime Minister's supervision because according to a view prevailing in legal doctrine, this supervision should be characterized by the possibility to check the actual state of affairs against the state postulated (in other words: not only the ability to control), but also the supervisor having the power and authority to correct the acts of supervised entities[21].

Concurrently, there are no legal instruments to interfere in the KNF's activity; so in the light of current regulations, the President of the Council of Ministers'supervision is only a formality. Nevertheless, while appraising the independence of the KNF from the point of view of its position among the authorities of state, and the method of appointing and dismissing its members, it is possible to demonstrate indirect relationships between them and the fact that only the Chairperson of the KNF is appointed for a term of office. Owing to these legal provisions, acts under external pressure, and a lack of real political independence might occur in the KNF's operations. In particular, even though **the KNF is designed as a body enjoying a certain degree of autonomy from the political majority; such autonomy does not imply that it is fully insulated from political influence**.

For the appraisal of the KNF's independence, requirements regarding the qualifications of persons who might be appointed as KNF members are also important. These requirements have been laid down by the Polish legislative only for the

[17] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483, as amended), hereinafter referred as the Constitution.

[18] Under Article 146 par. 3 Constitution, the Council of Ministers shall manage the government administration.

[19] Under Article 146 par. 4 Constitution, the Council of Ministers, in particular, shall coordinate and control the work of organs of government administration.

[20] As it was pointed out by the Polish Constitutional Tribunal when it emphasised that, among others, this leads to the impossibility of placing the KNF among organs of government administration (abovementioned judgement of the Polish Constitutional Tribunal dated of 15 June 2011).

[21] J. Zimmermann, *Prawo administracyjne*, 4th ed. Wolters Kluwer Polska - OFICYNA, Warszawa 2010, pp. 139-140, Z. Leoński, *Zarys prawa administracyjnego*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2004, p. 213; J. Sługocki, *Prawo administracyjne. Podstawowe zagadnienia ustrojowe*, 2nd ed. Wolters Kluwer Polska - OFICYNA, Warszawa 2007, pp. 389-390; M. Szewczyk, *supra* n. 9, p. 35; M. Wierzbowski, A. Wiktorowska, *Podstawowe pojęcia teoretyczne w nauce prawa administracyjnego*, In: *Prawo administracyjne*, Editor: M. Wierzbowski, Wydawnictwo Prawnicze LexisNexis, Warszawa 2003, p. 93.

Chairperson of the KNF and the Vice Chairpersons of the KNF. In accordance with Article 7 paragraph 1 and Article 9 u.n.r.f. the Chairperson of the KNF and the Vice Chairpersons of the KNF shall be appointed from among persons who enjoy an unblemished reputation and give a guarantee of the correct performance of the tasks entrusted to them; have the relevant know-how in the area of supervision over the financial market in the Republic of Poland and professional experience gained in the course of academic work or work performed for entities operating on the financial market or for a financial market supervisory body; have worked in managerial positions for not less than three years, as well as have completed higher education in Law or Economics. Legal criteria of knowledge and scientific excellence, as well as professional experience in the field of the financial market's supervision in relation to other KNF members have been not specified, however it might be assumed that the President of the NBP or the Vice President of the NBP, as assigned by the President of the NBP, would have the proper skills and professional experience. This path of normative regulations could indicate that in the case of some other members, political factors could play a more important role then qualifications when taking up such important posts.

The next matter worthy of notice is the independence in the fulfilment of supervisory and regulatory functions. In particular, the admissibility to seek or receive guidelines, recommendations, instructions, or any other types of act having legally binding power from any governmental or other public or private entity is very important. According to established regulations, the KNF enjoys absolute autonomy to chose any instruments, methods, and the range of its interference in the financial market[22]. However, the Polish Financial Supervision Authority must adhere to law[23] and shall only proceed in accordance with the legally-specified aims of financial market supervision and use only instruments allowed by law, as well as Polish legal system, allowing the courts to ***review*** the KNF's administrative acts.

As it has been said before, the financial aspect of the supervisory authorities' independence should also be considered; although, in the doctrine, a lack of the resources needed to fulfil their functions is commonly criticized. Lack of resources might compromise a regulator's independence if the regulator is heavily reliant on the state to fund its operations[24].

[22]As a side-note it should be emphasised that this conclusion is true only in the national matter. Quite different coherency might be observed in an international environment. The international institutions might imply an influence e.g. on the KNF's activity or acts of the KNF's bodies concerning the functioning of financial institutions (it is more widely considered in a further part of this paper).

[23] In Poland, Administrative law is based on the principle that government or public authority action, whatever form it takes, must be legal (the principle of legality).
This principle in banking supervision was pointed out by, among others: R. Kaszubski, *Funkcjonalne źródła prawa bankowego publicznego*, Wolters Kluwer Polska - OFICYNA, Warszawa 2006, pp. 54-55.

[24] K.K. Mweda, *supra* n. 3, p. 9.

The third chapter of the Act on Financial Market Supervision is very important for analysis of the Polish Financial Supervision Authority's financial independence. Article 19 u.n.r.f. has shown concern as the costs and expenses in connection with the fulfillment of the KNF and KNF Office's functions; and in the amount specified in the budget act, including funds to be assigned to the Chairperson of the KNF, the Vice Chairpersons of the KNF and staff remuneration and bonus awards, shall be financed from fees paid by the regulated entities.

The rules and amount of payments are regulated in separate acts[25], and concurrently, the President of the Council of Ministers shall specify, by regulation, the date of payments, amounts and the way the payments shall be calculated, taking into consideration the efficiency to be ensured by the exercised supervision**. It does mean thata rule for supplying public entities** (the KNF) **with private funds** (to be exact, the funds of those subject to regulation) **has been established**. At the same time, however, the Parliament and the Government shall have a real influence on the amount of the sum total which would be at the KNF's disposal (via the procedure for adopting a draft and drawing up the State Budget). Additionally, the latest statutory regulations of the financial market provide allowed limits for the expenses of supervision (although they refer only to the payment services market) and the necessity of use of the so called corrective mechanism, should the limit in a particular year threaten to be exceeded. The above solution equals rigid (from the expenses point of view) financing of the KNF's supervisory functions on the payment services market[26]. Otherwise, despite receiving private funds for the fulfillment of the KNF's functions, there is no separation between its finance and the public finance sector. Summing up, these rules make *de facto* the impossibility of accomplishing a wide range of financial autonomy by the KNF. To the same extent, as a side-note, it could be pointed out that the KNF, as an entity of the public finance sector, is obligated to collect and transfer income collected according to regulations on the detailed State Budget execution regime, and shall return unused financial resources to the central current account of the State Budget.

[25] See, among others: Art. 131a of the Banking Act, Art. 14 of the Act on Insurance and Pension Funds Supervision and on Insurance Ombudsman or Art. 113of the Payment Services Act of 19 August 2011, Liabilities arising from payments for financing costs of the supervision are subject to execution under provisions related to administrative enforcement proceedings.

[26] In the Payment Services Act of 19 August 2011, a solution so far unprecedented in Polish law was adopted. In Art. 180 of the aforementioned Act, the allowed limit of the state budget expenses for the years 2011-2020 for supervisory purposes was defined, and this amount has been spread over the particular years (the total amount designated for this purpose is PLN 7,301,073,000). The Payment Services Act also stipulates that in the case of the limit of expenses for the particular budget year threatening to be exceeded, a corrective mechanism shall be employed. This mechanism is the limitation of the material costs of the KNF's Office, related to the performance of the activities resulting from the supervision over payment institutions and payment service offices or the rationalisation of the frequency of the supervisory activities of the KNF over these entities. The authorities competent for implementing this mechanism are the KNF and the KNF's Office, respectively, whereas the authority competent for monitoring the use of the expenses' limit is the Minister competent for financial institutions.

Finally, the Polish legislator tried to ensure the KNF's industrial independence as well. Under Article 15 u.n.r.f., any action or activity taken by the KNF's Chairperson, Vice-Chairpersons and members, as well as the employees of the KNF Office which would be in conflict with theirduties or which could give rise to a suspicion of partiality or self-interest is not allowed[27].

The Polish Financial Supervision Authority as part of the European System of Financial Supervisors

Contemplating the KNF's independence, it is necessary to refer to changes in the European architecture of financial supervision. In fact, the conception of the internal financial market's supervision has been discussed for some time[28]. In particular, the necessity to ensure a true level playing field for all participants at the level of the Union and to reflect the increasing integration of financial markets in the Union has been emphasised[29]. As for the institutional architecture for supervision, a complex reform has been suggested. In consequence, a new framework for EU supervision has been prepared, and the European System of Financial Supervisors officially came into being as of 1st January 2011. The ESFS comprises the following:

- the European Systemic Risk Board (ESRB),
- three European Supervisory Authorities (ESAs) – one each for the banking, securities, and insurance and occupational pensions sectors[30];
- the Joint Committee of the European Supervisory Authorities ;
- the competent or supervisory authorities in the Member States as specified in the Union acts[31].

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[27] For example, the KNF's Chairperson, Vice-Chairpersons and members, as well as the employees of the KNF Office may not hold equity interests in entities which are subject to the KNF's supervision, except for holding shares admitted to organised trading within the meaning of the Act on Trading in Financial Instruments of 29 July 2005.

[28] See, among others: E. Wymeersch, *The Future of Financial Regulation and Supervision in Europe*, Common Market Law Review 42, nr 4 (2005), pp. 987-988; A. Lefterov, *How Feasible Is the Proposal for Establishing a New European System of Financial Supervisors?*, Legal Issues of Economic Interpretation 2011, vol. 38 (February 2011), pp. 34-35; M. Quintyn and M.W. Taylor, *supra* n. 3, p. 9; P.O. Mülbert and A. Wilhelm, *Reforms of EU Banking and Securities Regulations after the Financial Crisis*, Arbeitspapiere des Instituts für deutsches und internationales Recht des Spar-, Giro- und Kreditwesens an der Johannes Gutenberg-Universität Mainz 2011, at 6-7, http://www.s-wissenschaft.de/dokumente/WorkingPap_110714123620.PDF [last visited 27th July 2011].

[29] The preamble to the Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, O.J. L 331, 15.12.2010, p. 12.

[30] Threenew European authorities replaced the Committee of European Banking Supervisors (CEBS), the ***Committee of European Insurance and Occupational Pensions Supervisors (***CEIOPS) and the Committee of European Securities Regulators (CESR), so the ESAs comprises the following: the European Banking Authority(EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA).

[31] Article 2 the Union regulations established the ESA: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational

Under Union supervisory regulations, the main objective of the ESFS shall be to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services[32]. In particular, ESFS should pursue the upgrading of the quality and consistency of national supervision, the strengthening of the supervision of cross-border groups, and the establishment of a single European rule book applicable to all financial market participants in the internal market. From the perspective of the subject under consideration, it is of vital importance to accentuate the determination to achieve a connection between national supervisors within a strong EU network[33]. This postulate-normative aspect implies serious consequences for the KNF's autonomy**. A comparison between the aims as presented, with some of the tasks and competences of ESA, leads to the conclusion that the KNF's self-dependence is limited in the light of Union law**[34]. A quotation from Article 16 of the Union supervision regulations might well commence the confirmation of this thesis. In accordance with it, each of ESAs "shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions". Subsequently, Article 18 of the Union supervision regulations stipulates "where the Council has adopted a decision[35] (…), and in exceptional circumstances where coordinated action by national authorities is necessary to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the Authority[36] may adopt individual decisions requiring competent authorities to take the necessary action in accordance with the legislation[37] to address any such

Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, O.J. L 331, 15.12.2010, p. 48; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, O.J. L 331, 15.12.2010, p. 84, hereinafter referred to together as the Union supervision regulations.

[32]Article 2 paragraph 1 Union supervision regulations.

[33]The preamble to the Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

[34]For new tasks and the necessity of adjusting Polish regulations to them, see: M. Fedorowicz, A. Zalcewicz, *KNF jako element sieci bezpieczeństwa rynku finansowego. Rola Komisji Nadzoru Finansowego w nowej europejskiej architekturze nadzoru nad rynkiem finansowym*, conference material of the Polish Nation-Wide Scientific Conference „*Komisja Nadzoru Finansowego – status prawny i zadania nadzoru finansowego w Polsce*", Warszawa, 22nd February 2010.

[35] The decision pursuant to Article 18 paragraph 2 of the Union supervision regulations.

[36] Each of ESAs.

[37] Regulation and the provisions of Directive 2006/48/EC, Directive 2006/49/EC, Directive 2002/87/EC, Regulation (EC) No 1781/2006, Directive 94/19/EC and, to the extent that those acts apply to credit and financial institutions and the competent authorities that supervise them, within the relevant parts of Directive 2005/60/EC, Directive 2002/65/EC, Directive 2007/64/EC and Directive 2009/110/EC, including

developments by ensuring that financial institutions and competent authorities satisfy the requirements laid down in that legislation". Thirdly, Article 19 paragraph 3 of the Union supervision regulations, stipulates that in the case of disagreements between competent authorities in cross-border situations, each of the ESAs may "take a decision requiring them to take specific action or to refrain from action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law". Moreover, ESAs may adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law, using Article 19 paragraph 4 of the Union supervision regulations as a legal basis. There is no doubt that the autonomy of supervisory action is limited by the aforementioned articles. Under Union law it is permitted to take decisions and issue guidelines and recommendations addressed to supervision authorities which are binding for them.

In the Union supervision regulations, the power to develop the implementation of technical standards, by means of implementing acts pursuant to Article 291 Treaty of the Functioning of the European Union (TFEU), was conferred on the ESAs (Article 15 of the Union supervision regulations). Moreover, the European Commission (Commission) is responsible for endorsing, by means of regulations or decisions, regulatory technical standards[38](Article 10 and 11 Union supervision regulations). In consequence the KNF's supervisory and regulatory independence is limited. However, the legislator's main goal is to adhere to common Union supervisory standards for consistent, efficient and effective supervision of financial institutions throughout the Union.

Considering the above, regulations for any breach or non-application of Union law by a national supervision authority should not be foregone. The Commission is granted the authority to address national supervision authorities or financial institutions in order to ensure consistent application of EU law[39], and such competency seems highly exceptional[40]. It does mean that **under EU Lawthe KNF's supervisory and regulatory independence is also limited by the power of the European Commission to ensure compliance with Union law in financial markets.**

Summing upall the matters under discussion, it can be said that current regulations definitely stipulate that "the superiority of the Commission and the ESAs is

all directives, regulations, and decisions based on those acts, and of any further legally binding EU act which confers tasks on each or all of the ESAs separately.

[38] By means of delegated acts pursuant to Article 290 TFEU.

[39] According to Article 17 paragraph 4 and 6 of the Union supervision regulations, the European Commission "may issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law" and "adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law".

[40] A. Lefterov, *supra* n. 28, p. 46.

self-evident by their unprecedented powers to instruct national authorities on how to apply EU law"[41].

Finally, the range of the KNF's autonomy should be considered in the case of the delegation of tasks and responsibilities among competent or supervisory authorities. In accordance with Union supervision regulations, "the delegation of tasks means that tasks are carried out by one of the ESAs or by a national supervisory authority other than the responsible authority, while the responsibility for supervisory decisions remains with the delegating authority; whereas by the delegation of responsibilities, one of the ESAs or a national supervisory authority (the delegate) should be able to decide upon a certain supervisory matter in its own name in lieu of the delegating authority". In these legal circumstances the question arises whether this instrument would affect the KNF's autonomy in the event of the delegation of tasks or responsibilities. For the answer to this question, the main matter is supposed to be the delegating authority's responsibility for supervisory decisions. Looking at the delegation of tasks and responsibilities among the competent or supervisory authorities through the prism of a supervisory authority's responsibility, it should be assumed that each of the ESAs, or a national supervisory authority (the delegate) in the case of the delegation of tasks and responsibilities, shall act within the authority of, and in collaboration with, the delegating authority. This would delimit the range of liberty to their supervisory decisions. It would be justifiable that, fulfilling its functions as a delegating authority, the KNF should retain an influence on supervisory decisions which are made by the delegated authority. The Union supervision regulations do not regulate this matter, and they focus on the usefulness of this legal instrument for supervision ("to reduce the duplication of supervisory tasks, to foster cooperation and thereby streamline the supervisory process, as well as to reduce the burden imposed on financial institutions"[42]). It should be assumed that arrangements regarding the delegation of tasks and competencies will have to regulate these issues in detail.

Conclusions

The changes which have occurred in financial markets have caused the strong tendency to stipulate a wide range of independence in current law. It was observed in many countries that the concept of an independent supervisory authority provides incentives for enhanced quality in regulation. Although its independence may not necessarily prevent a financial crisis[43], it is true that it is essential for the achievement of financial stability. Lack of proper independence from political and industrial influence is indicated as the main factor in all recent systemic crises[44]. Despite common

[41] *Ibid*., p. 54.
[42] Point 39 Preamble, *supra* n. 29.
[43] K.K. Mweda, *supra* n. 3, pp. 34-35.
[44] See, among others: M. Quintyn and M.W. Taylor, *supra* n. 3, p. 33.

acceptance for the idea of an independent supervisory authority, its degree and supervisory structures' organization varies in different states. This is due to the fact that, despite globalisation and liberalisation, the financial services' market is still diverse. This means the necessary adaptation of the supervisory architecture for the environmental and specific requirements of the national financial market, though a not insignificant factor is also the historical and international background to regulatory framework.

The Polish Financial Supervision Authority is a specific public authority, and so is an entity of the public finance sector. The regulations at the national level guarantee a high degree of autonomy; and, as it has been analysed, the KNF enjoys both types of independence: political and industrial. First of all, political independence was considered in institutional, functional and financial aspects. In these aspects, the KNF's autonomy is not complete. In an institutional context, the KNF's autonomy seems theoretically to be properly regulated. It was established as an autonomous, specialised body for supervision of the financial market. However, the KNF's personnel structure seems to be problematic. Membership of the KNF consists not only of independent specialists, but also members of the Council of Ministers (or persons assigned by them) and representative of the President of the Republic of Poland. This does not guarantee complete independence. Moreover, some of the KNF's members are not, indirectly, outside political control, as well as being political accountable (members of Council of Ministers). This may undermine the KNF's self-dependence.

The KNF is *controlled* by the Prime Minister (whereas The Act on Financial Market Supervision stipulates "*supervised*"). Owing to its functional autonomy, this does not mean that the KNF is not a subject of any obligation *vis-à-vis* political institutions, this normative solution needs to be recognised as correct. With regard to financial independence, it should be emphasised that although this has been established, the rule regarding the supplying of public entities (KNF) with private funds by Polish legislators, Parliament and government has an influence on it through budgetary procedure.

In the second part of the paper, regulatory and supervisory independence was reviewed. The Polish Financial Supervision Authority has the ability to set technical rules and regulations for a supervised financial market, within the confines of the law (regulatory independence), and to use supervision tools like on-site inspections, off-site monitoring, sanctioning and enforcement of the sanctions (supervisory independence). However, the growing globalisation and internalisation of the financial sector has brought about the KNF's need to adapt different types of regulations (soft law) prepared by international bodies like, for example, the Basel Committee on Banking Supervision. Arguably, the KNF is autonomous in these dimensions at the national level. The situation is completely different at the EU level. Owing to the need to ensure the correct and full application of Union law has priority, there were established a variety of

mechanism and tools which can be used in instances of non-application or incorrect application of Union law amounting to a breach thereof. The ESAs and Commission have the power to intervene on an EU member's national financial market; therefore, they can directly instruct national authorities and take individual decisions addressed to national authorities or financial institutions. The aforementioned EU bodies are empowered to adopt and implement regulatory or technical standards, guidelines and recommendations in order to ensure efficient and effective supervision, foster the coherence of the application of Union law, and achieve convergence in supervisory practices. The KNF, as an important part of the new European supervisor's structure, is obligated to comply and accept all the acts, regulations, guidelines, etc. in fulfillment of its functions regardless of whether they are legally binding or have non-binding norms (soft-law). In consequence, the KNF's regulatory and supervisory independence is limited on the international level.

Finally, it should be stressed that the Polish legislative endeavours to ensure industrial independence. The KNF's industrial independence shall be guaranteed by the KNF's Chairperson, Vice-Chairpersons and members, as well as the employees of the KNF Office, not taking any action or indulging in any activities which would be in conflict with their duties or which could give rise to the suspicion of partiality or self-interest.

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Principle of Adequacy and Financial Autonomy/Financial Independence of the Local Self-Government Entities in Poland

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Abstract: The report contains an analysis of common relations between the notions "autonomy" and "self – government" as well as the notion of "local self – government financial independence". The subjective evaluation of the issue on the grounds of the Polish law in the context of binding of one of the most important principles that determines local self – government financial independence – the principle of adequacy, has been done with the respect to the Polish law regulations as well as the doctrine and judicial decisions. The results of the carried out analysis are included in the final conclusions.

Keywords: autonomy, self – governing, financial independence, adequacy, Constitution.

1. Basic notions

Legal analyses regards functioning of the local self-government in Poland, like, in case of reports of that kind referring to conditions of organizing and working of local authorities in other countries, include within several issues of different degree of generality. Besides basic analyses regarding e.g. local authorities structure / self – government structure / or their powers / competencies /, in the background of powers of the State authority often involve issues of a narrower degree of generality though, crucial from the point of view of the possibility of a normal functioning of the local government. The latter case describes mainly the sources of financing of tasks performed by agencies of the local self-government entities /further called: lsge/ and the services subject to them. Taking this aspect of activity of lsge into account, both in the regard with theoretical references towards the idea of indispensability, to ensure the realization of tasks on the basis of sufficient and regular financial sources, as well as the associated with it, the area of normative realization of that idea, constitutes a specific mapping of another, quite an essential problem. That problem is to establish common relationships between legal institutions: "autonomy" and "self – government". The shift of such a "confrontation" onto the facet of binding legal – financial regulations impels to undertake an attempt of specifying common correlations between the "financial autonomy" of lsge and a " financial independence" of such subjects. The need of carrying out such an analysis, albeit, in fact, limited due to requirements for the

present report, justifies the choice of the subject area delineated by the title of this report and corresponding with basic problems underlined by the subject of the Conference.

In the literature of the subject it is underlined that, in several countries, autonomy as a legal institution, but most of all of the characteristics favorable for the realization of different types of policies finds its use mainly as a manner of solving local problems: of State, of trade, of religion etc. [1] Taking this fact into consideration, neither the employer nor the doctrine indicate, however, any uniform, unequivocal definition of that institution, though, beyond the question, is the fact that, the notion has its Greek origin / "autos" – self, "nomos" – law/ and is translated as: evenness, sovereignty, independence, or the right to constitute legal principles for oneself [2]. The present understanding of that notion in the everyday speech, though, virtually concurrent with the understanding of the original one, differs from it in the area of detailed characteristics. And so, e.g. according to the encyclopedic definition it means: "independence, wide range of self – government powers of a particular area, a religious group within State" [3]. According to the Dictionary of Polish Language it means: "the widest self – government power / with its own legislation / of a particular area within the State; the right to independent decision making of the local community problems; self – government" [4]. On the other hand, the encyclopedia of law states that, autonomy is: "law making of the principles for oneself", whereas in the state law it is "the defined by the state organs independence of the part of the state territory, mainly in the domain of legislation" [5].

The comparison of the mentioned examples of determining the contents of the notion "autonomy", with characteristics that determine the legal essence of an institution of such name leads to a conclusion that it is an ambiguous notion, which can be defined in various ways depending on the applied research method [6]. The element linking the mentioned definitions is the binding of the autonomy institution with the local self governing and also equipping the autonomic subjects with certain legislative freedom[1]. Exhibiting such qualities results in, however, such a fact, that sometimes, in the subject literature both institutions are identified with each other without substantial justification [7]. Their target appeals against that concept. The aim of local self – government is the administration of local issues, and the aim of autonomy is also equipping it with law making powers which are not limited to constituting local laws as it takes place in case of self – government [8]. As a result it should be accepted that, unlike self – government, autonomy means, from one point of view, a form of State structure and from the other, that, a given territory or territories vary from the remaining part of the State with at least one specific quality, they have laws, which the other comparative administrative – territorial entities of State division do not have, and

[1] Such an understanding of autonomy corresponds with the autonomy of the Silesian Voivodship based on the organic status of the Silesian Voivodship conferred by the constitutional law of the 15th of July 1920.

which give it /them/ more independence with respect to the State [9], but of course, it does not mean any total independence but only such independence, which can be originated from the legal regulations granted by the State legislative agencies. As a consequence, the mentioned above local autonomy should be understood as a status of a relative independence of lsge towards State authorities. According to B. Dolnicki, lsge, including communes "are not thus a state in a state" and "have a right to an independent administration of their proceedings and achieving their own aims, that however, cannot remain in contradiction with social interest of the nation as a sovereign" [10]. In other words, local autonomy and strictly speaking, the independence of local self – government does not mean a total independence of the state but a transparent and legible determination in which moment and to what extent, the state administration by the use of means of surveillance, can interfere in the region of independent functioning of the lsge agencies [11]. Obviously, also in this case like in the case of an institution of "autonomy" cannot precisely determine the range and forms of the subjective realization of independence. In the light of the doctrine of the financial law and finances, the independence of self – government is determined thus by at least two elements: the financial independence and the functional independence [2]. On the grounds of the regulations of the Polish law this division finds its reflection mainly in the sounding of the regulations of the Constitution of the Polish Republic[13], which, to ensure the realization of the decentralization rule of the public authority, incorporates the participation of the local government in performing of public authority as well as the rule of financial independence of the local self-government entities[3]. The latter, however, according to J. Glumińska – Pawlic can be realized virtually only after the reassurance of a suitable amount of financial means for lsge, according to the principle of adequacy with tasks which are described in the further part of the report [15]. The essence of the latter rule materializes in the statement , that the independence of lsge is, though differently understood according to various criteria[4], in case, when it involves determining its real borders, cannot be excluded from the financial /economic/ bases for the local self – government activity. At the margin of the mentioned correlation it should be underlined that, both the Polish legislation and the doctrine derived from it, as well as the judicial decisions, have not elaborated a uniform and consistent definition of "the financial independence of lsge". In the literature of the subject the latter notion is often identified with the obligation of reassurance of such level of income for lsge,

[2] According to J. Bocia, who concluded on the basis of the Belgian legal regulations it should be also mentioned about self – governing of regulation, which means the regulation of social relationships exclusively within the borders of constitution and laws [12]

[3] According to B. Filipiak it means that communes and other lgu benefit on the wide decision making freedom, i.e. they can decide in their own behalf and for their own responsibility about all essential issues regarding the local community without any fear of external interference [14]

[4] According to M. Kulesza the reality of self – government independence constitutes the resultant of a few factors. The most important involve the binding warranty of political freedom, accepted in the legislation structural solutions, the existing system of financial supply, the rules of redistribution of tasks and competencies between the segments of public authority [16]

that would let realize the tasks inducted to them, and at the same time give them freedom of shaping the expenses and that would create suitable formal and procedural warranties[17], or as the power derived from the law for self – government to have enough means for the tasks realization, especially, individual incomes with the state obligation to reassure them [18].

The analysis of the mentioned opinions justifies the request that, none of them takes into consideration, to a satisfactory degree, the factors influencing the scope of independence. Those are mainly: the amount of pecuniary resources transferred, for an independent disposition of lsge, the scope of freedom in shaping the incomes, the scope of freedom in making expenses, as well as, the scope of freedom as far as the realization of budget procedure is concerned [19]. Taking that aspect of the analyzed issue into account but also the fact that, the financial independence of lsge is an element of finances of the local self – government which constitutes an essential but not an only sector of public finances and thus they must consider the necessity of the financial authority attributes division between them and the State [20]. The definition of the financial independence stated by J. Gluminska – Pawlic deserves paying attention. It seems to include all the described above elements. Thus, under the notion of financial independence of lsge, further, in this report one should understand the law of independent dealing with their financial economy granted to those units within the constitution and the law of the realm, i.e. accumulation of incomes and acquiring the return revenues, making expenses as well as creating and executing the budget [21].

2. Sources of incomes of the local self-government in Poland

The system of incomes of lsge in Poland has a heterogenic internal structure and it is based on legal acts of different sort. From the normative point of view the basic division of the incomes is shown in the Constitution of the Republic of Poland, regarding individual incomes, general subsidies and grants for designated tasks as the sources of incomes of lsge from the State budget according to the article 167 of the law 2 of the Constitution. The division is, however, faulty as it does not take into account the other virtually available sources of incomes e.g. grants from other subjects of the public law [22]. The legal act fully devoted to incomes of lsge is the law of the 13th of November 2003 about the incomes of local self-government entites [23], but also that normative act in spite of its designation suggesting that it is a complex act, does not regulate the totality of the incomes sources. Beside the mentioned law, it is regulated also, however, by other legal acts of the rank of a law, mainly structural laws [24]. The latter, on the other hand, echo the classification of incomes accepted in the Constitution and in the law of the 13th Nov., 2003 in different aspects and in specificity.

The mentioned sources of law regulating the issues of lsge incomes due to their internal construction and scope are not coherent [25] neither with the regulations of the Constitution nor with the European Charter of Local Self – Government /further called:

ECLSG/ [26]. The comparison of the regulations of the Constitution contents and the Law of the 13th of November 2003 allows to isolate, except the mentioned individual incomes, general subsidies, State budget grants and the means coming from foreign sources not being a subject of return as well as other means. The presented types of incomes can be thus divided into two basic groups: individual incomes and transfer incomes from other public means resources. This division, however, does not take into consideration other possible divisions that use different classification criteria. One of the most important is the division made according to the criterion of level and type of entity. Effects of that division can be clearly seen on the example of communes and higher level of self – government: of a district and of a voivodship. In contrast to the latter, the self – government commune has significantly more complex sources of tax incomes, similarly to districts but different rules of calculating general subsidies in relation to self – government voivodships, as well as significantly more complex system of grants for designated tasks and shares in the State income taxes [27].

The realization by Polish law maker, though in a way not free of certain faults, of the constitutional rule resulting from the regulation of the article 167 of the law 3 – the law of legal determining of the lsge income sources corresponds with other subjective laws accruing to lgu and resulting from ECLSG. The most important is the law of disposing freely the financial resources within the frames of performed powers, collecting taxes and local payments, diversified system of financial supplies, making use of the supplies of a compensatory character but also the law to express the opinion in the question of shaping the income sources or an access to the State capital market [28].

The fact, that from the formal and legal point of view, lsge dispose such laws ,does not mean, however, that in reality the binding legal system in Poland reassures their undisrupted realization. Beside the above mentioned doubts, that regard the contents of legal solutions establishing the sources of lsge incomes and also the method of using them in the literature of the subject, it is brought into attention both the real lack of tax power of lsge even, when it comes to self – government commune organs as well as the possibility of using by them the instruments of financial policy freely, e.g., in the form of revenues of a return character/ credits, loans, emission of securities [29]. To construct the income system of lsge in a proper manner and flexibly at the same time and such a one that would adjust to structural rules comprised in the Constitution as well as to the regulations of the international law that binds Poland with ECLSG, one should take into account that it is, according to the representatives of science, (as a representative opinion on the subject there should be taken into account the view of E. Kornberger – Sokołowska) to realize several detailed principles. Beside the mentioned above principles, which have been given the character of subjective laws, E. Kornberger – Sokołowska includes into those principles: the principle of stability and certainty of the income sources, the principle of efficiency and flexibility of income

sources, the principle of adequacy of tasks means, the principle of territorial localization of the income sources, the principle of minimizing the discrepancies at the level of lsge incomes. The superficial analysis itself of the above mentioned principles must lead to a conclusion that all of them have an essential significance for the proper functioning of the lsge income system. It is difficult, though, to display any of the mentioned principles before the others. Taking into account, however, the subject of the present report, though allowing of the common correlations and links between the mentioned principles, the further part of the discourse will be devoted to the legal regulation of the principle of adequacy in Poland.

3. The principle of adequacy on the grounds of the Constitution and other Polish legislative regulations

The basic determinant of transformations in public administration associated with decentralization of public administration competencies as well as the division of public means between particular sectors of public administration (of government and of self – government), is the principle of adequacy of tasks means. That is a principle linked with the realization of lsge financial independence which, in theory, refers to proper constructing of local self – government budget income sources, and which is considered a warranty of reassurance for each of the local self – government entity an income suitable for the entirety of tasks assigned to it [30].

If Polish legislation were subjected to evaluation from the point of view of the scope of legal warranties, which are to ensure the realization of the principle, it should be noticed that, basically the financial authority of local self government in Poland was warranted straight in the article 167 of the Constitution. According to law 1 of that regulation, the entities of local self – government are ensured the participation in public incomes according to the tasks assigned to them. This regulation determines warranties for local self – government in form of a suitable supply with public incomes, i.e. proportionally to the needs determined by the range of objective tasks (individual or commissioned) about which it is said in article 166 of the Constitution. The notion of public incomes, which is used by the law maker in this regulation involves firstly, an obligatory, non – returnable, general pecuniary performances – public tributes, but also other pecuniary performances of a public and legal character which are imposed in order to realize other functions e.g. of prevention or of punishing (tickets, fines, penalties) [31]. The execution of tasks means thus the necessity to bear expenses, for the financing of which the self – government has to find particular income sources. According to the article 167 of the law 1 of the Constitution the transfer of the tasks for realization to the local self - government entities must be accompanied by the relevant equipping of those entities with the financial means that come from the public and legal sources. Thus it can be accepted that the basic constitutional warranty of the lsge income independence is the obligation for participation of that entity in public incomes

in a relation relevant to the tasks ascribed to it. The regulation of the article 167 of the law 1 is , thus , an unequivocal manifestation of presence of the principle of adequacy (responsibility) in the Constitution. Constitutional warranty of relevance refers here to all the three aspects of financial independence of a commune, i.e. the income aspect, the expense aspect as well as the realization of budgetary economy [32]. In connection with that it is underlined in the literature that it has the most crucial significance in the structure of constitutional warranties shaping the commune income system [33].

The application of the principle of adequacy involves various effects of a financial – legal character. On the one hand it imposes upon the law maker an obligation of shaping the lgu public incomes on such a level as to make it possible to finance their tasks and on the other hand it creates natural powers for those entities to move for claim towards the State in a situation when public incomes would not cover the realization of the task. The proper realization of this rule requires thus, an establishment of criteria constituting the prerequisites to determine the claims according to which the local self government entity income power and its financial need can be estimated. Beyond any doubts, however, the validity of the claim should not exceed the real need justified by the performed tasks [34]. The claim that is mentioned above, i.e. the claim to ensure an "income adequacy" for lsge is supported by the doctrine. In the literature of the subject the adequacy of incomes is thus to be understood as:

- constitutional – legal evaluation of a potential economic efficacy of the income sources passed over to lsge in relation to the financial aspect of the tasks ascribed to it by law
- an evaluation of the flexibility level of the incomes in relation to dyna- mic process of changes that takes place while performing the financial tasks already ascribed to lsge
- an evaluation of financial correlations which take place in the process of performing tasks between the part of the tasks performed by a particular lsge, other levels of self – government as well as by central agencies
- presumption of the existence of lsge public subjective rights to the falling on incomes at the level that enables to perform tasks on one's own behalf and of one's own responsibility [35]

Moreover, the adequacy in judicial decisions of the Tribunal is a state allowing lsge to perform the tasks ascribed to it in a proper way [36].

The principle of adequacy on the grounds of the Constitution as it is understood in the literature of the subject should be derived not only from the regulation of the article 167 of the law 1 but also article 167 of the law 4, which requires to accept, that the changes in the lsge public incomes allocation are to be made in case of changes in self – government tasks and competencies. The issue regards the allocation of incomes between the state and self – government. The legislator of structure determined in that way, the standpoint on the subject of public income allocation between those public

legal subjects. However, an ordinary law maker was left with the task of performing a detailed allocation of the incomes. Thus, it is up to the parliament whether and to what extent the regulations regarding repartition of incomes would allow the realization of the Constitutional principle of adequacy at the moment of tasks relegation, and also during further stages of evolution of the tasks defining [37]. Here, one should take into account the opinion of E Kornberger – Sokołowska, that, the principle of adequacy of incomes to tasks ought to be interpreted in a broader way not only in the aspect of a relevant financial efficiency but also in the aspect of adequacy of legal structures that determine the financial sources in relation to types of self – government tasks [38]. It should be underlined also that according to the examined regulation, every each increase in commune tasks or of another lsge should be accompanied by a suitable (adequate, proportional) increase in self government public incomes in a way to enable the financing of tasks ascribed to the entity [39]. In other words, it should be accepted, that the regulation of the art.167 of the law4 of the Constitution requires maintaining the principle of adequacy of which it is said in law 1, article 167, not only "at the start", but throughout the whole period of task realization by lsge. It is also important to pay special attention to the necessity of taking into consideration the principle of adequacy in case of tasks change.

4. Conclusions

The carried out analysis allows to draw a few basic conclusions:

(1) - the notion "autonomy" is not identical with the notion "self – governing" andthe "financial independence of local self – government entities" and it does not exist at present on the ground of the Polish law

(2)– the Polish law regulates the principle of adequacy of lsge incomes to the performed tasks not only due to legal requirements of the international law – ECLSG, but also and possibly most of all due to the fact that the binding of such principle constitutes and indispensable financial condition for the self – government proper functioning

(3)– from the normative point of view the binding of the principle of adequacy in Poland is warranted by regulations of the highest legislative rank i.e. by regulations of the Constitution

(4) – regulations of the Constitution do not constitute and cannot constitute any detailed legal solutions regarding the realization of that principle, the task should be realized with the help of legal acts of a lower rank

(5) – legal acts issued on the basis and in the aim of obeying Constitution and regardingthe realization of the principle of adequacy should be maximally adjusted to the real needs and lge and the State financial capacities

Summary

The realization of the self – government entities the tasks imposed upon them in a proper way and a way that allows to fulfill the needs respectively of the local community and region, depends on several objective and subjective factors. The scope of independence belongs to the first ones and includes the financial independence of local self – government entities as well as the instruments with the help of which its realized. "The financial independence" as a notion has not yet been defined by the Polish law. Its essence and scope is determined by the standpoint of the doctrine and judicial decisions. As a result it often comes to identifying the notion of "autonomy" with the notion of "self – governing" and also the "financial autonomy" with the notion "financial independence." The notions need to be separated and such a need results from the fact that the latter, when it is to be realized by the local self – government entities, has to refer to lasting principles accepted in international agreements and establishing local self – government financial functioning standards and its relations with the central authority. One of the most important principles is the principle of adequacy of incomes according to types and scopes of tasks realized by local self – governments. The legal situation of that principle in the system of a given state legal sources constitutes an exceptionally crucial issue from the point of view of financial independence of local self government entities. This report has demonstrated an analysis of that issue on the grounds of Polish law.

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The Standards of Fiscal Jurisdiction in Poland in View of Case Law of the Constitutional Tribunal

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Abstract: The aim of this study is to determine and systematize the most important standards of fiscal jurisdiction in Poland that result from the constitutional principle of the democratic state of law on the basis of the Constitutional Tribunal's case law.

Keywords: fiscal jurisdiction, case law, Constitutional Tribunal.

1. Introduction

One of the fundamental constitutional principles that result from the sovereignty of each state is that of fiscal jurisdiction[1]. The existence of the state and performance of its multi-aspect tasks are not possible without sufficient amounts of public funds, whose key source is public levies, including taxes. Hence, there should not be any doubts about the state's right to charge specific entities with costs of its functioning. In Poland, this right is set forth in Art. 84 of the Constitution of the Republic of Poland (hereafter the "Constitution"), which provides that each Polish citizen is obliged to bear financial burdens and public levies, including taxes set forth in an act[2]. Pursuant to this article, this obligation may be imposed only by the act. Moreover, Art. 217 of the Constitution enumerates technical elements of the tax that absolutely must be included in the act. Such elements include: the object and subject of the tax, tax rates, criteria for awarding tax credits and tax depreciations, as well as categories of entities exempted from taxes.

In the Polish legal system, the legislative bodies authorized to enact acts are the *Sejm* (lower chamber of the Polish Parliament) and *Senat* (upper chamber). They have full freedom to this extent, which means that they can enact the law that meets political and economic aims[3]. However, the effects of the state's fiscal policy result in a specific amount to be paid by a taxpayer – such effects directly reduce the taxpayers' incomes –

[1]The fiscal jurisdiction is a part of levy jurisdiction that includes the right to determine public levies, to enact levies, to collect public levies (use of incomes from public levies), penal and fiscal jurisdiction, and the right to use public levies; cf. J. Kulicki, *Zakres władztwa podatkowego w obecnym systemie prawnym w Polsce,* Analizy BAS No. 16 (41) of 16 June 2010, p. 5.
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so the legislative body's freedom to determine taxes is not absolute and is subject to supervision in terms of the observance of its constitutional principles[4]. At the same time, these principles determine the standards of fiscal jurisdiction in Poland. The aim of this study is to determine and systematize the most important standards.

As mentioned above, the state's right to charge its citizens public levies is not absolute and is limited by the obligation to precisely observe constitutional principles pertaining to the legislation and implementation of the tax laws[5]. Among these, the principle of the democratic state of law is the most important[6]. In the applicable laws, this principle is set forth in Art. 2 of the Constitution, which provides that the Republic of Poland is the democratic state of law which implements principles of social justice. This directive is a collection of many norms and principles, which are not implemented directly in the Constitution, but they imminently result from axiology and the essence of the democratic state of law[7]. In this regard, a special role has been played by the Constitutional Tribunal, which defined under Art. 2 of the Constitution many principles which should be restrictively observed in enacting normative acts that restrict freedoms and civil rights and impose obligations towards the state[8]. The most important principles are as follows:

a) the principle of specificity of the act to determine essential elements of the fiscal relationship;
b) the principle of legal certainty and of certainty of the tax law; and
c) the principle of determinacy of the tax law;
d) the principle of specificity of the act to determine essential elements of the fiscal relationship.

On one hand, the principle of specificity of the act in the tax law is defined *explicite* in Art. 217 of the Constitution, but on the other hand, its effectiveness results from the clause of the democratic state of law[9]. According to this directive, the individual's rights and obligations towards the state, particularly any fiscal rights and obligations, should be governed by the act. This means that at present the primacy of the act in respect of levies is doubtless. In practice, however, it is not possible that fiscal

[4] P. Orawiec, *Zasady nakładania podatków w warunkach państwa prawa,* "Edukacja Prawnicza" 2006, No. 3, p. 24.
[5] *Ibidem*.
[6] See also: R. Zieliński, *Tworzenie prawa podatkowego w świetle zasady demokratycznego państwa prawnego,* [w]: *Konstytucyjne uwarunkowania tworzenia i stosowania prawa finansowego i podatkowego,* P.J. Lewkowicz, J. Stankiewicz, Białystok 2010, pp. 108-118.
[7] R. Dowgier, *Zasada demokratycznego państwa prawnego jako fundament stanowienia prawa podatkowego,* [w]: *Konstytucyjne* ..., op. cit., p. 97.
[8] Judgment of the Constitutional Tribunal of 20 November 2002, docket No. K 41/02, "Monitor Podatkowy" 2002, No. 12, p. 2.
[9] Cf. *Synteza o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2002 r. Prawo podatkowe w świetle orzecznictwa Trybunału Konstytucyjnego w 2002 r. Problematyka ochrony praw lokatorów w orzecznictwie Trybunału Konstytucyjnego pod rządami Konstytucji z 2 kwietnia 1997,* Studyof the Office of the Constitutional Tribunal, Warszawa, May 2003, p. 24.

acts exhaustively govern all aspects of this complex subject of the tax law. Therefore, in the process of enacting the tax law, it is essential to apply the statutory authorization to the extent not excluded by Art.217 of the Constitution. However, this poses a question about the particularity (depth) of the statutory regulation[10].The Constitutional Tribunal's case law provides that sub-statutory legal acts can include only regulations which supplement the regulation reserved for the act, which means that their scope cannot determine any essential elements of the tax[11]. Moreover, sub-statutory acts listed in the constitutional hierarchy of legal sources must meet formal requirements set forth in Art. 92 (1) of the Constitution[12].This means that these legal acts can be enacted only under the explicit authorization set forth in the act to the extent specified in this authorization and in order to perform a given act. Moreover, the authorization cannot be general, i.e., it cannot permit the authority allowed to make such authorization to regulate the whole set of issues which are not subject to any direct regulations nor guidelines specified in the act[13]. According to the Constitutional Tribunal, the authorization determined in the act also should be detailed in respect to the subject, object and content (i.e., it should determine a relevant authority authorized to adopt a directive, the scope of issues to be regulated and guidelines on the content of the act)[14]. Since it is unacceptable to conjecture which authority is competent to make the directive, the directive cannot be supposed to govern issues not specified in the authorization[15]. In addition, a method of editing guidelines (i.e., guidelines on the content of the normative act and the direction of substantive solutions to be included in this normative act) must be subject to specific standards[16]. According to the Constitutional Tribunal, no absolutely mandatory provisions of the act can be applied, only provisions which give the authority enacting the directive some freedom to choose the method of regulating a given issue and the regulation method that results in some effects required by the legislator[17]. According to settled case law, any guidelines on the

[10] Judgment of the Constitutional Tribunal of 20 June 2002, docket No. K 33/01, "Przegląd Orzecznictwa Podatkowego" 2003, No. 1, item 13.

[11] Judgments of the Constitutional Tribunal of 7 September 2010, Docket No. P 94/08, LexPolonica No. 2376151; 16 June 1998, docket No. U 9/97, "Glosa" 2003, No. 4, p. 28; l September 1998, docket No. U 1/98, LexPolonica No. 333168; 9 September 2004, docket No. K 2/03, LexPolonica No. 368690; 25 July 2006, docket No. P 24/05, LexPolonica No. 413619.

[12]The sources of the applicable laws of the Republic of Poland are as follows: the Constitution, acts, ratified international treaties and directives.

[13] Judgments of 13 November 2001, docket No. K 16/01, LexPolonica No. 355017; 26 October 1999, docket No. K 12/99, LexPolonica No. 344486; 16 January 2007, docket No. U 5/06, LexPolonica No. 1116834.

[14]W. Maruchin, *Zasady tworzenia prawa podatkowego na tle orzecznictwa TK,* "Monitor Prawa Celnego i Podatkowego" 2008, No. 7, p. 242.

[15] Judgments of the Constitutional Tribunal of 7 November 2000, docket No. K 16/00, LexPolonica No. 348579; 11 February 2010, docket No. K 15/09, LexPolonica No. 2135579.

[16] Judgment of the Constitutional Tribunal of 14 December 1999, docket No. K 10/99, LexPolonica No. 348063.

[17] Judgment of the Constitutional Tribunal of 20 June 2002, docket No. K 33/01, "Monitor Podatkowy" 2002, No. 8, p. 2.

content of the normative act may be negative (i.e., guidelines can exclude solutions not required by the legislator from all the possible solutions) and positive (e.g. guidelines determine criteria to be applied by the legislator while regulating the scope of issues, aims and functions to be met by a given normative act)[18].Furthermore, according to the Constitutional Tribunal's case law, the legislator, as a rule, chooses the method of determining the guidelines, establishes the scope of their details and determines their contents. However, the legislator should be aware of the fact that the more a given fiscal regulation applies to the fundamental issues of the individual, the wider the statutory regulation must be and the fewer references to executive acts there should be. In the tax law, if the legislator applies these references, it must determine the content of subsequent directives much wider, *inter alia* by providing more detailed guidelines on the content of the act in comparison with other areas[19].

2. The principle of legal certainty and of certainty of the tax law

The principle of the citizens' confidence in the state and its law is based on legal certainty and provides that the legislator enacts the law in a way that it cannot be a trap for the citizen. Thus, each citizen should be able to handle his/her issues in confidence that he/she is not exposed to legal effects that cannot be predicted at the moment of making the decision and that his/her actions taken under the applicable laws will be recognized by the law in the future[20]. In other words, new tax laws adopted by the legislator cannot surprise their addressees[21]. However, according to the Constitutional Tribunal, in the law governing public levies, the legal certainty is not expressed by the stability (i.e., permanency) of the law, which can be difficult to achieve, but by relevant conditions established to allow the taxpayers to make rational decisions on the basis of as-complete-as-possible knowledge about the operation of the state authorities and legal consequences of such operation. The enactment of the tax law on the basis of this principle of legal certainty builds confidence in the legislator and its tax law. Therefore, in the democratic state of law, a growth of tax burdens by amending the law should be made in such a way that individuals, to whom it applies, have enough time to rationally manage their interests[22]. Hence, the peculiar guarantors that allow the citizens to practically use the confidence in the state and its laws are as follows:

[18] Judgments of the Constitutional Tribunal of 7 November 2000, docket No. K 16/00, LexPolonica No. 348579; 3 October 2001, docket No. K 27/01, LexPolonica No. 354025.
[19] Judgment of the Constitutional Tribunal of 26 October 2001, docket No. K 12/99, LexPolonica No. 344486.
[20] Judgments of the Constitutional Tribunal of 3 December 1996, docket No. K 25/95, LexPolonica No. 353274; 25 November 1997, docket No. K 26/97, LexPolonica No. 325990; 29 November 2006, docket No. SK 51/06, LexPolonica No. 354025.
[21] Judgments of the Constitutional Tribunal of 25 November 1997, docket No. K 26/97, LexPolonica No. 325990; 29 November 2006, docket No. SK 51/06, LexPolonica No. 1016191.
[22] Judgments of the Constitutional Tribunal of 27 February 2002, docket No. K 47/01, LexPolonica No. 356499; 15 February 2005, docket No. K 48/04, LexPolonica No. 373960; 16 January 2007, docket No. U 5/06, LexPolonica No. 1116834.

a) the principle of protection of the vested rights and pending interests;
b) the principle of nonretroactivity;
c) the observance of the proper *vacatio legis* period[23]; and
d) the prohibition to amend fiscal acts in the fiscal year[24].

The essence of the principle of protection of the vested rights and pending interests is the guarantee that the taxpayers' previous rights vested under the authority's individual legal act or directly under the act, will not be arbitrarily annulled or restricted. In the tax law, the discussed principle is not absolute, since absolute protection of the vested rights would petrify the legal system and prevent the legislator from implementing essential amendments to the applicable laws. According to the Constitutional Tribunal, in the process of enacting the tax law the deviation from the principle of the vested rights can happen only if the following conditions are met. Firstly, the legislator imposes restrictions on the vested rights on the basis of constitutional values. Secondly, a given constitutional value cannot be performed without infringing the vested rights. Thirdly, the constitutional values, for performance of which the legislator restricts the rights conferred on the taxpayers, have priority over the values that form a basis for the principle of protection of vested rights. Finally, the legislator takes essential additional measures that allow the individual to adapt to a new regulation[25].

Whereas, the principle of protection of the pending interests pertains to the so-called fiscal predictability[26]. The aim of its operation is to legally protect the taxpayers in case that they have commenced some undertakings under the previous laws, having confidence that the principles determined in this law will not be amended to their disadvantage in the foreseeable future. Therefore, in order to observe this principle, the legislator is required to implement new tax laws in such a way that they will allow the taxpayers to complete the commenced undertakings on the basis of the previous laws or to adopt to a new legal situation. Similarly to the principle of confidence, this directive is not also absolute and restricts the legislator's freedom to amend the tax law, if it determined in advance some time limits for conducting some specific undertakings according to the previously agreed rules[27]. In this case the obligation to protect the pending interests is more categorical and the legislator is not allowed to amend the laws to the taxpayers' disadvantage before the expiry of the time limit determined by the legislator.

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[23] The period between the announcement of the normative act and its entry into force.
[24] Cf. R. Dowgier, *Zasada ...,* op. cit., pp. 101–102.
[25] Judgments of the Constitutional Tribunal of 25 June 2002, docket No. K 45/01, LexPolonica No. 356176; 10 December 2007, docket No. P 43/07, LexPolonica No. 1757998; 19 March 2007, docket No. K 47/05, LexPolonica No. 1265120; 20 January 2009, docket No. P 40/07, LexPolonica No. 1987849.
[26] In academic writing, predictability of the law is defined as learning all elements of the hypothesis of the fiscal and legal norm (i.e., subject and object of the taxation) to the extent that it becomes possible to predict a possible amount of the future obligation with the probability necessary to safely handle personal, property and economic issues; Cf. T. Dębowska-Romanowska, *Prawo finansowe – charakterystyka ogólna,* [w]: *Prawo finansowe,* W. Wójtowicz, Warszawa 2000, p. 30.
[27] Judgment of the Constitutional Tribunal of 25 June 2002, docket No. K 45/01, LexPolonica No. 356176.

The principle of nonretroactivity of the tax law has two aspects. The first is the prohibition to enact legal norms which would apply to future events completed prior to their entry into force. The other aspect is the prohibition to enact inter-temporal norms, if they could cause negative effects on legal security and respect for vested rights. This principle is performed by assessing consequences of legal events governed by the previous norms, according to these norms, even if at the moment of this assessment new norms are effective[28]. Secondly, the legal and fiscal relationships established under the previous laws, consequences of which have been developing since their amendments, are required to be assessed in compliance with norms of a new act[29]. According to the Constitutional Tribunal, the *lex retro non agit* principleshould be observed, especially in the fields of the law in which the individual is directly subject to state power. Besides the criminal law, these fields include the levy law, particularly the tax law[30]. In particular, this principle applies to an income tax in a form of advance personal income tax payments made for a given year finally settled after its ending. This principle – like previous principles – is not absolute, either. On the basis of the Constitution, it is not possible to completely eliminate the legislation of retroactive regulations in the levy law. However, these regulations must be firmly justified on an axiological basis[31]. This means that this principle may be abandoned if the legislator interferes in the previous legal relationships and situations in order to conduct another especially valuable constitutional value, and this value cannot be conducted in a different way. It is noteworthy that the more intensively the legislator interferes in the legal relationships developed in the past, the more valuable the constitutional values justifying such interference must be[32].

The next guarantor of the principle of citizens' confidence in the state is the obligation to meet a relevant adjustment period (*vacatio legis*). Such a period is used for two reasons. Firstly, it allows the addressees of new regulations to prepare themselves to their requirements, adjust their conducts to new regulations and make relevant decisions to protect their interests in the future. Secondly, the relevant *vacatio legis* period is one in which the legislator can correct detected mistakes after enacting the normative act which is not yet effective[33].

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[28] Judgment of the Constitutional Tribunal of 12 May 2009, docket No. P 66/07, LexPolonica No. 2031387.
[29] Cf. J. Oniszczuk, *Podatki i inne daniny w orzecznictwie Trybunału Konstytucyjnego,* Warszawa 2001, pp. 113–114.
[30] Judgments of the Constitutional Tribunal of 18 October 1994, docket No. K 2/94, LexPolonica No. 314072; 12 January 1995, docket No. K 12/94, LexPolonica No. 325344; Judgment of the Constitutional Tribunal of 2 April 2007, docket No. SK 19/06, LexPolonica No. 1299053.
[31] Judgment of the Constitutional Tribunal of 29 January 1992, docket No. K 15/91, LexPolonica No. 312417.
[32] Judgment of the Constitutional Tribunal of 2 April 2007, docket No. SK 19/06, LexPolonica No. 1299053.
[33] Judgment of the Constitutional Tribunal of 18 February 2004, docket No. K 12/03, LexPolonica No. 365704.

According to the Polish rules of publishing normative acts, a period between the day of publishing a new legal act in the official gazette and the day of its entry into force should be at least 14 days . However, the Constitutional Tribunal states that this period is not absolute and the "suitability" of using a given vacatio legis period in the tax law should be assessed in the context of providing taxpayers with the possibility of handling their interests after this new regulation goes into effect. Therefore, there may be specified circumstances that justify shortening the vacatio legis period required by the law or resigning from determining this period completely. According to the Constitutional Tribunal, one such circumstance is an important public interest. In the tax law, this important public interest is especially a situation in which the legislator opposes frauds and fiscal appropriations that result in avoiding the payment of due taxes . This circumstance completely allows the legislator to resign from any vacatio legis period. As a result, the day of entering new fiscal regulations is a day of publishing a normative act in the official gazette.

The principle of confidence also is conducted according to the formula which prohibits the tax law from being amended within a given fiscal year. One of the Constitutional Tribunal's justifications provides that no amendments to taxes payable annually can be made within a fiscal year[34], since the legal guarantees of the protection of the individuals' interests are exceptionally significant in the tax law at its substantive-legal level and the procedural level. In this context, the fiscal acts pertaining to taxes payable annually are required to be enacted according to the principle of nonretroactivity and the relevant *vacatio legis* period in a year preceding the fiscal year, since the taxpayers should have time to adjust their decision to new fiscal regulations[35]. Furthermore, the Constitutional Tribunal holds that amendments to fiscal burdens should enter into force at least one month before the end of the previous fiscal year.

3. The principle of determinacy of the tax law

The Constitutional Tribunal's case law frequently emphasizes the significance of the principle of determinacy of the law in the legislative process. The practical aspect of this principle is to make precise and clear laws according to the rules of language and logical correctness. Since any unclear and vague tax laws cause their addressees to be uncertain about the content of their rights and obligations, whereas authorities applying these laws have too much freedom to interpret these laws and consequently they negatively affect the quality of their legal opinions. In practice, it frequently happens

[34] Judgment of the Constitutional Tribunal of 28 December 1995, docket No. K 28/95, LexPolonica No. 314012.

[35] Judgments of the Constitutional Tribunal of 29 March 1994, docket No. K 13/93, LexPolonica No. 303766; 24 May 1995, docket No. K 1/94, LexPolonica No. 312457; 12 January 1995, docket No. K 12/94, LexPolonica No. 325344, Judgment of the Constitutional Tribunal of 25 April 2001, docket No. K 13/01, LexPolonica No. 352051.

that various fiscal authorities render different opinions in the same factual circumstances. The predominant view expressed in the Constitutional Tribunal's case law is that the field of the law, in which the determinacy must be especially emphasized, is – besides the criminal law – the levy law, particularly the tax law, and the law which is unclear and incomprehensible to its addressees violates Art. 2 and Art. 84 of the Constitution[36]. Moreover, this principle also is performed under the so-called legislative techniques which define guidelines on making normative acts and acts-in-law[37]. According to these guidelines, provisions of acts must be edited concisely and synthetically (by avoiding too many details) in a way in which common situations occurring in issues governed by a given act are described. Sentences in the act should be edited according to common rules of the Polish syntax and multi-complex sentences should be avoided. Furthermore, in the normative act, it is necessary to use correct language expressions in their basic and common meanings and to avoid specialist (professional) expressions, if they have equivalents in the common language, foreign expressions or borrowings, unless they have exact equivalents in Polish, as well as ideas and language structures (neologisms), unless there is a relevant expression in Polish. Only comprehensible editing of the tax laws which does not require the taxpayers to have any complex knowledge or specialist legal knowledge becomes the guarantor of the legal protection which makes it possible to make rational economic decisions.

4. Summary

The clause of the democratic state of law set forth in Art. 2 of the Constitution and its detailed principles formulated on the basis of the Constitutional Tribunal's case law determine the general legislative standards in Poland. The observance of these principles is exceptionally significant in the tax law because in this field of law the state is exceptionally powerful and the citizen has little impact on the content of the legal relationship. Therefore, it is exceptionally important to draw attention to the existing and rich case law of the Constitutional Tribunal and rules of legislating the tax law that affect its case law and form a basis for civilizing the tax law in Poland[38].

[36] Judgment of the Constitutional Tribunal of 19 September 2006, docket No. K 7/05, LexPolonica No. 417234; 20 November 2002, docket No. K 41/02, LexPolonica No. 358685; 27 November 2007, docket No. SK 39/06, LexPolonica No. 1733672.

[37] Directive of the Board of Ministers of 20 June 2002 on "Rules of Legislative Techniques", Dz. U. [Journal of Laws] of 2002, No. 100, item 908.

[38] A. Gomułowicz: *Aspekty ustrojowe opodatkowania,* [w]: *Konstytucja, ustrój, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl,* Warszawa 1999, p. 375.

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